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## Antisubordination of Whom? What India's Answer Can Tell Us About the Meaning of Equality in Affirmative Action

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Who should be the beneficiaries of race-conscious affirmative action? Conspicuous by its absence in the US affirmative action debate, this question takes us beyond conventional majority/minority discourse and forces us to confront questions of comparative entitlement. Asking the “Who Question” serves to illuminate a much larger debate over the nature of equality itself. Two paradigms of equal protection compete in modern scholarship: antidiscrimination vs. antisubordination. Yet, neither offers a satisfactory method to select affirmative action beneficiaries on its own.

The Supreme Court’s current antidiscrimination approach to affirmative action remains incomplete. In focusing solely on remedying particularized underrepresentation, the Court tells us *how* to count, but not *who* gets counted. Silence on the Who Question has led to doctrinal incoherence in lower courts; yet, a complete answer hinges on a societal understanding of race that antidiscrimination theory is unable to supply.

To examine an antisubordination alternative in action requires a comparative international perspective. By making the eradication of societal hierarchies its explicit goal, India presents a stark alternative to US affirmative action. It has developed a sophisticated methodology to assess group disadvantage empirically. This Article considers whether India’s approach could be replicated in the US, as other commentators have proposed. Highlighting obstacles posed by patterns of immigration and social mobility, the Article concludes that an antisubordination approach would be practically unworkable and normatively undesirable in the US context.

Appreciating the shortcomings of each of these equality paradigms on their own paves the way for an integrated understanding of equal protection in which antisubordination values serve to give normative content to antidiscrimination doctrine. India’s example also suggests ways to improve on our current method of selecting beneficiaries and provides the basis for a clearer allocation of decisional authority between the judiciary and the political branches in matters of race.

## **TECHNICAL NOTE**

This Article weighs in at just over 24,000 words (24,456 total; 14,935 in text and 9,521 in footnotes; excluding the table of contents, abstract and this page).

The Article includes several data tables that are presented in graphics format. To view them in Word, please use the “reading layout” or “print layout” setting.

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**Antisubordination of Whom?  
What India’s Answer Tells Us About the Meaning of  
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Have slavery and segregation left no fingerprints? When Justice O'Connor wrote in *Richmond v. J.A. Croson Co.* that the effects of societal discrimination are "inherently unmeasurable,"<sup>1</sup> this apparent whitewashing of history confirmed many commentators' worst suspicions about the Rehnquist Court. To them, *Croson's* holding disregarded rampant racial inequalities and flew in the face of the original intent of the Equal Protection Clause.<sup>2</sup> Moreover, the effective muzzling of affirmative action accomplished in *Croson* seemed to herald an ideology of "color-blindness" that placed in jeopardy three decades of civil rights progress.<sup>3</sup>

This Article suggests such criticism is misplaced. Instead, it links the *Croson* Court's dismissal of societal rationales to a question about affirmative action that *Croson* never asked, namely: Who should be the beneficiaries?<sup>4</sup> The argument that follows will suggest that the reasons *Croson* never asked this "Who Question" go a long way to explaining the Court's aversion to societal remedies. Appreciating these connections has substantive implications for our analysis of affirmative action.

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<sup>1</sup> 488 U.S. 469, 506 (1989) (rejecting past societal discrimination as an insufficient basis to justify race-conscious affirmative action). Technically, *Croson's* holding applied only to state and local governments. It took six more years for the other shoe to drop in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995), which held the federal government to the same strict scrutiny standard enunciated in *Croson*.

<sup>2</sup> See, e.g. Sameer M. Ashar & Lisa F. Opoku, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence—Adarand Constructors, Inc. v. Peña*, 31 HARV. C.R.-C.L. L. REV. 223, 235-38 (1996); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 Mich. J. Race. & L. 51, 70 (1996).

<sup>3</sup> Simmons, *supra*, at 53-55. The term "color-blindness" comes from Justice Harlan's famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), which proclaimed that "Our Constitution is Colorblind." It describes a view of equal protection inimical to formal distinctions based on race. Cf. *Adarand*, 515 U.S. at 239 (Scalia, J., conc.) ("In the eyes of government, we are just one race here. It is American.").

<sup>4</sup> This Article focuses on affirmative action based on race. In addressing the question who should benefit, we can identify two distinct substantive inquiries: (1) the *selection* question: which racial/ethnic groups are eligible? and (2) the *definition* question: how do we define the boundaries of a group? This Article refers to both inquiries collectively as the "Who Question." The Article does not address the related procedural question of how the substantive criteria we select are to be applied in practice. See generally Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. REV. 1231 (1994).

Despite the oceans of ink spilled in pages of American law reviews on affirmative action, the Who Question has been conspicuous by its absence: Only a handful of articles have devoted more than cursory attention to the question of who benefits.<sup>5</sup> As Cass Sunstein has observed, arguments over affirmative action often seem almost hopelessly abstract, akin to a stylized “form of Kabuki theater [in which] no one learns anything.”<sup>6</sup> Asking the Who Question serves as a valuable corrective.

Asking who benefits keeps the affirmative action debate grounded in facts, rather than abstractions.<sup>7</sup> The sheer diversity and heterogeneity of racial/ethnic groups who benefit from affirmative action belie the simplistic Black & White, majority/minority framework to which discussions of race are frequently reduced. Moreover, the uneven distribution of such benefits undermines assumptions that affirmative action is helping the groups that need it most. In particular, current practices appear to systematically shortchange the one group whose claim to affirmative action is almost universally accepted—African-Americans.<sup>8</sup>

Asking the Who Question thus forces us to confront questions of comparative entitlement. Doing so requires clarity as to our underlying purpose. After all, who we include in affirmative action depends on why we are doing it.<sup>9</sup> Confronting choices between possible beneficiaries could

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<sup>5</sup> See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995); George LaNoue & John Sullivan, *Deconstructing the Affirmative Action Categories*, 41 AMERICAN BEHAVIORAL SCIENTIST 913 (1998).

<sup>6</sup> Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311, 1314 (1999).

<sup>7</sup> Focusing on actual outcomes is in keeping with the empirical turn in affirmative action scholarship that Sunstein and others have championed. *Id.* at 1314-15; Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367 (2004).

<sup>8</sup> Nor are Blacks the only group to be shortchanged under current practices: Native-Americans, Southeast Asians, and Pacific-Islanders may have their own cause for complaint. See *infra* notes xx and accompanying text.

<sup>9</sup> There is unlikely to be a single answer to these questions. See Brest & Oshige, *supra* note xx, at 898-99 (analyzing Who Question in higher education context under three

help us to penetrate the fuzzy rhetoric surrounding affirmative action rationales and perhaps to target benefits more rationally.<sup>10</sup> At the same time, this Article will argue that too much clarity could prove counterproductive. Far from an accidental oversight, avoidance of the Who Question may reflect the genuine costs in undertaking such a project.<sup>11</sup>

Exploring the practical and prudential limitations on our ability to answer the Who Question serves to illuminate a much larger debate over the nature of equality itself. Ever since Owen Fiss' 1976 article, *Groups and the Equal Protection Clause*,<sup>12</sup> equality scholars have argued over which of two competing models should be used to interpret the Equal Protection Clause: antidiscrimination vs. antistatutory. Commentators favoring the latter view have criticized existing doctrine for emphasizing an antidiscrimination approach that reduces equality to a mere "procedural" requirement of facial neutrality in matters of race.<sup>14</sup> In advocating an alternative antistatutory reading, they seek a more robust "substantive" approach focused on equalizing outcomes rather than process.<sup>15</sup>

Viewed through the lens of the Who Question, however, neither theory offers a satisfactory method of selecting affirmative action

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possible affirmative action rationales).

<sup>10</sup> See Sean Pager, *Comparisons in Color Consciousness: Targeting Affirmative Action in India, France and the US*, in Barbara Pozzo, ed., *MULTICULTURALISMS: MEANINGS AND PERSPECTIVES OF MULTICULTURALISM IN A GLOBAL WORLD* (2006).

<sup>11</sup> See *infra* notes xx and accompanying text.

<sup>12</sup> Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL & PUB. AFF.* 107 (1976).

<sup>13</sup> Compare, e.g., Paul Brest, *Foreword: In Defense Of The Antidiscrimination Principle*, 90 *HARV. L. REV.* 1 (1976), with Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 *N.Y.U. L. REV.* 1003 (1986); see also Reva B. Siegel, *Equality Talk: Antistatutory and Anticlassification Values in Constitutional Struggles Over Brown*, 117 *HARV. L. REV.* 1470 (2004) (summarizing extensive literature).

<sup>14</sup> Simmons, *supra* note xx, at 81.

<sup>15</sup> Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, in Crenshaw, et. al., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 105 (1995). Antistatutory theorists also challenge current doctrine's focus on individual equality at the expense of groups. See *id.*; Siegel, *supra* note xx, at 1473.

beneficiaries. As we will see, an antisubordination approach founders on the ambiguous, amorphous nature of group identities and social hierarchies whose shifting demographic footprint makes the identification of subordinated groups problematic.<sup>16</sup> The Court's current approach, rooted in antidiscrimination theory, avoids such societal complexities by focusing on remedying underrepresentation in particularized contexts. However, this methodology of "counting heads" remains incomplete. It tells us *how* to count, but not *which* heads get counted.<sup>17</sup> Appreciating the shortcomings of either approach pursued on its own paves the way for an integrated understanding of equal protection that combines the perspectives of both.

Affirmative action has long represented a key flashpoint in this larger debate over equality. By rejecting the remedying of societal discrimination as a constitutionally compelling rationale, critics see the Supreme Court as marginalizing affirmative action by consigning it to narrowly circumscribed contexts, grudgingly tolerated as an "exceptional" remedy.<sup>18</sup> Moreover, the Court's failure to adequately justify its rejection of societal remedies has led many to question the Court's motives, attributing its neutering of affirmative action to an ideological enthrallment with color-blindness, which, for some, is merely the hegemonic conspiracy of White privilege inscribed in legal doctrine.<sup>19</sup>

This Article offers a more prosaic account of the Court's motives. It argues that the Supreme Court's aversion to societal remedies is better explained by examining the difficulties posed by the Who Question. Such difficulties make the explicit targeting of racial hierarchies contemplated

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<sup>16</sup> See *infra* notes xx and accompanying text.

<sup>17</sup> See *infra* notes xx and accompanying text.

<sup>18</sup> Cheryl Harris, *Whiteness as Property*, in *Critical Race Theory*, *supra* note xx, at 289.

<sup>19</sup> See *id.*; Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 62 (1991).

under an antistatutory model both impractical and inadvisable.

Reinterpreting *Crosby* in this fashion has important implications:

Understanding the Court's objection to societal remedies to be founded on pragmatic concerns rather than underlying principle paradoxically opens the door to the incorporation of antistatutory values into existing equal protection doctrine. Such an integrated approach is appealing because the Court's current answer to the Who Question contains a crucial omission: It has constitutionalized the selection of beneficiary groups without defining what counts as a "group." This lacuna has left lower courts to adjudicate racial identities under ad hoc and wildly inconsistent methods.<sup>20</sup>

Bringing a societal context to the Court's "particularized" remedies will enrich our understanding of equal protection and result in more nuanced doctrine. Its benefits include: (1) a firmer normative foundation for group remedies; (2) more carefully targeted affirmative action; and (3) a rebalancing of decisional authority between the judiciary and the political branches in defining racial boundaries.<sup>21</sup>

To advance these arguments, this Article employs a comparative international perspective. In doing so, the Article builds on a growing receptiveness of American constitutional law to comparative scholarship.<sup>22</sup> As Clark Cunningham has observed, the sterile nature of domestic debate on affirmative action has inspired scholars to look elsewhere for fresh ideas.<sup>23</sup> India, in particular, has attracted the attention of leading

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<sup>20</sup> See *infra* notes xx and accompanying text.

<sup>21</sup> Moreover, this integrated understanding of equality has important implications beyond the affirmative action context. See *infra* notes xx and accompanying text.

<sup>22</sup> This trend toward comparative constitutionalism has not been without controversy. See Clark Cunningham, *SYMPOSIUM: After Grutter Things Get Interesting! The American Debate Over Affirmative Action is Finally Ready for Some Fresh Ideas from Abroad*, 36 CONN. L. REV. 665, 665-667 (2004)

<sup>23</sup> *Id.*

constitutional law scholars,<sup>24</sup> Supreme Court justices,<sup>25</sup> and social scientists.<sup>26</sup>

In contrast to the relative indifference toward such issues in the US, the Who Question has long been a central preoccupation of Indian affirmative action law. The selection and identification of beneficiaries has been extensively studied, debated and litigated. As a result, India has developed a rather sophisticated methodology that relies on a formalized administrative process to determine eligibility empirically by assessing societal disadvantage based on socio-economic data.<sup>27</sup>

By reconceptualizing affirmative action as a project dedicated to eradicating societal hierarchies, India illustrates “the road not taken in the US,” offering a working model of an antisubordination approach to equality.<sup>28</sup> The Indian experience thus provides an instructive case study. Indeed, such comparative insights prompted a group of American scholars to file a recent *amicus* brief before the US Supreme Court, highlighting India’s societal approach to the Who Question.<sup>29</sup> The brief explicitly

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<sup>24</sup> E.g. Sunstein, *supra* note xx, at 1313; Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV. 649 (2004).

<sup>25</sup> E.g. Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 273-77 (1999); Cunningham, *supra* note xx, at 667 n.13 (noting that Justices O’Connor and Breyer participated in a scholarly exchange on affirmative action with justices of the Supreme Court of India shortly before the *Grutter* opinion was handed down).

<sup>26</sup> E.g. Clark D. Cunningham, Glenn C. Loury, & John David Skrentny et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835 (2002) [Hereinafter *Passing Strict Scrutiny*]; Sunita Parikh, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* (1997); Laura Dudley Jenkins, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* (2003).

<sup>27</sup> See *infra* notes xxx and accompanying text.

<sup>28</sup> Clark D. Cunningham & N.R. Madhava-Menon, *Race, Class, Caste . . . ? Rethinking Affirmative Action*, 97 MICH L. REV. 1296, 1302-1305 (1999).

<sup>29</sup> Brief Amicus Curiae Of Social Science And Comparative Law Scholars in *Adarand Constructors, Inc. v. Mineta*, 2000 U.S. Briefs 730 (June 1, 2001).

proposed that the US adopt India's methodology.<sup>30</sup>

This Article casts doubt on the *amicus* scholars' proposal. In this critique, the Indian example functions not as a model to emulate but rather as a demonstration of why an antistatutory approach would prove unworkable in the US context. Any attempt to select affirmative action beneficiaries on this basis would be confounded by the demographic complexities posed by immigration and social mobility. Moreover, the racially polarizing effects of such efforts would exact a prohibitive social cost.<sup>31</sup>

The comparative perspective thus helps to account for the current US approach to—or avoidance of—the Who Question. That *laissez faire* attitude, in turn, partly explains the Supreme Court's preference for an antidiscrimination reading of equality. However, an antidiscrimination approach has its own shortcomings. To overcome this impasse, this Article proposes an integrated solution in which the two readings of equality would go hand in hand, with antistatutory values serving to give normative content to antidiscrimination doctrine. The Article concludes with some practical illustrations of the potential for this integrated understanding to resolve ambiguities in current doctrine. It also shows how a more modest adoption of Indian methodology can improve on our current method of selecting affirmative action beneficiaries.<sup>32</sup>

The argument proceeds in three parts. Part I-A begins by exploring the connection between the Supreme Court's silence on the Who Question and its rejection of societal remedies. Part I-B shows how the Court's silence leaves in place a popular consensus approach to racial categories by

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<sup>30</sup> *Id.* Three of these scholars later expanded the insights of their brief in a law review article calling for a more general reform of affirmative action. *See Passing Strict Scrutiny.*

<sup>31</sup> *See infra* notes xx and accompanying text.

<sup>32</sup> *See infra* notes xx and accompanying text.

default. This section challenges such popular consensus definitions on several levels, namely: (1) the indeterminate boundaries of the standard racial categories, (2) the extreme heterogeneity of the groups contained within them, and (3) the arbitrary basis on which such groups were constituted. Indeterminacy and heterogeneity are demonstrated empirically, the former through survey evidence showing inconsistencies in the definitions actually used in affirmative action, the latter through socio-economic data drawn from the US Census. Arbitrariness is traced both historically, by showing how our current categories emerged through a largely ad hoc process driven by bureaucratic and political expediency, and doctrinally, in the wildly inconsistent ruling of courts facing classificatory challenges. Part I-C confronts the inability of antidiscrimination theory to resolve such ambiguity and arbitrariness. Such failures call into question the Supreme Court's *laissez faire* approach to the Who Question. To investigate the claims of "inherent unmeasurability" that underlie this approach entails exploring the feasibility of quantifying racial disadvantage.

Part II-A then introduces India's model in which empirical assessments of societal disadvantage are used to determine affirmative action eligibility. Part II-B illustrates how the model might be applied in practice to the US context, again using Census data disaggregated into racial subgroups. Doing so raises both demographic and methodological challenges. In particular, Part II-C highlights the uncertain connection between immigration and ethnic disadvantage. Part II-D then explores the prudential risks in embracing Indian methodology: The Who Question can be divisive, heightening race-consciousness in ways that have unintended repercussions. Ultimately, Part II concludes that the Supreme Court's avoidance of the Who Question may be justified on political grounds. If so, the Court's aversion to societal remedies can be explained in terms of second order consequentialist concerns rather than any *a priori* principle.

Understanding the Court’s objections to antisuordination as grounded in pragmatism rather than principle opens the door to a reintegration of antisuordination values in equal protection doctrine. Part III-A explores the potential for an antisuordination perspective to resolve ambiguities in affirmative action case law by moving away from an intent-based notion of discrimination. It also calls for consideration of systemic disadvantage as a threshold test to tailor the categories we count with. Part III-B proposes some further applications of Indian methodology with regard to the definitional issues of race, arguing for a more differentiated and contextualized analysis of ethnic subgroups. Part III-C then addresses a procedural issue, namely: who decides the Who Question? Here, India’s administrative process model offers a useful midpoint between two competing impulses in US law: avoidance and constitutionalization. The fingerprints of race are undeniable. How we choose to acknowledge them is up to us.

## **I. A Tale of Two Equalities**

### **A. What the Supreme Court Hasn’t Told Us**

The absence of the Who Question from affirmative action discourse in the US can be, in part, explained historically. Like the Civil Rights Movement from which it sprang, affirmative action initially focused on redress for the historical injustices of slavery and segregation.<sup>33</sup> Not only did African-Americans present the most compelling claim to racial justice,<sup>34</sup>

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<sup>33</sup> Hugh Davis Graham, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 143-44, 173 (2002), . Lyndon Johnson famously justified affirmative action by evoking the imagery of slavery. “You do not take a person who for years has been hobbled by chains and liberate him, bring up to the starting line of a race and then say, ‘You are free to compete with all the others.’” *Id.* at 77.

<sup>34</sup> *See Regents of the University of California v. Bakke* , 438 U.S. 265, 400 (1978)

for all intents and purposes, they were the *only* racial minority of national significance.<sup>35</sup>

Early efforts to ensure equal opportunity hardened into overt racial preferences in the atmosphere of crisis precipitated by the 1960s race riots, with little unifying vision beyond the perceived need for action.<sup>36</sup> Because such efforts focused so clearly on one group—African-Americans—the Who Question was largely overlooked.<sup>37</sup>

Over time, the original focus on remedying historical injustice expanded to embrace other objectives and include other groups.<sup>38</sup> Yet, while courts have said a lot about *why* we can do affirmative action (which rationales count as constitutionally compelling) and *how* we can do it (preferably not via quotas), they have said very little about *who* gets included.

Such judicial avoidance of the Who Question is no accident. The Supreme Court has been unwilling to choose between competing groups

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(Marshall, J., conc. & dis.) (“The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that of a whole people marked as inferior by the law.”).

<sup>35</sup> David Lauter, *Minorities Adding up to a Majority*, TIMES UNION (Albany, NY), April 12, 1995 at E1. Other groups were mostly limited to a regional presence—Chinese and Japanese-Americans on the West Coast, Mexican-Americans in the Southwest, and Puerto-Ricans in the Northeast; Graham, *supra* note xx at 104.

<sup>36</sup> John David Skrentny, *THE IRONIES OF AFFIRMATIVE ACTION* (1996); Graham, *supra* note xx, at 137-38.

<sup>37</sup> Lauter, *supra* note 71. The 1967 Kerner Commission investigating the race riots concluded that “special encouragement” was needed to guide Blacks into the economic mainstream. No other groups were discussed. George LaNoue & John Sullivan, *Presumptions for Preferences: The Small Business Administration’s Decisions on Groups Entitled to Affirmative Action*, 6 J. POL’Y HIST. 439, 440-443 (1994) [hereinafter *Presumptions*]. Similarly, the Labor Department held hearings in 1969 to document discrimination against Black workers to justify its “Philadelphia Plan” for racially preferential hiring. No record was made of discrimination against any other minority groups at the hearings. Graham, *supra* note xx, at 139.

<sup>38</sup> See Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677 (2004); Graham, *supra* note xx, at 195.

because it regards such questions as judicially unmanageable.<sup>39</sup> As Justice Powell explained in *Bakke*, almost every ethnic group has suffered at least *some* discrimination at some point. The United States, he argued in *Bakke*, “ha[s] become a Nation of minorities,” in which even the so-called “‘majority’ is composed of various minority groups, most of whom can lay claim to a history of prior discrimination.”<sup>40</sup> He saw no principled basis to prioritize their competing claims to remedial justice. “The kind of variable sociological and political analysis necessary . . . simply does not lie within the judicial competence.”<sup>41</sup> Justice O’Connor in *Croson* similarly bemoaned the impossibility of selecting between “inherently unmeasurable claims of past wrongs.”<sup>42</sup>

This refusal to play favorites animates the Court’s antidiscrimination approach to equality. By reading the Equal Protection Clause to require equal treatment between *individuals* rather than groups, the Court deflects the issue of systemic inequalities and renders racial hierarchies invisible. This reading of equality regards racial classifications as inherently “suspect,” making affirmative action presumptively invalid regardless who the beneficiaries are. Race itself is reduced to an abstraction, an irrelevant and illegitimate criterion that only the most compelling rationale and narrowly tailored means can legitimize.

The result has been to significantly restrict the scope of affirmative

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<sup>39</sup> Cf. Alexandra Natapoff, 47 STAN. L. REV. 1059, 1082 (1995) (describing the Who Question as Rehnquist Court’s worse nightmare).

<sup>40</sup> *Bakke*, 438 U.S. at 295.

<sup>41</sup> *Id.* at 297; *see also* De Funis v. Odegaard, 416 U.S. 312, 1714 (1974) (Douglas, J., dissenting) (noting the theoretical difficulties in evaluating competing claims of minority groups).

<sup>42</sup> 488 U.S. at 506. Justices Powell and O’Connor’s concerns focus on the institutional inadequacy of the courts to engage in societal fact-finding. *See Passing Strict Scrutiny*, *supra* note xx, at 857-59 (arguing that is all the Court was concerned with). However, O’Connor makes clear that strict scrutiny does not permit the judiciary to defer to anyone else on these issues either, therefore effectively taking societal rationales off the table. *See infra* note xx.

action by foreclosing societal rationales for affirmative action. Applying its strict scrutiny standard, the Court has rejected societal discrimination as too “amorphous” to support racial preferences.<sup>43</sup> Instead, the Court has conditioned the use of racial preferences on more narrowly defined aims limited to specific contexts: either remedying identified discrimination within a particularized setting or enhancing the diversity of viewpoints represented in higher education.<sup>44</sup>

Focusing on such particularized contexts eliminates any need to address the societal significance of race. Instead, the US answer to the Who Question—to the extent it has one—focuses on numbers: Affirmative action is cognized in terms of remedying the “underrepresentation” of racial/ethnic minorities. Therefore, either explicitly or implicitly, the choice of beneficiaries is determined essentially by counting heads.

Under the *Croson* decision, such counting became a constitutional mandate. *Croson* holds that cities could justify racial preferences by demonstrating a significant disparity between the availability of qualified minority-owned firms and the share of city contracts awarded to such firms.<sup>45</sup> The Court emphasizes that the disparities must be shown to exist within a specific sector in the local market.<sup>46</sup> Such disparities created an inference of unlawful discrimination that would legitimate a remedy for underrepresented groups. What the Court does not tell us, however, is underrepresentation of whom? The Court seemed to suggest that disparities be measured on a group-specific basis, yet it left open the definitional

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<sup>43</sup> *Croson*, 488 U.S. at 510 (opinion of O’Connor, J.).

<sup>44</sup> *Grutter v. Bollinger*, 123 S. Ct. 2325, 2345-46 (2003)

<sup>45</sup> *See Croson*, 488 U.S. at 501-03, 509. *Croson* makes clear that such disparities can only legitimize the use of racial preferences in extreme cases.

<sup>46</sup> *Id.* at 504 (rejecting Richmond’s efforts to rely on findings of discrimination in contracting nationwide).

question of which heads get counted in which column or even what the categories should be.

Reconceiving racism as discrete acts of prejudice in a limited context elides the enduring salience of societal discrimination.<sup>47</sup> Moreover, *Croson*'s prescribed means to identify such particularized injuries distances the Court even further. In relying on statistical disparities to justify racial preferences, the Court supplants a messy inquiry into the dynamics of group prejudice with the seemingly objective comfort of statistical analysis. The Court no longer has to choose between groups because the numbers will do the job for it.

In *Bakke*, Justice Powell introduced a second rationale for affirmative action: promoting educational diversity by giving preference to underrepresented viewpoints.<sup>48</sup> Rather than awarding a predetermined preference based on race, universities were instructed to weigh the total diversity value of each applicant in a holistic assessment in which race would be considered amongst other characteristics.<sup>49</sup> Focusing on individual applicants again moves away from the broader societal relevance of race. Moreover, by deferring to universities on first amendment grounds to make such determinations, the Court remains agnostic as to who would qualify under such a regime.<sup>50</sup>

In both cases, the Court's solution relies on counting. Whether measured in contracts or viewpoints, group representation has thus become our default answer to the Who Question.<sup>51</sup> The process by which such

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<sup>47</sup> Cf. *Gotanda*, *supra* note xx, at 43-44.

<sup>48</sup> Justice Powell's diversity rationale, first enunciated in *Bakke*, received the imprimatur of the full Court in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

<sup>49</sup> *Bakke*, 238 U.S. at 318.

<sup>50</sup> *See id.* at 312-313; Richard Pildes & Richard Niemi, *Expressive Harms*, "Bizarre Districts," and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 498 (1993).

<sup>51</sup> EEOC reporting requirements likewise force employers to pay attention to racial

counting occurs depends on the context. *Croson* establishes an intricate statistical methodology to calculate disparities in contracting. *Bakke* and its progeny stipulate a flexible, individualized evaluation in which race is weighed as only one “plus factor” among many.<sup>52</sup> Yet, the numbers game is ubiquitous.

But *who* are we counting? Which minority groups do we look at?<sup>53</sup> How do we define them? *Croson* doesn’t tell us. It instructs us to choose beneficiaries through statistical analyses, but says almost nothing about whose statistics to gather. Similarly, *Bakke* accepts race as a proxy for viewpoint yet leaves open how underrepresented “racial” views are to be identified. *Bakke* and *Croson* thus answer only half the Who Question. They allow us to choose affirmative action beneficiaries through numerical formulae, while ignoring the definitional question of what race actually is.<sup>54</sup>

## **B. What’s Wrong with the Status Quo?**

The Court’s hands-off approach to the Who Question has some perverse consequences. The original beneficiaries of affirmative action, African-Americans, now constitute a minority among minorities, while

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balance, many of whom voluntarily undertake affirmative action to increase minority representation. Deborah Malamud, *Affirmative Action and Ethnic Niches*, in John David Skrentny, ed., *COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA* 321 (2001) [Hereinafter, *Color Lines*] (explaining how employers have incentive to maintain racial parity to preempt discrimination claims).

<sup>52</sup> Justice Powell makes a point of distinguishing Harvard’s flexible, individualized assessments of diversity (good) vs. U.C. Davis’ overly rigid, numerical quotas (bad). *Grutter*, 539 U.S. at 335 (reiterating distinction).

<sup>53</sup> America is full of ethnic and national origin groups that could *potentially* face discrimination. The US Bureau of Census counts at least 630 established ethnic groups. Students in New York City School District 23 alone converse in some 83 different languages. See LaNoue & Sullivan, *Presumptions*, supra note xx, at 439. It would be impractical to count them all, but how do we choose between them or even decide who goes in which box?

<sup>54</sup> Despite a vast body of case law on discrimination, there is surprisingly little law defining the core concepts of “race” or “ethnicity.” This ambiguity proved controversial when the SBA excluded Hasidic Jews from federal affirmative action on the ground that the Hasids were a religious group and not an ethnicity. See LaNoue & Sullivan, *Presumptions*, supra note xx, at 449.

affirmative action benefits instead go—disproportionately<sup>55</sup>—to newer immigrant groups who lack a comparable history of discrimination in the US.<sup>56</sup> Indeed, even within the category of “African-American,” the beneficiaries of affirmative action are increasingly Black immigrants from Africa and the Caribbean rather than the descendants of American slaves originally contemplated.<sup>57</sup>

*Croson*’s insistence on counting in particularized contexts also penalizes groups such as Native Americans whose numbers are often too small to generate statistically meaningful evidence. Conversely, counting with broad categories leads to other problems. For example, because Asians as a whole are no longer underrepresented in higher education, Asian subgroups such as Laotians and Samoans who *are* underrepresented are denied access to affirmative action.

By default, most affirmative action plans continue to classify beneficiaries within one of four broad racial groupings devised by federal statisticians: Black, Asian, Hispanic, and Native Americans. This “ethno-racial quadrangle” has emerged as our quasi-official definition of what it means to be a “minority” in the US. Yet, as a blueprint for affirmative

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<sup>55</sup> In 1993, Black-owned construction companies received less than a fifth of federal highway set-asides, and in 1996 garnered only a third of the SBA minority business funding—less than the share of their proportional representation among US minorities would justify and roughly half their share from a decade earlier. Asian-Americans claimed almost as much SBA money as African-Americans despite having half the population. Graham, *supra* note XX, at 164; *see also* George R. LaNoe, *The Impact of Croson on Equal Protection Law and Policy*, 61 ALBANY L. REV. 1, 41 (1997) (noting slower growth rate of Black-owned minority businesses compared to other minorities will mean continued decline in African-American share of MBE benefits); Malamud, *supra* note xx, at 318 (describing the predominant share of minority scholarships going to nonblacks); Graham, *supra* this note, at 192, 197 (describing how many employers have added “diversity” to their workforce by hiring Hispanic or Asian immigrants at the expense of African-Americans).

<sup>56</sup> La Noe, *Presumptions*, at 460.

<sup>57</sup> Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones*, N.Y. TIMES, June 24, 2004 at A1; Jennifer Lee, *The Racial and Ethnic Meaning Behind Black*, in Skrentny, *COLOR LINES*, *supra* note xx, at 184.

action, the value of the quadrangle is questionable for at least three reasons: (1) its boundaries are indeterminate; (2) the internal heterogeneity of these groupings is too extreme for them to serve as meaningful categories; and (3) its categories were arbitrarily constituted and unfairly advantage certain groups over others.

### **1. Indeterminacy**

Most people take the standard minority categories for granted. So deeply are they woven into our national consciousness that they seem innate, almost like the air we breathe.<sup>58</sup> Examined more closely, however, the categories of the quadrangle appear far more anomalous and arbitrary.

For one thing, there is widespread disagreement as to their boundaries. For example, the Hispanic classification varies considerably across jurisdictions. Even within the same region, different entities may recognize different groups as Hispanic.<sup>59</sup> According to the US Census, “Hispanic” does not even count as a race. Instead, it is treated as an “ethnic category” that cuts across racial identities and is tracked independently.

Uncertainty as to who counts as Hispanic naturally leads to questions over eligibility for affirmative action. The definitional boundaries of “Hispanic-ness” has been repeatedly contested. The inclusion of Spanish- and Portuguese-Americans in affirmative action remedies has proven particularly contentious. San Francisco’s Civil Service Commission fielded a heated debate on the issue,<sup>60</sup> and litigation in New York State

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<sup>58</sup> Dvora Yanow, CONSTRUCTING “RACE” AND “ETHNICITY” IN AMERICA 83-85 (2003) (charting evolution of categories).

<sup>59</sup> See Table I (contrasting Hispanic definitions used in five Bay Area jurisdictions). The data presented are drawn primarily from a survey of municipal MBE programs conducted in 2004 by and on file with the author.

<sup>60</sup> See Alex Saragoza, et. al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L. J. 1, 4-10 (1992).

reached the Second Circuit.<sup>61</sup>

**Table I - Who is Hispanic?**

Name of Jurisdiction	Spaniards	Portuguese	Other Latin American
Atlanta	No	No	Yes
Baltimore	Yes	Yes	Yes
Boston	No	No	Yes
Miami	Yes	Yes	Yes
New York	No	No	Yes
Oakland*	Yes	No	Yes
Richmond*	Yes	No	Yes
San Francisco*	No	No	Yes
San Jose*	No	No	Yes
Small Business Administration	Yes	Yes	Yes
US Census**	Yes	No	Yes
Stanford University	No	No	Only Mexican-American and Puerto Rican
Univ. of Texas <sup>†</sup>	No	No	Only Mexican-American

\* Pre 1996

† Pre 1995

\*\* US Census treats Hispanic classification as an ethnic identity independent of its racial categories

Nor are Hispanics the only beneficiary group to inspire such definitional debates. The boundaries of the “Asian Pacific” classification are equally variable and contested.<sup>62</sup> Ohio courts fielded a flurry of litigation when the state decided that contractors from India and Lebanon no longer qualified for affirmative action set asides.<sup>63</sup> Oregon administrators wrestled with a similar ambiguity when a Kazakhstani contractor claimed eligibility.<sup>64</sup>

Even African-American has become a contested category. Commentators have questioned whether Black immigrants should qualify for affirmative action in light of recent studies showing that 40% of

<sup>61</sup> *Jana-Rock Construction, Inc. v. New York State Dep’t of Econ. Dev.*, 2006 U.S. App. Lexis 4050.

<sup>62</sup> Formal definitions of the “Asian” category vary widely. Some exclude Subcontinental Asians or Filipinos; others out leave Pacific Islanders and/or Native Hawaiians. Some include Afghanis; the city of Charlotte also included Persians. See Miranda Oshige McGowan, *Diversity of What?*, 55 REPRESENTATIONS 129, 130 (1996). George LaNoue, *Standards for the Second Generation of Croson-Inspired Studies*, 26 URBAN LAWYER 485, 491 (1994).

<sup>63</sup> The case of Lebanese-American contractor Nadim Ritchey went all the way to the Ohio Supreme Court. (He lost). *Ritchey Produce Co. v. State*, 707 N.E.2d 871, 927 (Ohio Sup. Ct. 1999).

<sup>64</sup> Telephone Interview with Jill Miller, Certification Specialist, Oregon Office of Minority, Women, & Emerging Small Business, Portland, Oregon (May 27, 2004).

African-American students admitted at Harvard and other elite universities were immigrants or children of immigrants.<sup>65</sup> Studies have also shown that employers in New York City are much more willing to hire Jamaicans and Africans than non-immigrant Blacks.<sup>66</sup>

“African-ness” is itself contested. Affirmative action programs typically define African-Americans in circular fashion as descended from “black racial groups.”<sup>67</sup> Yet, racial distinctions in Africa are not always clear-cut. While Teresa Heinz Kerry faced ridicule for implying that her (Caucasian) *Africaner* heritage made her “African-American,”<sup>68</sup> minority contracting programs have had a much harder time deciding whether Sudanese and Ethiopians qualify as “Black.”<sup>69</sup>

Meanwhile, other ethnic groups currently classified as White have sought “minority” status in part to gain inclusion in affirmative action. While Middle-Eastern-Americans lobbied unsuccessfully for census recognition in 2000, they did win eligibility for affirmative action in San Francisco. French-Acadians were eligible in Louisiana. City University of New York at one point recognized Italian-Americans.<sup>70</sup> Congress championed rural Appalachian Whites as equally deserving.<sup>71</sup> And while Hasidic Jews failed to win recognition from the Small Business

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<sup>65</sup> Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones*, N.Y. TIMES, June 24, 2004 at A1. The University of Texas explicitly excluded Black immigrants from affirmative action. *Hopwood v. Texas*, 78 F.3d 932, 936 n.4 (5<sup>th</sup> Cir. 1996) (describing Texas’ admissions preferences as applying only to “American blacks,” but not “a black citizen of Nigeria”). And at least one federal court of appeals has questioned giving “African-American a hemispheric meaning.” *Podberesky v. Kirwan*, 38 F.3d 147, 159 (4<sup>th</sup> Cir. 1994) (questioning award of racial scholarship to student from Jamaica).

<sup>66</sup> See Lee, *supra* note XX, at 184.

<sup>67</sup> E.g. 49 C.F.R. pt. 26 (199); 13 C.F.R. 124.103.

<sup>68</sup> Maureen Dowd, *Out of Africa*, N.Y. TIMES, July 18, 2004, at 14.

<sup>69</sup> Interview with Hayden Lee, *supra* note xx. Cf. *The World Notices Darfur*, THE ECONOMIST, July 31, 2004, at 39 (describing racial ambiguities in Darfur).

<sup>70</sup> Dvora Yanow, CONSTRUCTING “RACE” AND “ETHNICITY” IN AMERICA 67 (2003).

<sup>71</sup> See LaNoue & Sullivan, *Presumptions* at 443 (describing legislative history to Congressional authorization of federal MBE program).

Administration (SBA), they are included in other federal affirmative action contexts.<sup>72</sup>

As such disputes increasingly find their way into the courts, the result has been alarmingly inconsistent rulings. For example, the Seventh Circuit recently held that including Iberian-Americans in affirmative action violated the narrow tailoring prong of strict scrutiny.<sup>73</sup> Defining a “Hispanic” category in this way was deemed overinclusive. Judges in the Eleventh Circuit reached the opposite conclusion—on the same question.<sup>74</sup> Meanwhile, the Fifth Circuit suggested that counting only Mexican-Americans could be *underinclusive*.<sup>75</sup>

If you read these opinions, there seems little driving them besides the judges’ underlying intuitions. Judge Posner states flatly that Iberians haven’t been victims of discrimination and challenges the defendant to produce evidence to the contrary.<sup>76</sup> The Eleventh Circuit reverses the burden of proof, requiring the *plaintiff* to prove that Iberians don’t belong.<sup>77</sup> Meanwhile, the Fifth Circuit simply assumes the underinclusiveness of Mexican-Americans is self-explanatory.<sup>78</sup>

The wildly different stratagems courts have employed to cope with such disputes testifies to the inability of current doctrine to resolve them. Some courts avoid grappling with definitional issues directly.<sup>79</sup> Some

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<sup>72</sup> Compare LaNoue & Sullivan, *Presumptions* at 449, with Congressional Research Service, COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS (1995) (citing 48 C.F.R. § 2426.101 (1994)). Hasidic Jews were also eligible for other SBA programs at some point. LaNoue & Sullivan, *Presumptions*, *supra* note xx, at 461.

<sup>73</sup> *Builders Ass’n of Greater Chicago v. Cook Cty*, 256 F.3d 642, 647 (7th Cir. 2001).

<sup>74</sup> See *Peightal v. Metropolitan. Dade County*, 26 F.3d 1545, 1560 (11th Cir. 1994).

<sup>75</sup> *Hopwood*, 78 F.3d at 948 n.37.

<sup>76</sup> *Builders Ass’n*, 256 F.3d at 647.

<sup>77</sup> *Adarand*, 228 F.3d at 1164.

<sup>78</sup> *Hopwood*, 78 F.3d at 948 n.37.

<sup>79</sup> Courts have invoked obstacles of standing to deflect definitional challenges, *cf.* *Peightal*, 940 F.2d at 1409 n.39 (questioning plaintiff’s standing as white male to object to

falsely assume that disparity testing can itself validate the initial choice of categories.<sup>80</sup> Others struggle to locate definitional disputes within equal protection doctrine. Such classificatory challenges could be cognized in two different ways: either (1) as a facial attack on the definition *qua* racial classification or (2) as a narrow tailoring challenge to the remedy that follows from it. Courts have followed both approaches, sometimes even in the same opinion.<sup>81</sup> They also differ as to the level of scrutiny they apply.<sup>82</sup> Still others treat definitional uncertainties as a statutory interpretation issue, “more a question of nomenclature than of narrow tailoring.”<sup>83</sup>

Courts have also differed widely as to the evidentiary criteria they examine. In trying to define what it means, for example, to be “Hispanic” for purposes of affirmative action, some courts have consulted dictionaries<sup>84</sup> and turned to legislative history.<sup>85</sup> Some assume “Hispanicness” is a

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Hispanic definition); limited their assessment to the facts “as applied,” *cf. Peightal*, 26 F.3d 1545; *Jana-Rock*, 5:04-CV-635, Memorandum-Decision and Order, Oct. 28, 2004 (N.D.N.Y.); or demanded evidence of bad intent. *Cf. Jana-Rock*, 2006 U.S. App. Lexis 4050. Others simply ignore the issue entirely. *Rothe Dev. Corp. v. United States Dep’t of Def.*, 324 F. Supp. 2d 840 (W.D. Tex. 2004); *Dynalantic Corp. v. United States Dep’t of Def.*, 937 F. Supp. 1 (D.C. Dist. 1996).

<sup>80</sup> *Cf. Ritchey Produce*, 707 N.E.2d at 893-95. Such courts argue that disparity testing “validates” the categories being tested because it identifies discrimination against the population thus encompassed. Yet, such reasoning is circular. Because disparity testing merely infers “discrimination” statistically, the validity of such findings hinges on the assumptions underlying its inputs. For example, Hispanics might be found to be underrepresented whether or not Iberians are included in the relevant data set. While Hispanic underrepresentation might support a general inference of anti-Hispanic bias, it tells us nothing about whether Iberians experience the same discrimination. *Croson’s* methodology instead remains a black box to which the old saying applies: Garbage in, garbage out.

<sup>81</sup> Compare *Jana-Rock* Memorandum-Decision (facial classification approach), with *Peightal*, 26 F.3d 1545 (narrow tailoring analysis); *Jana-Rock*, 2006 U.S. App. Lexis 4050 (pursuing both approaches).

<sup>82</sup> Compare *Jana-Rock*, 2006 U.S. App. Lexis 4050 (declining to apply either strict scrutiny directly or require narrow tailoring), with *Ritchey* trial court (applying strict scrutiny); *Builders Ass’n*, 256 F.3d at 647 (requiring narrow tailoring).

<sup>83</sup> *Adarand*, 228 F.3d at 1185.

<sup>84</sup> *Ritchey Produce*, 707 N.E.2d at 927 (Ohio Sup. Ct. 1999) (construing “the common, ordinary, and everyday meaning of the term ‘Oriental’”).

<sup>85</sup> *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610 (1987) (defining race in part based on popular understandings at the time Section 1981 was enacted).

question of ancestry; others stress language, culture,<sup>86</sup> history,<sup>87</sup> community practice,<sup>88</sup> or even physical appearance.<sup>89</sup> For some courts, defining the boundaries of “Hispanic” is like asking where blue ends and green begins; they dismiss the category as meaningless.<sup>90</sup>

## 2. Heterogeneity

The problem goes beyond mere uncertainty as to boundary cases. The very logic of using such categories is arguably undermined by the heterogeneous nature of the groups contained within them. Across a wide array of socio-economic indicators, the differences *within* the main racial groups appear as great as those *between* them. Such internal variance is particularly striking within the Asian and Hispanic categories.<sup>91</sup> Across the board, the “top performers” in these groups score well above the US average, while those at the bottom measure well below the US mainstream.

For example, Asian Indian-, Chinese-, and Japanese-Americans earn bachelors degrees at almost double the US average, and their success at the graduate level is even more extreme—almost quadruple the US average for Indian-Americans. Twice as many Asian Indians occupy managerial or professional positions as the US norm, with Chinese and Japanese also well above average. These groups’ homes are valued at double the US median. By contrast, Cambodian-, Laotian-, Samoan-, and Tongan-Americans show

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<sup>86</sup> *Lagrua v. Ward*, 519 N.Y.S.2d 98, 99 (N.Y. Sup. Ct. 1987).

<sup>87</sup> *Builders Ass’n of Greater Chicago*, 256 F.3d at 647.

<sup>88</sup> *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954).

<sup>89</sup> *Bennun v. Rutgers State Univ.*, 941 F.2d 154, 173 (3rd Cir. 1991). *See also* *Peightal v. Metro. Dade County*, 940 F.2d 1394, 1408-09 (11th Cir. 1991) (opinion of Judge Brown).

<sup>90</sup> *Concrete Works of Colo., Inc. v. Denver*, 86 F. Supp. 2d 1042, 1069 n.17 (D. Ct. Colo. 2000) (describing Hispanic as an inherently indeterminate category for which “there is no agreed working definition”); *Alen v. State*, 596 So.2d 1083, 1084-85 (Ct. App. Fl. 1992) (questioning whether Hispanics constitute a judicially cognizable ethnic group for jury selection purposes).

<sup>91</sup> *See* Table II for Asian census data. For a comparable analysis of Hispanic subgroups, *see infra* notes xxx and Table III.

statistics that present almost the reciprocal image of their East and South Asian compatriots.<sup>92</sup> Cambodian-Americans garner half as many BAs and a quarter the number of graduate degrees as the US average, their representation among the professional class is also half the US rate, and their poverty rate more than double. Laotians, Samoans and Tongans fare only slightly better.

**Table II - Socioeconomic Breakdown of Asian Pacific Subgroups**

Population Group	Education		Occupation	Property	Income
	% earning degree	% Graduate	Managerial or Professional	Median Home Value	% below Poverty Level
<b>ALL US</b>	<b>15.5%</b>	<b>8.8%</b>	<b>33.6%</b>	<b>\$119,600</b>	<b>12.4%</b>
<b>ASIANS</b>	26.7%	17.3%	44.6%	\$199,300	12.6%
Asian Indian	29.6%	34.3%	59.9%	\$210,200	9.8%
Japanese	28.7%	13.1%	50.6%	\$238,300	9.7%
Chinese	24.1%	23.8%	52.2%	\$232,200	13.5%
Koreans	29.1%	14.6%	38.7%	\$209,500	14.8%
Vietnamese	14.5%	4.8%	26.9%	\$151,400	16.0%
Samoan*	7.5%	3.0%	18.6%	\$153,200	20.2%
Tongan*	7.3%	1.3%	13.3%	\$149,100	19.5%
Laotians	6.3%	1.4%	13.3%	\$100,500	18.5%
Cambodian	6.9%	2.2%	17.8%	\$120,800	29.3%
<b>BLACKS</b>	9.5%	4.8%	25.2%	\$80,600	24.9%

\*Not included in Asian totals

Source: 2000 U.S. Census

Such intra-group differences call into question the statistical inferences of discrimination on which *Crosby* is premised by potentially skewing the data used in disparity analyses. For example, consider the variation in business formation rates among Asian-Americans (a key variable used in disparity analyses): Koreans have the highest business formation rate of any ethnic group, while Laotians have the lowest.<sup>93</sup> If you're doing a disparity study that lumps these groups together, the conclusions you reach based on numbers alone may not tell you much.

<sup>92</sup> The socio-economic standing of Southeast Asians and Pacific Islanders thus more closely resembles African-Americans than the "model minority" stereotype associated with the Asian group overall.

<sup>93</sup> See LaNoue & Sullivan, *supra* note xx, at 913.

Disparate business formation rates have been specifically cited by courts as undermining the results of disparity studies.<sup>94</sup> Such internal heterogeneity also raises the danger that nondisadvantaged subgroups may ride the coattails of their less fortunate group members. The problem is not just that a few jobs or contracts may go to a group that doesn't deserve them. *Less*-disadvantaged groups often end up usurping a disproportionate share.<sup>95</sup>

The risks cut both ways. Not only can undeserving subgroups piggyback on the underrepresented status of a larger group, but genuinely disadvantaged subgroups might be unfairly excluded if the larger, umbrella group they belong to is too successful. One sees this in higher education, where Asians are often overrepresented and no longer counted for diversity purposes. Yet, several Asian Pacific subgroups remain heavily *underrepresented*.<sup>96</sup> Samoan and Laotian students thus suffer from being lumped together with more successful East and South Asians.

Moreover, some arguably disadvantaged minority groups lie outside the quadrangle entirely. A recent study of employment discrimination in California looked at discrimination against job applicants with ethnically identifiable names.<sup>97</sup> The study revealed greater bias against applicants with identifiably Arab names than those of any other ethnic group—hardly

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<sup>94</sup> *Concrete Works*, 86 F. Supp. 2d at 1070; *Houston Contractors Ass'n v. Metro. Transit Auth. of Harris County*, 993 F. Supp. 545, 554 (S.D. Tex. 1997) (condemning the “use of aggregate statistics [that fail to] show the variation within the groups”).

<sup>95</sup> “[W]hen all members of minority groups are equally eligible for affirmative action, the best-off among them will prevail.” Malamud, *supra* note xx, at 321. An extreme example of this phenomenon occurred in Washington, D.C., where a pair of Portuguese-American brothers, duly certified as “Hispanic business owners,” managed to claim over 60% of affirmative action contracts. See Graham: COLLISION COURSE, *supra* note xx; see also Thomas Sowell, AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY 12, 33 (2004) (providing further empirical evidence).

<sup>96</sup> Brief *Amicus Curiae*, *supra* note xx.

<sup>97</sup> *Names Make a Difference: The Screening of Resumes by Temporary Employment Agencies in California*, Report by the Discrimination Research Center (Oct. 2004), on file with the author.

surprising after 9-11. Yet, most affirmative action programs count Arab-Americans as White, which means they *don't* get counted.

### 3. Arbitrary composition

Some argue that such internal differences are inevitable and beside the point. Race is not a logical construct but a projection of societal perceptions and stereotypes, however irrational.<sup>98</sup> Courts have therefore defended a “popular consensus” approach to the Who Question on the ground that race is best understood as “a matter of practice or attitude in the community.”<sup>99</sup> Choosing affirmative action categories that reflect such conventions also accords with a long line of Supreme Court cases that have defined race according to a “popular belief” standard.<sup>100</sup>

However, to say that the categories used in affirmative action “reflect” a popular consensus may be to get the causality reversed. The federal government’s establishment of formal categories for race has itself helped to manufacture the current consensus on race. One of the byproducts of the civil rights movement was that federal agencies suddenly felt the need to collect detailed racial data across a wide range of contexts. Federal statisticians therefore devised new standardized categories to record such data.<sup>101</sup> To some extent, the categories devised by federal statisticians

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<sup>98</sup> See *Peightal*, 26 F.3d at 1561 n.25 (bemoaning “irrationality of the definitional process underlying social stereotypes”); Ian F. Haney López, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1 (1994).

<sup>99</sup> *Peightal*, 26 F.3d at 1561 n.25.

<sup>100</sup> Ian F. Haney López, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (describing naturalization cases); *St. Francis*, 481 U.S. at 610 (defining race based on popular understanding when Section 1981 was enacted).

<sup>101</sup> Prior to this time, the boundaries of race had remained ill-defined and were often regionally specific. Conceptions of race continued to evolve as ethnic minorities such as “Jews” and “Irish,” initially stigmatized as racial outsiders, gradually assimilated into the White “majority.” Thus, as Justice Powell observes in *Bakke*, “[t]he concepts of ‘majority’ and ‘minority’ necessarily reflect temporary arrangements and political judgments.” *Bakke*, 438 U.S. at 295; Graham, *supra* note xx, at 40, 42; Noel Ignatiev, *HOW THE IRISH BECAME WHITE* (1995); see also *St. Francis*, 481 U.S. at 610 (“Plainly, all those who might be deemed Caucasian today were not thought to be of the same race [in the 19<sup>th</sup> century]”).

tracked the “classic color codes” of an earlier era.<sup>102</sup> Yet, in other ways, the categories were clearly constitutive. The Hispanic category, in particular, crystallized a new popular understanding of race. The Mexican-Americans of the American South-West, the Northeast’s Puerto Ricans, and Florida’s Cubans had rarely thought of themselves, or been thought of by others as constituting a single group until somebody decided to lump them into a single statistical category of “Spanish-Americans.”<sup>103</sup> Moreover, the classic color codes expanded to “color in” all sorts of new immigrant groups whose racial identities may have been ambiguous upon arrival (and occasionally “recolored” existing groups). In the process, their boundaries have stretched almost beyond recognition. The “Asian Pacific Islander” category today joins together half the world’s population.

Several recent studies have shed light on the genesis of our current racial consensus.<sup>104</sup> Three main themes emerge: First, the categories we use were largely created by mid-level bureaucrats acting without little or no policy guidance and virtually without public input other than selective lobbying by self-serving ethnic interests.<sup>105</sup> Instead, such decisions were made in essentially ad hoc fashion, with little thought as to their long-term consequences.<sup>106</sup>

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<sup>102</sup> David A. Hollinger, *Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action*, in 55 REPRESENTATIONS 31, 33 (1996).

<sup>103</sup> *Id.* at 879 n.258. In part, such a grouping was inspired by bureaucratic convenience. Political considerations also played a role: The Nixon White House actively lobbied to include Cubans in the nascent category to curry favor with this loyal bloc of Republican voters. LaNoue & Sullivan, *Deconstructing*, *supra* note xx at 915. The artificiality of this new grouping was underlined by the initial confusion as to what to call it: Spanish-Americans, Spanish-Speaking Americans, and Spanish-Surnamed Americans all vied for contention (each of which, taken literally, would embrace slightly different constituencies). Moreover, Puerto Ricans remained excluded from early definitions of this group. Only in 1976, was the category rechristened “Hispanic.” Graham, *supra* note xx, at 139 n.16.

<sup>104</sup> See LaNoue, *Presumptions*, *supra* note xx; Graham, *supra* note xx; John David Skrentny: *MINORITY RIGHTS REVOLUTION* (2002).

<sup>105</sup> LaNoue, *Presumptions*, *supra* note xx; Graham, *supra* note xx at 134, 136.

<sup>106</sup> The choices were also partly influenced by instrumental constraints. For example,

Second, once the lists were created, the groups included quickly assumed the status of “official” minorities.<sup>107</sup> Originally created as statistical measures to monitor equal opportunity, the federal categories were carried over into overtly preferential contexts without any second thoughts as to their suitability. Blindly propagated throughout all levels of government, the ethno-racial quadrangle became the template of affirmative action eligibility by default.

Third, while the original categories centered on groups with undeniable histories of persecution, they soon embraced newer immigrant groups with more tenuous claims to inclusion. Thus, while the standard categories have remained largely fixed since the 1960s, the groups included *within* these categories have expanded over time. Like a hungry Pacman devouring a global game board, the original “Oriental” category composed of Chinese- and Japanese-Americans rapidly engulfed other East and Southeast Asian groups as well as a broad swath of Pacific islanders before veering westward to incorporate Indians and Pakistanis. Similarly, once the category of “Spanish-speaking Americans” was rebranded “Hispanic,” it came to include groups such as Brazilians who don’t even *speak* Spanish.<sup>108</sup>

Such category inflation did not just “happen.” Ethnic lobbies pushed for expanded definitions out of self-interest.<sup>109</sup> Federal officials obliged, basing their decisions on “bureaucratic convenience rather than

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EEOC categories were intended to be used by employers classifying their workforce through visual inspection. White ethnic groups, who would be more difficult to distinguish visually, were not included partly for this reason. *Passing Strict Scrutiny*, *supra* note xxx at 862-63.

<sup>107</sup> *Passing Strict Scrutiny*, *supra* note xxx, at 859-67.

<sup>108</sup> See *Alen v. State*, 596 So. 2d 1083, 1094 (Ct. App. Fl. 1992) (noting the South American “Hispanics” can also be from Belize, and British and French Guyana—none of which speak Spanish or Portuguese); see also Graham, *supra* note xx, at 191 (questioning inclusion of Belize, Surinam, Guiana as non-Spanish speaking nations).

<sup>109</sup> Prior to 1971, South Asians and Iberians were both considered Caucasian. Each successfully petitioned the federal government to reclassify them as racial minorities based on conclusory allegations of ethnic disadvantage. LaNoue, *Presumptions*, at 451-52.

careful ethnographic analysis.”<sup>110</sup> The main premise seems to have been proximity of geographical origin (at least as judged from Washington, DC). In what other sense can Samoans be said to be ethnically “like” Chinese? Or Vietnamese “related to” Pakistanis? These groups come from vastly different cultures and look almost nothing alike. How then do we justify grouping them together?

Such arbitrary origins and dubious ethnography might not matter if the categories we use make sense in the context of the United State today. The real question is whether use of the quadrangle accords with the underlying purposes of affirmative action. Some commentators have expressed skepticism, arguing that any popular consensus surrounding the quadrangle remains superficial, with no connection to underlying reality. To George La Noue, “these categories are merely bureaucratic conveniences around which political constituencies have been constructed.”<sup>111</sup> Clark Cunningham and his coauthors similarly criticize the quadrangle as “based on a mixture of inadequately examined folk categories and interest group politics.”<sup>112</sup>

Others defend the standard categories on the ground that they capture the sort of intangible, inter-subjective phenomena that are salient to affirmative action. This line of argument would seem to have little merit under the diversity rationale as originally presented in *Bakke*. As a proxy for viewpoint, the broad quadrangular categories are simply too blunt.<sup>113</sup>

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<sup>110</sup> *Id.* at 459. Moreover, such decisions smack of double standards. The SBA turned down Persian-Americans who had demonstrated undeniable evidence of racial prejudice on the ground that the record presented was insufficiently “longstanding,” while letting in others, such as Tongans, who made even less of a showing. LaNoue & Sullivan, *Presumptions*, at 465, 453.

<sup>111</sup> See LaNoue & Sullivan, *Deconstructing*, *supra* note xxx at 917.

<sup>112</sup> *Passing Strict Scrutiny*, *supra* note XX, at 879.

<sup>113</sup> *Hopwood*, 78 F.3d at 946-47; McGowan, *supra* note xx, at 135 (“categorization by race or ethnicity fails to capture the complexity of social experience of many groups . . . . As a result, real diversity may suffer”).

Indeed, rather than conforming to existing stereotypes on race, the goal should be to challenge them.<sup>114</sup> Emphasizing the variation *within* group identities would encourage students to look beyond such stereotypes.<sup>115</sup>

In the context of remedial affirmative action, using categories that track the contours of societal prejudice makes more sense. After all, the basic law of remedies is to define the remedial class based on the scope of the injury.<sup>116</sup> David Hollinger argues that the quadrangular categories “serve well as predictors of the dynamics of mistreatment, and thus as a foundation for initiatives designed to protect people against such mistreatment or to compensate them for it.”<sup>117</sup> The Tenth Circuit similarly justifies use of the quadrangle based on “the harsh fact that racial discrimination commonly occurs along lines of the broad categories.”<sup>118</sup>

However, the extent to which the popular consensus on race maps the functional lines on which discrimination operates remains questionable. Are persons of European Spanish or Portuguese origin really subject to kind of anti-Hispanic prejudices that Mexican-Americans or Puerto Ricans experience in this country? The Seventh Circuit thought otherwise.<sup>119</sup> Even though Iberians might fall within the popular meaning of “Hispanic,”

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<sup>114</sup> *Cf. Metro. Broadcasting, Inc. v. FCC*, 497 U.S. 547, 615 (1990) (O’Connor, J.) (criticizing assumption that there is a single “minority” viewpoint).

<sup>115</sup> The only justification for using broad categories would be to achieve a *particular* kind of viewpoint diversity: the shared viewpoint of minorities *subjected to discrimination* on the basis of existing racial stereotypes. But this argument, in effect, conflates the diversity justification with a remedial rationale. *See McGowan, supra* note xx, at 136.

<sup>116</sup> *Cf. Montana Contractors’ Ass’n. v. Sec’y of Commerce*, 460 F. Supp. 1174, 1176 (D. Mont. 1978) (“To define an Indian or a Black to determine who should be counted . . . [you] look at the actual discrimination being rectified and treat as Blacks or Indians the same kind of people that the defendants had treated as Blacks or Indians.”).

<sup>117</sup> Hollinger, *supra* note xx, at 33.

<sup>118</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d at 1176, 1185 (rejecting the need for further inquiries at the level of subgroups); *Passing Strict Scrutiny* at 872 (current categories make sense as “a prophylactic against anticipated future” discrimination).

<sup>119</sup> *Builders Ass’n*, 256 F.3d at 647.

this functional test of racial meaning would justify excluding them from affirmative action.<sup>120</sup>

Viewing race functionally in the context of discrimination might justify other departures from the conventional categories of race, such as drawing a distinction between Arabs/Persians and European Whites.<sup>121</sup> One might also question the logic of the “Asian Pacific Islander” category: Are Samoans, Japanese, and Pakistanis really subject to a common set of stereotypes that distinguishes them from such supposedly “non-Asian” ethnic groups such as Azerbaijanis, Kazakhs, and Mongolians that the federal definitions omit?<sup>122</sup>

Such questions are not just academic. Where we draw the lines matters determines who benefits from affirmative action. For example, Pakistanis are considered racially “Asian” and hence presumptively disadvantaged in the US. Just across the Khyber pass, Persians and Afghans are relegated to “Whiteness” and, as such, ineligible for affirmative action.<sup>123</sup> Do these groups experience race differently in the US in a way that justifies such disparate treatment?

Courts have seized on such definitional vagaries to attack affirmative action remedies for being over- or underinclusive and thus

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<sup>120</sup> *See id.* One sees a similar divergence between popular vs. functional conceptions of race with Black immigrant groups in New York City. Although most people would unquestionably identify Nigerians and Jamaicans as racially “Black,” these groups do not seem to attract the same degree of racial prejudice as African-Americans. *See Lee, supra* note xx, at 184. At least in the job market, employers have either learned to look beyond color and differentiate by subgroup, or are otherwise responsive to cultural nuances that permit such immigrants to evade the full brunt of racial prejudice.

<sup>121</sup> *Cf. Hernandez v. Texas*, 347 U.S. 475 (1954) (contrasting the then-popular view of Mexican-Americans as racially White with the systematic prejudice that marked them as something “other,” the functional equivalent of a separate race).

<sup>122</sup> *Cf. Ritchey Produce*, 1997 Ohio App. LEXIS 4590 at \*6 (criticizing Ohio’s inclusion of South Asians, but not Lebanese in its “Oriental” category).

<sup>123</sup> A trial judge in Ohio found this truncated geography preposterous, declaring it “repugnant to our constitutional system of government [to] exclude a group of United States citizens . . . [solely based on] the side of a river, a mountain range, or a desert their ancestor decided to settle.” *Ritchey Produce*, 707 N.E.2d. at 878.

failing the narrow tailoring test under strict scrutiny.<sup>124</sup> Indeed, some courts regard the inherent imprecision of racial remedies as effectively fatal.<sup>125</sup> By its very nature, race is messy, and there are no perfect answers.<sup>126</sup> Yet, the Supreme Court has repeatedly insisted that when it comes to affirmative action, strict scrutiny must not be “strict in theory, but fatal in fact.”<sup>127</sup> Finding “a permissible middle ground . . . between [an] entirely individualized inquiry . . . and an unconstitutionally sweeping, race-based generalization”<sup>128</sup> therefore requires some criterion of categorical tailoring against which category definitions can be tested.

Most affirmative action plans continue to adhere to the standard minority categories, often incorporating federal definitions verbatim. As we have seen, these definitions emerged in a fairly arbitrary process. Categories concocted without much thought were politically manipulated and expanded through dubious exercises in armchair ethnography, then blindly replicated and defended by entrenched interest groups. Such manipulation continues. For example, South Asians were retroactively added to Ohio’s “Oriental” category by an executive order of the governor, which critics linked to campaign contributions from Indian donors.<sup>129</sup> Portuguese joined California’s Hispanic category under similar circumstances.<sup>130</sup>

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<sup>124</sup> *Adarand Constructors, Inc. v. Peña*, 965 F. Supp. 1556, 1580 (D.Colo. 1997); *Ritchey Produce*, 1997 Ohio App. LEXIS 4590, \*6; *Houston Contractors*, 993 F. Supp. at 557; *Hopwood*, 78 F.3d at 948 n.37.

<sup>125</sup> *Adarand*, 965 F. Supp. at 1580; *Ritchey Produce*, 1997 Ohio App. LEXIS 4590, \*6.

<sup>126</sup> *Cf. Houston Contractors*, 993 F. Supp. at 557 (“[r]ace has never been either narrow or accurate”); *Jana-Rock*, 2006 U.S. App. Lexis 4050 at \*33-34 (“[W]e find it difficult to imagine what a “correct” racial classification would be. It will always exclude persons who have individually suffered past discrimination and include those who have not.”).

<sup>127</sup> *Adarand*, 515 U.S. at 237; *Grutter*, 539 U.S. at 326.

<sup>128</sup> *Adarand*, 228 F.3d at 1186 (rejecting the district court’s tailoring analysis because “[r]equiring that degree of fit would render strict scrutiny “fatal in fact”).

<sup>129</sup> Inspector General of Ohio, Report of Investigation, Case No. 93-39 available at <http://watchdog.ohio.gov/investigations%5Coiggov.htm#pri>.

<sup>130</sup> Executive order of Pete Wilson.

As one court summarized: “Race is politics, not biology.”<sup>131</sup> It may be tempting to dismiss such definitional wrangling as the normal cut and thrust of identity politics. Yet, there are tangible benefits at stake on which people’s livelihoods depend. It is one thing to argue that race is inherently subjective and that arbitrary divisions are inevitable. However, if the *process* by which such definitional lines are drawn is itself suspect, it becomes more difficult to justify according them a presumptive validity.<sup>132</sup>

Another criticism of the standard federal categories is that they make no allowance for regional variation. As one court observed, “the needs of the Japanese in Hawaii are [not] the same as those of the Japanese in California . . . the needs of [American] Indians in New York are [not] the same as those of the Indians in Montana.”<sup>133</sup> Accordingly, the ubiquity of the ethno-racial quadrangle stands in uneasy tension with *Croson*’s emphasis on particularized remedies. In *Croson*, the Court made a point of criticizing Richmond’s use of beneficiary categories that did not reflect the city’s demographic make-up.<sup>134</sup> Such “random inclusion” of implausible groups in affirmative action cast doubt on Richmond’s remedial intent.<sup>135</sup>

Following *Croson*’s lead, lower courts have duly incorporated a “random inclusiveness” prong as part of their “strict scrutiny” of affirmative action. A Sixth Circuit panel found Ohio’s definition of “Oriental” overinclusive, in part, because it included groups “who might never have

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<sup>131</sup> *Houston Contractors*, 993 F. Supp. at 546.

<sup>132</sup> Since the choice of categories helps determine who is preferred (and who is excluded) on the basis of race, courts should arguably require some justification beyond the reflexive rubberstamping of federal definitions. See *Jana-Rock*, 2006 U.S. App. Lexis 4050 at \*31-32 (arguing New York needed to tailor its categories to its own context in order to comply with strict scrutiny).

<sup>133</sup> *Montana Contractors*, 460 F. Supp. at 1178; see also Christopher Edley, Jr., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 175 (1996) (distinguishing the social position of Aleuts in Anchorage vs. Richmond).

<sup>134</sup> 488 U.S. at 506 (criticizing inclusion of groups such as Aleuts and Eskimo when “[i]t may well be that Richmond has never had an Aleut or Eskimo citizen”).

<sup>135</sup> *Id.*

been seen in Ohio until recently” such as Thai-Americans.<sup>136</sup> Increasingly, courts are thus requiring justification for the categorical lines being drawn that goes beyond the reflexive rubberstamping of federal definitions.<sup>137</sup> Rejecting “laundry list” approaches to category-making, they have pushed for greater sensitivity to regional context.<sup>138</sup>

However, none of these opinions offers a coherent account of how a “non-random” method of category-making would actually function. Without a theory of “non-random inclusiveness” or indeed any clear definition of what constitutes a “group,” such inquiries have a suspiciously ad hoc flavor. Why are Thai-Americans a relevant unit of analysis whose presence/absence proved material in the Ohio case, as opposed to, e.g., Asians or Southeast Asians or even people from Bangkok?<sup>139</sup> How many Thais does it take to establish a legally cognizable presence? Does their presence have to be continuous? Would it matter if Ohio had evidence that local bigots couldn’t distinguish between Chinese and Thais, although discrimination in the past has been solely against the former? Should the

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<sup>136</sup> *Assoc. Gen. Contractors of Ohio v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> Cir. 2000); *see also Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (9<sup>th</sup> Cir. 1997) (same problem with Aleuts in California). San Francisco chose to omit Dominicans from its Hispanic category on similar grounds. Interview with Mara Rosales, Office of City Attorney, San Francisco, February 2, 1998 (explaining that the Dominicans had not been represented in the relevant population of contactors).

<sup>137</sup> *See Jana-Rock*, 2006 U.S. App. Lexis 4050 at \*31-32 (emphasis added). Other courts have similarly taken a dim view of affirmative action plans that adopt a “laundry list” approach to category-making (holding that New York State needed to “mak[e] an independent assessment of discrimination against [persons] of Spanish origin *in New York*” before including them in its Hispanic category).

<sup>138</sup> *Builders Ass’n*, 256 F.3d at 647; *Houston Contractors*, 993 F. Supp. at 555 (criticizing Texas for “cop[ying] whatever the federal government required to get federal funds without a determination of the categories or the applicability to Texas’s experience.”); *Monterey Mechanical*, 125 F.3d at 714 (speculating that “those who drafted the statute for the legislature copied from a model form and neglected to strike its inapplicable portions”); *Hopwood*, 78 F.3d at 932 (approving restriction of affirmative action categories to groups subject to historical discrimination in Texas).

<sup>139</sup> Almost any group definition will include an identifiable subset of people who were/are not actually “present” at some relevant time. To exclude them would require individualized analysis to a degree that would preclude group remedies based on race.

answer vary depending on whether the discrimination is ongoing? And what evidence should courts rely on to decide these questions?

The judicial floundering such challenges have generated only confirms the undertheorized nature of the Who Question in US law. Arguably, what's missing is a societal perspective grounded in empirical fact. In disagreeing as to whether Iberian-Americans should be counted as "Hispanic," the Second, Seventh, and Eleventh Circuits all framed the issue as whether Iberians faced the same societal discrimination as other Hispanics.<sup>140</sup> Yet, in none of these cases was any attempt made to answer through evidence. Instead, courts justify their underlying intuitions by manipulating the burden of proof<sup>141</sup> or rely on generalized *ipse dixit* as to the "nature of discrimination."<sup>142</sup>

### C. The Limits of Antidiscrimination

At core, such disputes turn on an empirical understanding of the socio-pathology of racial bias. This brings us back to the challenge that Justice Powell saw as intractable: How to evaluate "amorphous" claims of societal discrimination? As we have seen, the Court has steadfastly declined to answer this question. This omission cannot be merely accidental. After four decades of affirmative action litigation, if the Court had wanted to probe the logic of racial categories, it surely could have found a way to do so.<sup>143</sup> The comments of individual justices writing outside the majority betray a noticeable disquietude at the unanswered questions the Who Question raises. Several members of the Court have

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<sup>140</sup> Of course, the answer is unlikely to be all or nothing. One could assess the perceived "Hispanic-ness" of Iberians in terms of how often they are identified as *Latino* relative to other Hispanic subgroups.

<sup>141</sup> *Builders Ass'n*, 256 F.3d at 647; *Jana-Rock*; *Peightal*; see also *Ritchey*, 707 N.E.2d at 927.

<sup>142</sup> *Builders Ass'n*, 256 F.3d at 642; *Adarand*, 228 F.3d at 1176, 1185.

<sup>143</sup> The Supreme Court selects the cases it wants to review through grant of certiorari and can direct parties to brief additional issues it deems relevant. See Pildes & Niemi, *supra* note xx, at 498.

suggested that singling out certain minority groups but not others for preferred treatment may violate equal protection.<sup>144</sup> Yet, the Court's majority and plurality opinions have stuck doggedly within the confines of a majority/minority framework in which the question becomes whether racial preferences can be justified for *anyone*, rather the merits of any particular group's claim.<sup>145</sup>

Viewed in this light, the Court's failure to address the logic of affirmative action categories can be seen as part of a larger pattern running through much of the Court's recent cases, namely the profound discomfort which the Court exhibits in coming to terms with race.<sup>146</sup> In contrast with the racial jurisprudence of the nineteenth century where courts freely indulged in the racial classification game,<sup>147</sup> the modern Court shuns such inquiries, because it recognizes that there are no easy answers. Racial identities, the Court has belatedly acknowledged, reflect societal

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<sup>144</sup> For example, Justice Douglas questioned the preference shown to Filipinos, but not Japanese by the University of Washington. *DeFunis v. Odegaard*, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting). Likewise, Justice Powell suggested that the list of groups targeted by University of California was both underinclusive *Bakke*, 438 U.S. at 309 n.45. ("The University is unable to explain its selection of only the four favored groups.") and overinclusive, *id.* at 310 ("The inclusion of [Asians] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process). *See also* *Metro. Broadcasting Inc. v. FCC*, 497 U.S. 547, 633 (1990) (Kennedy, J. dissenting) (criticizing enumeration of preferred racial groups as underinclusive); *Fullilove v. Klutznick*, 448 U.S. 448, 537-39 (1980) (Stevens, J., dissenting) (suggesting that selection of preferred classes failed a rational basis test); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 284 n.13 (opinion of Powell, J.). Justice Kennedy has also questioned the politics underlying specific category definitions. *Grutter*, 539 U.S. at 393 (Kennedy, J. dissenting) (relating attempt to exclude Cubans from Hispanic group "on the grounds that [they] are republicans").

<sup>145</sup> *Cf. Bakke*, 438 U.S. at 359 n.35 (1978) (Opinion of Marshall, Brennan, Blackmun, and White) ("We are not asked to determine whether groups other than those favored . . . should similarly be favored. All we asked to do is to pronounce the constitutionality of [the affirmative action]"). The one notable exception is *Croson*. *See supra* notes xx and accompanying text.

<sup>146</sup> *Cf. Pildes & Niemi, supra* note xx, at 498 (noting "the caution and tentativeness that characterizes the current Court's approach to race.").

<sup>147</sup> Haney López, *WHITE BY LAW, supra* note xx.

conventions more than biological truth.<sup>148</sup> However, rather than undertaking an accounting of such social realities, the Court prefers to rhetorically distance itself, referring to race instead in terms of its most superficial attribute—skin color.<sup>149</sup>

Indeed, the very model of strict scrutiny that defines the modern Court's equal protection jurisprudence posits race as an irrelevant, even distasteful phenomena to be tolerated only under extreme circumstances. The problem with a doctrinal structure premised on dismissing race as an irrelevancy is that affirmative action is one area where, by hypothesis, race does matter.<sup>150</sup> The question is how?

Redefining affirmative action as a project confined to discrete contexts such as university admissions or municipal contracting cabins this inquiry. By reconceiving racism as discrete acts of prejudice within a limited context, the Court obscures the underlying societal dynamics of racial disadvantage.<sup>151</sup> Likewise, stressing the instrumental value of racial identities as an educational tool shifts the focus away from the societal context in which such identities function.

Yet, as we have seen, by telling us how to count, but not whom, the Supreme Court does not so much answer the larger societal questions as deflect them. By relying on numbers to sort through the complexities of race, the Court abstracts the question of selection from the problem of definition. In doing so, it leaves policy-makers to adhere to the quadrangle by default,<sup>152</sup> which means counting with categories that are themselves

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<sup>148</sup> *St. Francis College*, 481 U.S. at 610 n.4.

<sup>149</sup> See Gotanda, *supra* note xx, at 3, 40. An extreme example of such rhetorical distancing is Justice Thomas' dissent in *Grutter*, 539 U.S. at 355 n.3 (likening racial preferences to an "aesthetic" of skin color).

<sup>150</sup> See *Grutter*, 539 U.S. 306 (majority); *Gratz v. Bollinger*, 539 U.S. 244, 299-301 nn.1-7 (2003) (Ginsburg, J., dissenting) (giving statistics to document).

<sup>151</sup> Gotanda, *supra* note XX, at 43-44.

<sup>152</sup> In theory, policy-makers could depart from quadrangular orthodoxy and construct

suspect, the product of the same “unthinking stereotypes or . . . racial politics” that the Court has feared all along.<sup>153</sup>

To confront the Who Question ultimately means navigating the minefield of race and addressing its enduring significance in society. Faced with this challenge, Justices Powell and O’Connor recoiled, declining to engage in the “variable sociological and political analysis” required. Indeed, Justice Powell not only questioned whether such analysis was feasible, but also whether it would be desirable.<sup>154</sup> Instead, Powell retreated into a kind of historical relativism in which everyone has suffered and thus no one claim stands above another. Both theoretically and empirically, this accounting of racial equities seems seriously flawed. Even if other groups have suffered historically, the real issue is where do the burdens of societal discrimination fall today.<sup>155</sup> Whether conceived of in terms of lingering effects or ongoing patterns of exclusion, contemporary evidence of racial disparities seems indisputable.<sup>156</sup> Yet, Justices O’Connor and Powell seem to confuse this point almost willfully. They situate societal discrimination entirely in the past and then plead helplessness before the fog of history.

Justice Ginsburg challenges such evasiveness in dissenting opinions citing a wealth of social science research documenting present-day racial disparities which persist “[i]n the wake of ‘a system of racial caste only recently ended.’”<sup>157</sup> Members of racial minorities—in particular Hispanics

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alternative categories. In practice, such departures have been rare. No one wants to stick their neck out, nor to reinvent the wheel. Moreover, local actors have to conform to federal definitions whenever they receive federal funding. The benefits of definitional standardization thus function as a kind of a “network effect” reinforcing the status quo.

<sup>153</sup> *Croson*, 488 U.S. at 510 (opinion of O’Connor, J.).

<sup>154</sup> *See id.*

<sup>155</sup> *See Fullilove*, 448 U.S. at 463 (purpose of preferential remedies is to address present effect of past discrimination).

<sup>156</sup> *Adarand*, 515 U.S. at 272 (Ginsburg, J., dis.) (citing empirical evidence of “discrimination’s lingering effects”); Ashar & Opoku, *supra* note xx, at 237-38 (documenting “continuing discrimination”).

<sup>157</sup> *See Gratz*, 539 U.S. at 299-303 & nn.1-9 (Ginsburg, J., dis.); *Adarand*, 505 U.S. at

and Blacks—are shown to fare much worse than Whites across a wide range of societal indicators<sup>158</sup> as well as in audit studies documenting disparate treatment directly.<sup>159</sup> On its face, such scholarship would seem to belie Justice O’Connor’s claim that the effects of societal discrimination are “inherently unmeasurable.”

Commentators too have challenged the Court’s reasoning. They argue that the Court’s indifference to societal discrimination flies in the face of the Equal Protection Clause’s historical origins as a vehicle for Negro Emancipation.<sup>160</sup> They see the Court’s emphasis on the personal nature of the equality right and its privileging of process over outcome as providing an incomplete account.<sup>161</sup> Moreover, the Court’s conclusory assertions about the unmeasurability of societal discrimination ring hollow in light of the abundant evidence of enduring racial inequalities. Its transparent attempt to portray such evidence as the remnant of a distant, murky past seems particularly duplicitous.<sup>162</sup> The Court’s stated concerns about judicial competence are therefore dismissed as a mask to advance its underlying agenda of color-blindness. The Court’s feigned helplessness is just another act in a series of crocodile tears shed at the altar of White privilege.<sup>163</sup>

Such critics have called for an alternative approach that would

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272 (Ginsburgh, J., dis.).

<sup>158</sup> *Id.*; see also Brief of the American Sociological Association, et. al., 2002 U.S. Briefs 241 (2003); Ashar & Opoku, *supra* note xx, at 237-238.

<sup>159</sup> Audit studies typically involve matched “testers” with identical credentials who apply for jobs, loans, or housing in order to assess the effects of the applicant’s race with other factors being equal.

<sup>160</sup> Ashar & Opoku, *supra* note xx, at 235-237.

<sup>161</sup> See, e.g. Sunstein, *supra* note xx, at 1314-18; Gotanda, *supra* note xx, at 40-47.

<sup>162</sup> See Ashar & Opoku, *supra* note xx, at 223 (judicial indifference to continuing discrimination “warrant[s] skepticism about the [Court’s] good faith”).

<sup>163</sup> See Harris, *supra* note xx, at 287-88. *Cf.* *McClesky v. Kemp*, 481 U.S. 279, 315-319 (1987) (pleading lack of institutional competency to counter discriminatory application of the death penalty); *Washington v. Davis*, 426 U.S. 229, 247-48 (1976) (declining to exercise constitutional review over disparate impacts).

reinterpret equal protection review as concerned not with the form of state action but rather than its substantive effect.<sup>164</sup> Instead of scrutinizing racial classifications, the goal would be to eradicate racial hierarchies.<sup>165</sup> Instead of focusing narrowly on individuals, a societal perspective would prevail. Under such a reading of equality, affirmative action becomes a vehicle for enforcing equality directly, rather than a suspect and narrowly tolerated deviation from it.<sup>166</sup>

Justice Ginsburg's invocation of the rhetoric of "racial caste" in *Gratz* seems an implicit endorsement of such an antistatutory approach and repudiation of the Court's apparent indifference to societal inequality. Yet, is the topography of racial inequality as readily mapped as Justice Ginsburg's statistics seem to suggest? Moreover, even if societal evidence *could* be meaningfully evaluated, perhaps we should decline the opportunity on political grounds as Justice Powell cautioned. When it comes to race, is dabbling in societal reengineering so fraught with danger that it should be avoided? Other members of the Court have conjured ominous visions of such a project, invoking Nazi Germany and Apartheid South Africa as the legal precedents we would have to draw upon to deal with the classificatory challenges entailed.<sup>167</sup> Yet, these admittedly distasteful examples do not exhaust the list of available models. There is another country that has committed itself to societal reengineering which may offer a more appealing precedent. That country is India.

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<sup>164</sup> Crenshaw, *supra* note xx, at 105.

<sup>165</sup> See Harris, *supra* note xx, at 289-90. The Court has taken notice of *de facto* caste systems in other contexts. See *Hernandez*, 347 U.S. at 476-77 (describing social exclusion of Mexican-Americans). Cf. Haney López, *supra* note xx, at 1163 (arguing for generalization of *Hernandez* approach).

<sup>166</sup> Simons, *supra* note xx, at 98-99.

<sup>167</sup> *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (drawing analogy to Nazi Reich Citizenship Law); *Metro. Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (facetious citation to South African Apartheid statute).

## II. Lessons From Abroad: Does India Hold the Answer?

### A. India's Empirical Approach

Like the US, India is a diverse, multi-ethnic democracy struggling to overcome the legacy of centuries of officially-sanctioned segregation and discrimination. Although Indian affirmative action focuses on caste, not race, there are close parallels. In both cases, beneficiary groups are defined primarily by ancestry (unlike, e.g. Brazilian affirmative action which is based on color).<sup>168</sup> India and the US also share the common challenge of sorting through competing claims to entitlement from a diversity of groups (unlike, e.g., in Malaysia or Fiji, where affirmative action focuses solely on one group).<sup>169</sup> Like the US, India operates under a Common Law tradition. Moreover, its written constitution interpreted by an activist judiciary adheres closely to the US model of public law.<sup>170</sup>

Unlike the US Supreme Court, however, which rejected any attempt to measure societal discrimination, India has developed a rather sophisticated methodology to measure such effects empirically. It uses such measures to select affirmative action beneficiaries. The criteria relied on have been studied by several high-profile national commissions and extensively litigated, with several cases reaching the Indian Supreme Court.<sup>171</sup>

The purpose of affirmative action in India is to remedy the societal effects of caste discrimination.<sup>172</sup> Caste is somewhat different than race.

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<sup>168</sup> Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 CONN. L. REV. 787, 826 (2004).

<sup>169</sup> See Sowell, *supra* note xx.

<sup>170</sup> Cunningham & Menon, *supra* note xx. In this respect, India's legal system has more in common with the US than other common law systems whose adherence to traditional notions of parliamentary supremacy inhibit the role that courts play in policy-making.

<sup>171</sup> *Id.*

<sup>172</sup> *Indira Sawhney v. Union of India*, (1992) 3 SCC.C.C. 217 (1992). India's history

Whereas racial distinctions in the US are often associated with visible differences in physical appearance (e.g. skin color), in India, caste distinctions are conceived of most fundamentally as a matter of societal status.<sup>173</sup> The caste system began as a hierarchical system of social ordering within the framework of traditional Hindu belief. Based on birth, caste membership determined one's station in society. Groups at the top of the hierarchy enjoyed superior resources, status, and privilege, while those at the bottom endured ostracism and abuse.<sup>174</sup>

There were five main categories in the traditional caste system. Brahmins, Kshatriyas, Vaishyas, and Sudras made up the four official castes or *varnas*. Beneath them (and outside the formal caste system) were the outcastes, or so-called “untouchables.” At each of these five levels, the broader categories divide into smaller caste groups known as *jatis* (or *jats*). The *jatis* were the focus of caste identities; they determined what you did for a living, where you lived, the deities you worshipped, the foods you ate, and whom you could marry. Even today, such identities exert powerful influence on Indian life. To be born to a lower caste retains an enduring stigma.<sup>175</sup>

Despite the differences in context, one can draw at least a superficial analogy as to the organizing schema under which caste and race function. The five broad caste categories parallel the five racial groups identified in

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of preferential policies extends back to British rule. Quotas (or “reservations”) have become a ubiquitous feature of Indian public life. A specified percentage of civil service posts, university admissions, and even parliamentary seats are reserved for members of groups deemed disadvantaged in Indian society.

<sup>173</sup> While the lower castes are sometimes associated with darker complexions and broader noses, it is not generally not possible to tell a person's caste by visual inspection. Nonetheless, there are subtle clues—e.g. family name, dietary and religious practices—from which an educated guess can be made. See Jenkins, *supra* note XX, at 46-52, 60 (describing dubious attempts by British colonial anthropologists to correlate caste with physiognomic differences, such as “nasal index” measurements).

<sup>174</sup> Cunningham & Menon, *supra* note xx, at 1302.

<sup>175</sup> M.N. Srinivas, COLLECTED ESSAYS 168-69 (2002).

the US. Just as *varna* are composed of smaller subgroups—*jatis*—racial groups in the US can be broken down by ethnicity or national origin.<sup>176</sup> While *jati* and *varna* stand in a very different sociological relationship than race and ethnicity, the key point is that Indian affirmative action focuses on the smaller groups—the *jatis*—whereas the US focuses on much broader categories.<sup>177</sup>

Officially, caste discrimination has been banned. Yet, as with segregation in the US, patterns of disadvantage continue. And because the caste system had a pyramidal structure, there are many groups in the lower echelons that can plausibly claim to experience such disadvantage—not unlike the “majority of minorities” that Justice Powell talked about in *Bakke*. However, where Powell rejected any attempt to choose between competing groups, India does exactly that.

The starting point in this process remains the caste hierarchy. For the groups at the very bottom—the so-called Scheduled Castes and Tribes—traditional status alone determines eligibility.<sup>178</sup> Under the Indian constitution, these groups are automatically allotted a “reservation” (quota) for all civil service jobs, university admissions, and electoral representation.<sup>179</sup>

For a much larger group of affirmative action beneficiaries, however, known as the “other backward classes” (or OBCs), caste disadvantage is no longer presumed from traditional status alone.<sup>180</sup> Some

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<sup>176</sup> The *jatis* were also subject to traditional hierarchies within each *varna*, although the relative rankings were generally less well defined and could change over time. *Id.* at 162-63.

<sup>177</sup> Sowell, *supra* note xx.

<sup>178</sup> The Scheduled Castes consist mostly of the former untouchables (now known as Dalits), while the Scheduled Tribes comprise tribal groups isolated from mainstream society.

<sup>179</sup> Jenkins, *supra* note xx at 2.

<sup>180</sup> The term “backward classes” comes from the Indian Constitution and has been interpreted to transcend traditional caste status and incorporate a broader assessment of

lower caste groups have become landowners and gained political power. Others have moved to urban areas where economic opportunities enable upward mobility. In some cases, lower castes have even succeeded in redefining their caste status upwards.<sup>181</sup> Therefore, in order to be included in affirmative action set-asides, each *jati* has to demonstrate that it's still "backward"—a term of art in Indian affirmative action law.<sup>182</sup>

The process of identifying "backward classes" remains the responsibility of provincial government as caste differences vary by region. Each province compiles initial lists of eligible groups based on a comprehensive review of the local populace.<sup>183</sup> "Backwardness" is determined shown empirically by looking at a wide range of socio-economic indicators. The data are collected and analyzed on a group-by-group basis. In other words, the caste (*jati*) as a whole is the unit of analysis. The criteria examined are supposed to be specifically chosen to identify the systemic effects of caste disadvantage.<sup>184</sup>

Both the breadth of criteria and level of detail to which such analysis extends are impressive. One standard form used to collect this information runs over seventeen pages.<sup>185</sup> The factors considered include the average income and education level of caste members,<sup>186</sup> literacy rates, occupational

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social standing. *See* Balaji v. Mysore, A.I.R. 1963 S.C. 649. The OBC receive a separate quota from the Scheduled groups.

<sup>181</sup> Srinivas, *supra* note X, at 200.

<sup>182</sup> "Backward classes" need not be defined strictly by caste. Non-Hindu groups—e.g. Christians, Muslims—can also attain OBC status if they meet the "backwardness" standard. *See* Jenkins, *supra* note xxx at 197-214.

<sup>183</sup> Groups left excluded from the central OBC list can apply independently for inclusion by furnishing their own evidence of "backwardness."

<sup>184</sup> Indian affirmative action thus aims at corrective as well as distributional justice. Cunningham & Menon, *supra* note xx, at 1307.

<sup>185</sup> *See* "Questionnaire for consideration of requests for inclusion and complaints of under-inclusion in the central list of Other Backward Classes" *in* Jenkins, *supra* note xxx at 197-214.

<sup>186</sup> Jenkins, *supra* note xx at 208-09.

profiles,<sup>187</sup> land-ownership, capital resources, political representation (i.e. number of caste members occupying elective or civil servant posts), housing quality, and access to infrastructure (roads, electricity, irrigation, etc.). The form also inquires whether the caste's position has improved or deteriorated during the last twenty years and requires applicants to furnish names of comparable caste groups at similar levels.<sup>188</sup>

Wherever possible, the data are supposed to be disaggregated even below the *jat* level. Thus, if an identifiable subgroup of the caste is doing much better than the others, "backwardness" should be appraised for each part separately so that the more "forward" part can be potentially excluded. Similarly, individual caste members who have enjoyed unusually privileged background may also be deemed ineligible.<sup>189</sup>

In other words, India attempts to choose beneficiary groups using precisely the "sociological and political analysis" that Justice Powell thought couldn't or shouldn't be attempted in the US. However, rather than attempt to sort between competing historical claims of past discrimination, India focuses on the here and now.<sup>190</sup> The idea is that groups shown to experience systemic disadvantage across a wide array of societal indicators can be presumed to be the ones most afflicted by discrimination. India thus answers the Who Question empirically. Instead of accepting the existence of caste hierarchies as frozen in time, India defines caste functionally in terms of subordination. It then quantifies such subordination through

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<sup>187</sup> For example, the form inquires whether the caste is identified with a traditional occupation, whether such hereditary occupation is regarded as "lowly, undignified, unclear or stigmatized" or subject to bonded labor, and what proportion of the caste is still engaged in such occupation. Jenkins, *supra* note xx, at 204-05.

<sup>188</sup> *Id.* at 214.

<sup>189</sup> This skimming off of the so-called "creamy layer" of caste elites is constitutionally required. See *Indra Sawhney* 3 S.C.C. 217. Thus, OBC membership only creates a presumption of eligibility.

<sup>190</sup> See *Sawhney*, 3 S.C.C. 217 (rejecting retrospective rationale of compensating for past injury).

empirical proxies and targets its affirmative action accordingly.

In drawing inferences of discrimination from empirical measures, Indian methodology superficially resembles the underrepresentation model of *Croson*. Both rely on counting—using quantitative measures to determine affirmative action eligibility. However, very different kinds of counting are involved: Whereas India focuses on societal disadvantage, *Croson* confines its analysis to particularized contexts. India also employs a multifactoral, systemic analysis, whereas counting in the US focuses solely on a single indicator: group representation.

The units being counted are also sized very differently. Most affirmative action programs operate within the standard four “minority” categories, roughly analogous to India’s *varnas*. Samoans are thus lumped together with Pakistanis in a pan-Asian grouping counted en masse. By contrast, India’s counting focuses on the *jatis*—the smaller units that make up each *varna*. The analogy in the US context would be to analyze Samoans and Pakistanis separately.

Fundamentally different assumptions underlie these quantitative measures. In the US, a statistically significant disparity is taken as prima facie of evidence of unlawful discrimination. In other words, the counting is (at least in theory) supposed to uncover actual “statutory or constitutional violations” traceable to the very institution seeking to grant the remedy. By contrast, India makes no effort to assign individual responsibility. It seeks to measure the systemic effects of enduring caste discrimination irrespective of their cause.<sup>191</sup>

To some extent these different emphases can be ascribed to differences in the way race and caste are conceived. In the US, race is often

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<sup>191</sup> Cf. Alan David Freeman, *Legitimizing Discrimination through Equal Protection*, in *CRITICAL RACE THEORY*, *supra* note xx, at 29-30 (contrasting “perpetrator vs. victim” perspectives on discrimination).

considered an immutable trait, inhering in highly visible (albeit superficial and morally irrelevant) characteristics such as skin color.<sup>192</sup> As a result, racial discrimination is conceived of in terms of discrete acts of irrational prejudice triggered by such phenotypic differences—i.e. a matter of individuals responding inappropriately to “racial” stimuli.<sup>193</sup> Remedying discrimination thus entails neutralizing individual bad actors, as opposed to effecting broader institutional change.<sup>194</sup>

In India, however, caste is less associated with immutable traits, but instead inheres in explicit social hierarchies. It is thus more natural to think of caste discrimination as a societal problem that must be addressed systemically. In order to remedy such discrimination, the social hierarchies themselves must be attacked and rendered invisible.<sup>195</sup>

India also differs in its allocation of decisional authority to an administrative process only indirectly supervised by the judiciary.<sup>196</sup> By contrast, the constitutionalization of racial policy in the US precludes similar efforts at social reengineering. The Supreme Court has rejected societal remedies because of concerns over judicial competence. Yet, its distrust of racial politics means the Court will not allow other branches to act in its stead.<sup>197</sup>

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<sup>192</sup> Indeed, “color” is often used synonymously with race.

<sup>193</sup> Gotanda, *supra* note XX, at 45.

<sup>194</sup> *Id.*

<sup>195</sup> Cunningham & Menon, *supra* note xx, at 1304.

<sup>196</sup> *See id.* at 1306-07; *infra* notes xx and accompanying text.

<sup>197</sup> As Justice O’Connor explained, “our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate ‘a piece of the action’ for its members.” *Croson*, 488 U.S. at 510-511 (Opinion of O’Connor, J). The inability of courts to measure societal discrimination raises the “danger that [putative remedies are] merely the product of unthinking stereotypes or a form of racial politics.” *Id.* at 510. The inability of courts to control societal rationales means they cannot be relied on legislatively. *Id.* at 497, 506; Sean Pager, *Strictness and Subsidiarity: An Institutional Perspective on Affirmative Action at the European Court of Justice*, 26 B.C. INT’L & COMP. L. REV. 35, 70 (2003).

## B. From India to the US: Applying the Model

For some, the Indian approach based on societal disadvantage offers a more attractive means of selecting beneficiaries. The preoccupation with identifying intentional bias in US law has been criticized for employing unrealistic assumptions about the etiology of discrimination.<sup>198</sup> Rather than focusing myopically on identifiable “bad actors,” commentators have stressed the need to address systemic patterns of disadvantage.<sup>199</sup> In proposing this paradigm shift from antidiscrimination to antistatutory subordination, Cass Sunstein tellingly uses the metaphor of a constitutional “Anticaste Principle,”<sup>200</sup> and, in fact, his definition of “caste” in terms of systemic societal disadvantage is reminiscent of the way India actually goes about identifying “backwardness.”<sup>201</sup>

That India offers a working model of an antistatutory subordination program has not gone unnoticed by scholars of comparative affirmative action.<sup>202</sup> In advocating India’s approach to the US Supreme Court, Cunningham and his fellow scholars on the *amicus brief* make the case that the empirical validation supplied by Indian methodology should put to rest judicial concerns over the “amorphous” nature of societal discrimination.<sup>203</sup> Moreover, Sunstein and Cunningham both highlight the institutional

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<sup>198</sup> See Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations after Affirmative Action*, 86 CAL. L. REV. 1251.

<sup>199</sup> Freeman, *supra* note xx, at 30, 35. Some commentators also argue that the Court’s existing jurisprudence already contains the seeds for such a paradigm shift. *E.g.* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997).

<sup>200</sup> Cass R. Sunstein, *The Anticaste Principle*, 92 Mich. L. Rev. 2410, 2411 (1994).

<sup>201</sup> Cunningham & Menon, *supra* note xx, at 1302-1306.

<sup>202</sup> *Id.* at 1302-04; *Passing Strict Scrutiny*, *supra* note xx, at 874-75.

<sup>203</sup> Amicus Brief, *supra* note xx; *Passing Strict Scrutiny*, *supra* note xx at 874, 881 (“India’s experience shows without a doubt that it is possible to design a program to remedy the effect of past discrimination in which beneficiary groups are designated through an objective process based on empirical research”).

advantages of shifting responsibility over questions of structural equality from the judiciary to the political branches.<sup>204</sup>

On its face, the multifactoral analysis applied under the Indian approach does seem like a more rational answer to the Who Question. Whereas *Croson* tells us simply to count heads without much thought about their underlying meaning, India employs empirical measures specifically chosen to correlate with the social phenomenon being targeted. Moreover, by analyzing the narrowest possible units—*jatis* instead of *varnas*—using definitions tailored to local context, the Indian approach achieves a greater degree of precision which helps to avoid over- or underinclusive remedies and thus reduces the concern over definitional issues.<sup>205</sup>

India is able to work with smaller units because it is looking at caste societally, using a composite of many factors to map social hierarchies. In looking at this broader picture of underprivilege, group size becomes less of a limitation than with *Croson*'s particularized analyses in which statistical significance is often a limiting factor. By determining affirmative action eligibility through a centralized process, India's approach is also more efficient than the separate disparity studies that *Croson* demands for each remedial context. Moreover, unlike racial definitions in the US, Indian methodology responds to regional variations in caste identities.

How might such a model translate to the US context? To return to the Iberian cases discussed above, recall that the key question was whether Iberians experienced the same patterns of racial disadvantage as other

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<sup>204</sup> See Sunstein, *supra* note xx, at 2412-13, 2440 (describing “superior democratic pedigree and fact-finding capacities” of legislative and administrative bodies); Cunningham, *supra* note xx, at 858-59.

<sup>205</sup> Smaller groups also generally have better defined identities, a phenomenon that applies in the US as much as in India. See Cunningham & Menon, *supra* note xx, at 1305, 1309-10. Therefore, while counting small groups does not eliminate definitional ambiguity, it minimizes it.

Hispanics. Applying Indian methodology, this question could be answered by analyzing empirical data.

The idea would be to use societal disadvantage as a proxy for racial subordination. This would entail gathering statistics on Iberians and other Hispanic subgroups, using appropriate criteria designed to quantify patterns of subordination in the US. This might include examining access to education, average household wealth, patterns of residential segregation, rates of inter-racial marriage,<sup>206</sup> political representation, and a host of similar criteria. If it turns out that Iberians do much better on these measures than *Latinos*, this could mean they're not experiencing the same patterns of discrimination.<sup>207</sup>

In fact, data from the 2000 US Census reveals that on several such measures, Iberians *are* differently situated from other Hispanic groups. They are significantly wealthier, better educated, and engaged in higher status occupations than Mexican-Americans and Puerto Ricans, who make up the bulk of US Hispanics<sup>208</sup>; indeed, on many measures Iberians outperform the US population at large. Almost twice as many American Spaniards, for example, hold a graduate degree than the US average; they are 25% better represented in managerial or professional occupations; and they own homes valued at 36% above the national median.<sup>209</sup> Mexican-

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<sup>206</sup> See *Passing Strict Scrutiny*, *supra* note xx at 873 n.216 (pointing to intermarriage rates and patterns of “White flight”).

<sup>207</sup> As in India, allowance should also be made for possible regional variations.

<sup>208</sup> Mexican-Americans (or Chicanos) are by far the largest Hispanic subgroup represented almost 60% of the total. Puerto Ricans account for just under 10%. See Table III for census data on Hispanic subgroups.

<sup>209</sup> Portuguese-Americans do slightly less well than Spaniards on these measures. They are somewhat *less* likely to hold a college degree or be a manager/professional than the average US resident. But they experience poverty at only 2/3 the national rate and the median value of their homes exceeds that of the general populace by 34%. See Table III.

Americans and Puerto Ricans living on the US Mainland, by contrast, rank well below the US average on all of these measures.<sup>210</sup>

**Table III - Socioeconomic Breakdown of Hispanic Subgroups**

Population Group	Education		Occupation	Property	Income
	% earning degree Bachelors	Graduate	Managerial or Professional	Median Home Value	% below Poverty Level
<b>ALL US</b>	<b>15.5%</b>	<b>8.8%</b>	<b>33.6%</b>	<b>\$119,600</b>	<b>12.4%</b>
<b>HISPANIC</b>	6.7%	3.8%	18.1%	\$105,600	22.6%
<b>Argentinean</b>	16.2%	19.0%	42.5%	\$180,000	13.8%
<b>Spaniard</b>	16.2%	13.7%	42.0%	\$162,100	12.7%
<b>Portuguese</b>	13.0%	6.0%	29.9%	\$160,100	8.1%
<b>South American</b>	14.5%	10.6%	27.7%	\$153,100	15.0%
<b>Cuban</b>	11.5%	9.6%	31.6%	\$135,700	15.0%
<b>Central American</b>	6.2%	3.4%	13.3%	\$131,400	19.9%
<b>Puerto Rican</b>	8.3%	4.2%	24.2%	\$112,500	26.0%
<b>Mexican</b>	5.0%	2.4%	14.9%	\$95,300	23.5%
<b>BLACKS</b>	9.5%	4.8%	25.2%	\$80,600	24.9%

Source: 2000 U.S. Census

If one accepts such societal indicators as appropriate criteria to determine affirmative action eligibility, the case for including Iberians seems weak.<sup>211</sup> Even if the popular consensus would regard them as Hispanic, they appear less burdened by the systemic handicaps associated with the larger group.<sup>212</sup> It may be that the success of Spaniards comes in spite of race, not because of it. But it is more likely that these differences in societal standing reflect genuine difference in how such subgroups experience race. Scholars have identified intra-Hispanic disparities based on skin color.<sup>213</sup> The lighter skin and European features of Spaniards could permit them to function more easily in mainstream US society. Moreover,

<sup>210</sup> Mexican-Americans, for example, earn graduate degrees at a quarter the rate of the US average, they are only half as well represented in the managerial/professional classes, and their home values rank 20% below the national median. See Table III.

<sup>211</sup> A similar argument could be made for excluding Hispanics of South American and Cuban origin. Argentine-Americans fare particularly well on these measures, outstripping even Spaniards.

<sup>212</sup> The popular consensus is, in any case, influenced by the terms on which formal race categories are constructed. Shifting to a narrower *Latino* classification would arguably reduce the tendency of the public to associate Iberians with other Hispanics.

<sup>213</sup> See Edward E. Telles & Edward Murguia, *Phenotypic Discrimination and Income Differences Among Mexican Americans*, 71 SOC. SCI. Q. 683 (1990).

class differences may themselves insulate societally successful Hispanics from the patterns of prejudice that other group members encounter.

This does not mean that Iberians never encounter racial prejudice, but it does suggest that, like Jews or Irish, they have learned to navigate around it. And we may want to focus our affirmative action efforts on groups that *are* being held back. Since most affirmative action definitions of “Hispanic” still do include Iberians, a disadvantage approach would lead to a narrowing of eligibility in this case.

Clark Cunningham and his collaborators propose to generalize such inquiries to “redraw the map” around which our racial compass is oriented. They call for a “national bipartisan commission” to be convened to replace the standard categories of the quadrangle with “scientifically” redesigned groupings built around systemic disadvantage.<sup>214</sup> Newly fashioned empirically-validated categories could then serve to allocate affirmative action remedies in a more targeted, rationally defensible fashion.<sup>215</sup>

India’s example of selecting affirmative action beneficiaries directly based on societal disadvantage closely approximates the antisubordination approach to affirmative action championed by US scholars. The Indian model therefore serves as a useful thought experiment to examine the viability of such an alternative model.

### **C. Demographic Challenges**

Could an Indian-style disadvantage model provide a workable answer to the Who Question as such commentators suggest? There are significant differences in moving to the US context that would complicate the analysis. Moreover, even if such an approach proved workable, a further question remains whether the consequences would be desirable.

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<sup>214</sup> *Passing Strict Scrutiny*, *supra* note xx at 880-81.

<sup>215</sup> *Id.* at 882.

Arguably, Justice Powell was right to resist societal rankings as a matter of practical politics. If so, the Indian model may serve as a negative example, more cautionary lesson than a model to emulate. Exploring the reasons why points to some of the dangers lurking within the Who Question.

First, consider the demographic contrasts. India remains a largely rural society in which patterns of caste oppression have been entrenched literally over millennia. As a result, caste identities remain well defined.<sup>216</sup> Most caste groups still live in their traditional villages and engage in time-honored occupations. Inter-caste marriage is virtually unknown. Given these relatively stable baseline conditions, Indian policy-makers can generally presume that empirical disadvantage flows from the lingering effects of caste, as opposed to extrinsic causes.

By contrast, the United States is a nation of immigrants, with a high degree of geographic and social mobility. Although “ethnic niches” in the workforce still exist,<sup>217</sup> occupational diversity is increasingly the rule. Ethnic and racial identities are not as well defined, and inter-racial marriage rates are rising. All of this makes the dynamics of group disadvantage much more difficult to model because, as Justices O’Connor and Powell noted, it requires analyses of amorphous, moving targets.<sup>218</sup>

Dealing with immigration effects would present a particular challenge, one which the *amicus* scholars appear to overlook and for which many subordination theorists make no allowance.<sup>219</sup> Immigrants typically

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<sup>216</sup> This is not to deny the phenomenon of caste mobility, nor to deny the existence of grey areas in caste identity. The point is merely a comparative one: Caste remains a much more stable marker of identity in India than race in the US.

<sup>217</sup> See generally Malamud, *supra* note xx, at 327-29.

<sup>218</sup> See *Bakke*, 438 U.S. at 296-97 (Opinion of Powell, J.) (describing need for constant reranking of groups); *Crosby*, 488 U.S. at 506 (describing “mosaic of shifting preferences”).

<sup>219</sup> Cunningham *et. al.* begin with a “mad bomber” parable that posits a model of lingering disadvantage traceable to a unitary injury at time zero. This model fails to address the phenomenon of immigration as a independent variable correlating with societal

arrive in positions of relative disadvantage and then progress up the socio-economic ladder. In general, the longer they have been in the country, the better they do.<sup>220</sup> Such “immigration effects” skew socio-economic measures of status, and for groups with high rates of immigration, the distortions can be appreciable. Yet, affirmative action, properly understood, should target racial disadvantage that goes beyond such transitory phenomena. Unlike traditional welfare policies grounded in distributional equity, affirmative action takes its moral force from a corrective justice ideal: It targets a *specific type* of disadvantage arising from a morally irrelevant and seemingly immutable characteristic—race—whose fundamental injustice transcends individual circumstances.<sup>221</sup> Moreover, affirmative action functions on a collective level that captures positive externalities beyond its individual recipients.<sup>222</sup> At its most ambitious, affirmative action seeks nothing less than to remake society in a new, less prejudicial image.<sup>223</sup> To accomplish this goal, we need appropriate adjustments to identify patterns of “intractable disadvantage” unrelated to immigration.<sup>224</sup>

This is more easily said than done. Adjusting for “immigration effects” requires dealing with myriad causal variables. Immigrants begin at differing starting points and their ability to progress also varies, based on the circumstances they face upon arrival.<sup>225</sup> Many Mexicans and Central

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disadvantage. Nor does it contemplate new or ongoing sources of racial prejudice. *Passing Strict Scrutiny*, *supra* note xx, at 836.

<sup>220</sup> Many components contribute to success in navigating US society: familiarity with US customs, employment skills, language ability, social capital (“connections”), financial resources, etc. All of these take time to cultivate.

<sup>221</sup> Brest & Oshige, *supra* note xx, at 866-67.

<sup>222</sup> *Id.* at 868-871 (describing benefits of affirmative action in eliminating stereotypes and creating positive minority role models).

<sup>223</sup> Ronald Dworkin, A MATTER OF PRINCIPLE, 294-95 (1985).

<sup>224</sup> Brest & Oshige, *supra* note xx, at 873-74. The idea would be to target multigenerational patterns of disadvantage that are *due to* (as opposed to merely correlative with) race or ethnicity. *Id.*

<sup>225</sup> See Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration*

Americans come across the border, often illegally, from poor, rural communities, with little education, and then remain concentrated in linguistically isolated communities which resist assimilation.<sup>226</sup> By contrast, Argentinean and Asian Indians often arrive with higher education degrees in hand and go on to achieve greater successes.

In general, Asian immigrants seem more successful at economically integrating than Hispanics. Language ability may account for at least part of this discrepancy. Roughly the same percentage of Asians as Hispanics are recent immigrants.<sup>227</sup> However, almost half of foreign-born Hispanics lack the ability to function adequately in English compared to just over a quarter of their Asians counterparts. About one in five Hispanic immigrants speak English “not at all” compared to a mere 5.6% of Asians. Accordingly, even legal Hispanic immigrants often remain excluded from opportunities for upward mobility. In addition, Hispanics do not seem to face the same barriers to spatial mobility as Blacks, suggesting that their segregation is more a cultural choice than a condition of racism.<sup>228</sup> Second generation Hispanics are also much more likely marry outside their racial groups than African-Americans, suggesting less ingrained racial antipathy against them.<sup>229</sup>

Nonetheless, there are clearly some Hispanic communities that have been held back for generations at least partly due to racism.<sup>230</sup> Isolating the

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*Prisons in the United States*, 10 PUBLIC CULTURE 577-606 (1998) (contrasting varying conditions met by Haitians vs. *Marielitos* in 1980s); Anthony DePalma, *15 Years on the Bottom Rung*, N.Y. TIMES, May 26, 2005 at A1 (contrasting Greek vs. Mexican immigrant experience).

<sup>226</sup> Graham, *supra* note xx, at 182-83; DePalma, *supra* note xx.

<sup>227</sup> 2000 U.S. Census data, on file with the author.

<sup>228</sup> See Douglas Massey & Nancy Denton, *American Apartheid: the Perpetuation of the Underclass*, in John Arthur & Amy Shapiro, ed., COLOR CLASS IDENTITY: THE NEW POLITICS OF RACE, 138-39 (1996).

<sup>229</sup> See Graham, *supra* note xx, at 193.

<sup>230</sup> See Brest & Oshige, *supra* note xx, at 886-87 (citing conflicting evidence on links between Hispanic disadvantage and discrimination).

“racial” headwinds that impede ethnic advancement from other contingent variables requires making a number of subjective and normatively problematic assumptions about the dynamics of racial prejudice and the uncertain divide between culture and race, all of which would severely test our understanding of “race” as a construct.<sup>231</sup> Faced with such a demographic and sociological challenge, even the best social scientists given infinite time and resources might find it difficult to choose between competing claims of disadvantage in a way that would be generally accepted as fair.<sup>232</sup>

Appreciating such difficulties provide a fuller explanation for the Court’s antipathy toward societal rationales for affirmative action than the Court’s stated reasons. Justices O’Connor and Powell stress the “inherent[] unmeasurab[ility]” of *past* societal injuries. However, these concerns also apply to an antisubordination model focused on the present. Moreover, while their comments focus on the limits of *judicial* competence, the ramifications extend beyond the judicial context. At the core lies a question of political rather than merely technical feasibility. An antisubordination approach to equality would be inherently subjective and contestable. Conditioning valuable societal benefits on such judgment calls—however well-intentioned—would be a recipe for social discord.

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<sup>231</sup> Because race is itself a cultural phenomenon constructed intersubjectively, the boundaries between race and culture often blur. Other indicia of ethnic integration are subject to similar ambiguities. For example, rates of exogamy (interracial marriage) are often viewed as a negative indicator of prejudice, the ability to marry outside one’s race being a proxy for societal integration. Yet, some groups exhibit preferences for endogamy for cultural reasons that have nothing to do with how outsiders view them.

<sup>232</sup> India’s socio-economic approach is by no means the only measure of societal subordination. However, alternative methodologies such as audit testing or attitudinal surveys have their own shortcomings and subjectivities whose details lie beyond the scope of this Article. Cite DP critic. Suffice it to say that a generalized assessment of societal hierarchies presents a daunting challenge by any method.

#### D. Politicization and Backlash

In any case, in the real world, we should not expect that “disadvantage” would be determined through neutral social science because the whole process would inevitably become politicized. Competing interest groups would lobby for favorable criteria and attempt to “game” the system.<sup>233</sup> Threshold standards would be hard to maintain. All of this has happened in India.<sup>234</sup> Reservation politics dominate election campaigns and attract corruption. New groups are constantly being added to the OBC ranks, but very few ever get taken off the lists.<sup>235</sup>

In this sense, the idealized account of Indian methodology provided by the *amicus* scholars requires a dose of legal realism. Given the more complex and contestable terrain that the implementation of a “disadvantage model” in the US would have to negotiate, one could expect the scope for politicization and manipulation of the process to increase dramatically.

Fear of such “racial politics” underlies the Supreme Court’s rejection of societal rationales. As Justice O’Connor tells us in *Croson*, the Court relies on strict scrutiny to “‘smoke out’ illegitimate uses of race.”<sup>236</sup> Without an objective metric to measure societal injuries, affirmative action would too easily devolve into a pretext for the politically empowered to “negotiate a ‘piece of the action.’”<sup>237</sup> Justice Powell similarly warns against “hitching the meaning of the Equal Protection Clause to . . . the ebb and flow of political forces.”<sup>238</sup> It was to preempt such evils that the Court seemingly closed the door constitutionally to antidisubordination arguments.

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<sup>233</sup> See Sunstein, *supra* note xx, at 1317 (noting risk “of strategic and self-interested behavior”).

<sup>234</sup> Cunningham & Menon, *supra* note xx, at 1306.

<sup>235</sup> Sowell, *supra* note xx.

<sup>236</sup> 488 U.S. at 493 (Opinion of O’Connor, J.).

<sup>237</sup> *Id.* at 510-11 (Opinion of O’Connor, J.).

<sup>238</sup> *Bakke*, 438 U.S. at 298 (Opinion of Powell, J.).

We already see a politicization of the disparity testing that contracting programs do under *Croson*; critics have accused them of relying on phony social science to achieve predetermined ends.<sup>239</sup> And as we saw, the process of creating our current racial categories was also not without its politics. Yet, disparity testing is confined to a particularized context and usually involves a contest between industry insiders, unbeknownst to the general public. Similarly, the racial prehistory of the quadrangle largely took place behind closed doors.

By contrast, an Indian disadvantage model would elevate to the Who Question to a much more visible plane. Determinations of “backwardness” involve a holistic assessment of group standing, not in a limited context, but across society. Such assessments inevitably pit competing groups against one another in an adversarial process. At stake is not just eligibility for one program in one sector, but affirmative action benefits across the board. The result is a far more competitive, high profile contest where the winners take all. Inevitably, caste consciousness becomes sharpened, not reduced in the process.<sup>240</sup>

This may seem an acceptable price to pay in a country where caste identities have already been entrenched as an instrument of oppression over three thousand years. Yet, as we have seen, racial identities in the US are not so well-defined. Moreover, as with our demographics, race presents a moving target. US census categories on race have changed dramatically over the years; they continue to be redefined today.<sup>241</sup> Such permeability of

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<sup>239</sup> LaNoue, *supra* note xx, at 12-13.

<sup>240</sup> Indeed, Indian commentators commonly lament the “Mandalization” of Indian politics (referring to the government commission expanded caste reservations nationally). Some link the rise of the Hindu Right to the upper caste backlash against “Mandalism.” See Achin Vanaik, *THE FURIES OF INDIAN COMMUNALISM: RELIGION, MODERNITY AND SECULARIZATION* 51, 319 (1997); Thomas B. Hansen, *THE SAFFRON WAVE: DEMOCRACY AND HINDU NATIONALISM IN MODERN INDIA* 164-66 (1999).

<sup>241</sup> Yanow, *supra* note xx, at 83-85 (charting evolution of categories).

racial identities arguably has a positive value. Avoiding overt intergroup rivalries helps to minimize the hardening of such identities through forced political mobilizations.

The competitive element of Indian affirmative action has other troubling features. Because more “forward” groups tend to usurp a lion’s share of benefits, groups ranked lower down the hierarchy inevitably demand their own separate quotas. India already has two established tiers of beneficiaries, the Scheduled Castes/Scheduled Tribes having precedence over the Other Backward Classes. Competition within these groups has increasingly led to further distinctions whereby groups deemed “more disadvantaged” demand separate reservations, requiring ever more intricate rankings.<sup>242</sup> Again, for a country dealing with the effects of an entrenched caste system, such inverted hierarchies may seem like an acceptable, even desirable remedy. South Africa has taken a similar approach: prioritizing affirmative action eligibility according to the degree of oppression that the various beneficiary groups experienced under Apartheid (which was itself a rigidly hierarchical system).<sup>243</sup>

Clark Cunningham has hypothesized an analogous remedial hierarchy in which Blacks and American Indians—the two groups that suffered the greatest historical injury in the US—would be first in line for affirmative action.<sup>244</sup> Several US courts have already hinted that equal

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<sup>242</sup> Sowell, *supra* note xx, at 34.

<sup>243</sup> *Id.*

<sup>244</sup> Cunningham, *supra* note xx, at 673 (drawing a further analogy comparing Black and Indians with, respectively, India’s Scheduled Castes and Tribes). Cunningham stresses in a footnote that the analogy is made for illustrative purposes only, not as an “import model.” *Id.* at n.37. However, there is a logical case to be made for such a proposal. It’s revealing, for example, that the SBA justified its minority set-asides by emphasizing the unique historical experience of these two groups. See LaNoue, *Presumptions*, *supra* note xx, at 450 (quoting SBA interim rule explaining that “blacks had suffered ‘enslavement and subsequent disfranchisement’ and Indians had endured ‘near extermination’” while omitting explanation of other included groups).

protection may *require* that such distinctions be made.<sup>245</sup> Once racial disadvantage can be empirically quantified, the demand for differential remedies calibrated in proportion to the injury would become all-but irresistible. Making such distinctions would only intensify infra-minority competition at all levels of the disadvantage ladder.<sup>246</sup>

The spectacle of so many groups competing in a collective airing of dirty linen would be one that many Americans would instinctively resist. Such special pleading runs strongly against the grain of American egalitarianism.<sup>247</sup> Even from the start, when affirmative action was so clearly focused on redressing injustices against Negroes, policy-makers were loathe to single out any one group for preferential treatment. This reluctance to play favorites in favoritism appears to be widely shared, even among African-Americans themselves.<sup>248</sup> Similarly, it's notable that claims based on Native American singularity have focused on reclaiming traditional homelands and privileges rather than the more general demand for societal preference voiced by other indigenous groups, e.g., in Malaysia or Fiji.<sup>249</sup> The US likes to think of itself as a classless society and a nation founded on universal equality. However imperfectly that ideal has been

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<sup>245</sup> See *Hopwood*, 78 F.3d at 955 n.50 (“one would intuit that the minority group that has experienced the most discrimination . . . would be entitled to the most benefit from the designated remedy.”); *Assoc. for Fairness in Bus. v. State*, 82 F. Supp. 2d at 353, 362 (D.N.J. 2000) (same); *Concrete Works*, 86 F. Supp. 2d at 1077 (same).

<sup>246</sup> See Sunstein, *supra* note xx, at 1317 (describing danger “of “play[ing] the game of ‘more victimized than thou’”).

<sup>247</sup> Admittedly, affirmative action already requires a break from formal equality. However, it's easier to accept that “minorities” generally deserve a leg up than to engage a whole spectrum of claims to differential levels of entitlement.

<sup>248</sup> Studies have also shown that African-Americans would be loathe to assume the stigma of being the *only* group singled out for special benefits. David Sabbagh, *Affirmative Action Policies: An International Perspective* (unpublished paper?). While African-Americans have at times protested the diminishment of their share of the affirmative action pie due to competition from other groups, the dominant ideology espoused by Black leaders is that of “solidarity” between “people of color.” *Id.*

<sup>249</sup> Sowell, *supra* note xx.

applied in practice, we would likely be uncomfortable with a hierarchical system of affirmative action that so overtly belied it.

The Who Question thus has its tradeoffs. Gains in distributive or corrective justice from pursuing increased precision and clarity might be outweighed by sharpened group consciousness and polarization.<sup>250</sup> Justice Powell adverted to such concerns in *Bakke* when, after dismissing a sociological ranking of racial disadvantage as outside the judicial competence, he questioned whether such rankings would even be “politically feasible and socially desirable.”<sup>251</sup> Powell’s solution in *Bakke* was to advance a model of “pluses” awarded based on an individualized assessment of each applicant’s diversity contribution. Powell’s approach thus preserves a symbolic commitment to individualism, maintaining the illusion that everyone can compete equally with no group enjoying a superior *a priori* claim.<sup>252</sup> Likewise, *Croson*’s disparity testing reduces group entitlement to a question of statistical analysis in particularized settings. The Supreme Court thus pursues a strategy of judicial indirection designed to disguise the workings of race consciousness and reduce the polarizing effects such policies engender.<sup>253</sup> It’s not that the Court cannot choose between groups, but that it chooses not to.

In this sense, critics of the Court may be correct to dismiss claims of “inherent unmeasurab[ility]” as judicial hyperbole. However, they are too quick to accuse Justices O’Connor and Powell of having a hidden agenda. At root, the Court’s concerns are pragmatic, rooted in the realm of practical

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<sup>250</sup> Cunningham, *supra* note XX, at 675 (describing “[t]he concern that the fruit of ‘strict scrutiny’ of group selection and definition might be a counter-productive perpetuation of racial identity”).

<sup>251</sup> *Bakke*, 438 U.S. at 297.

<sup>252</sup> See Pager, *supra* note XX (drawing comparison with similar approach by ECJ).

<sup>253</sup> See David Sabbagh, *The Judicial Uses of Subterfuge*, 118 POL. SCI. Q. 411, 419, 433 (2003) (arguing “affirmative action . . . being . . . a deliberate attempt at reducing the degree of racial identification in the United States must be concealed in order to achieve its intended effect”); Robert Post, *Intro: After Bakke*, 55 REPRESENTATIONS 4 (1998).

politics rather than the kind of ideological hostility to race-consciousness that critical race theorists often assume.

Indeed, the lacuna in American law when it comes to the Who Question can be seen as part of a broader strategy of legal ambiguity in affirmative action rulings.<sup>254</sup> On this account, the Court's apparent disregard of social context when it comes to affirmative action can be seen as a pragmatic accommodation in which vagueness, if not an actual virtue, becomes a necessary evil.<sup>255</sup>

Such intentional ambiguity runs directly contrary to the Indian approach of targeted reservations based on explicit reckonings of comparative societal disadvantage. Yet, as the preceding sections have argued, when it comes to the Who Question, too much clarity can prove counterproductive. Indeed, understanding this conflict between precision and polarization helps to explain the Supreme Court's preference for an antidiscrimination approach over antidisubordination.

A degree of ambiguity as to racial identities is tolerable within an antidiscrimination model because the doctrinal structure is symmetric: *All* racial classifications are equally suspect, reducing the need for precise definitions as to categorical boundaries.<sup>256</sup> However, a theory of equal

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<sup>254</sup> See Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263 (2000) (summarizing commentary on judicial use of ambiguity in affirmative action).

<sup>255</sup> Critics have sometimes accused the Court of engaging in a form of subterfuge, a judicial shell game in which intentionally opaque rationales mask the realities of racial preferences. Kingsley R. Browne, *Affirmative Action: Policy-Making by Deception*, 22 OHIO N.U. L. REV. 1291 (1996). Yet, intentionally opaque rulings are not always bad. They can serve as a judicial strategy to avoid entering unnecessarily divisive territory and preserve a space for political compromise. Pildes & Niemi, *supra* note xx; Sunstein, *supra* note xx, at 1315; Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L. J. 79 (1994).. Powell's opinion in *Bakke*, for example, represents a carefully crafted formula that finesses the most objectionable and problematic aspects of affirmative action while appealing to symbolism around which Americans can unite. See Sabbagh, *supra* note xx, at 433; Post, *supra* note XX.

<sup>256</sup> Cf. Power, *supra* note xx, at 88 (describing symmetry/asymmetry distinction).

protection that treats groups asymmetrically, favoring certain groups over others based on their perceived downtrodden status puts a much greater premium on precise criteria to delineate who falls in which category.

Limiting an antistatutory rationale to non-immigrant African-Americans could, in theory, simplify matters.<sup>257</sup> However, a theory of equality focused solely on a single group seems unlikely to gain traction as a practical matter, even ignoring the constitutional challenges such a move would encounter.<sup>258</sup> Whether rightly or wrongly, affirmative action has *always* included other groups almost as a matter of reflex. Some argue the widespread acceptance of affirmative action has sprung directly from its pluralist nature.<sup>259</sup> There is little to suggest we are ready to revisit such practices now.<sup>260</sup> Indeed, the political economy of today's identity politics is increasingly stacked against it.<sup>261</sup>

An antistatutory approach thus makes the Who Question unavoidable. The ambiguity embraced through vague formulas such as "people of color" would dissolve in a highly public process of adjudicating competing claims. Even if such determinations were possible, they might

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<sup>257</sup> There is certainly a strong case to be made for African-American exceptionalism. Such an approach would find support in the legislative history of the Equal Protection Clause. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 25-27 (1992). Moreover, both Supreme Court justices and commentators have advanced it in the context of affirmative action. See *Bakke*, 438 U.S. at 400 (Marshall, J., dissenting); Orlando Patterson, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS 192-93* (1998); Glenn C. Loury, *Double Talk*, THE NEW REPUBLIC, Aug. 25, 1997, at 23; Nathan Glazer, cited in Graham, *supra* note xx, at 132.

<sup>258</sup> See Pillai, *supra*, at 34-36; see also Edley, *supra* note xx (arguing that Native Americans have an even stronger claim to remedial justice than African-Americans).

<sup>259</sup> Skrentny, *supra* note xx; see also Sabbagh, *supra* note xx (suggesting even African-Americans prefer a pluralist approach).

<sup>260</sup> Cf. *Bakke*, 438 U.S. at 295 (Opinion of Powell, J.) ("It is far too late to argue that the guarantee of equal protection permits the recognition [of Blacks as] special wards entitled to a degree of protection greater than that accorded others").

<sup>261</sup> As African-Americans have become outnumbered demographically by Hispanics, politicians increasingly compete for the latter's support. Likewise, the financial clout wielded by Asian-Americans gives them a growing political voice.

come at a prohibitive social cost. Proponents of antisubordination theory often ignore such practical and prudential concerns, writing as if the victims of racial disadvantage were self-evident.<sup>262</sup> They focus on doctrinal implications of the theory, while taking its feasibility for granted. However, a theory of equality whose central concept cannot—or should not—be measured has questionable value.

### **III. Finding the Balance**

This Article has suggested reasons to hesitate before pushing the Who Question too far. Such concerns provide a powerful argument against relying on societal disadvantage to select affirmative action beneficiaries directly. Moreover, they should give pause to those who advocate antisubordination as the controlling principle of equal protection review.

That said, the impracticability of antisubordination as a stand-alone theory does not make it irrelevant to analyses of equality. The objections to antisubordination arise from second order concerns regarding implementation. The Court has taken societal remedies off the table because it fears an antisubordination approach would be unworkable, not because it objects on principle. As a result, its doctrinal preference for antidiscrimination should not preclude a sensibility to antisubordination values as a normative matter. Indeed, antisubordination and antidiscrimination ultimately represent two sides of a single coin.<sup>263</sup>

Moreover, the argument for ambiguity in affirmative action is based on a tradeoff between competing values, and where we draw the line is open

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<sup>262</sup> Sunstein offers a notable exception in explicitly distinguishing groups subject to discrimination, but not systemic subordination (e.g. Asian-Americans, Jews) who thus fall outside his “anticaste principle.” Sunstein, *supra* note xx, at 2443.

<sup>263</sup> Jack Balkin & Reva Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, 58 U. MIAMI L. REV. 9, 13 (2003).

to debate. The risk in raising the Who Question does not mean we should blithely accept the status quo. Indeed, recent case law threatens to make continued avoidance of the Who Question untenable. As lower courts continue to take a skeptical look at the categories used to allocate affirmative action remedies, the tradeoffs between clarity and ambiguity will need to be addressed. Even if India’s methodology is not the answer to our Who Question, it might have more modest uses.

### A. Anti-Subordination After All

Affirmative action constitutes an anomaly within equal protection doctrine: the rare instance in which race *is* relevant. As such, it remains notably undertheorized.<sup>264</sup> Our existing answers to the Who Question privilege method over meaning. Too often, we count heads without knowing whom we are counting or why. As a doctrinal matter, such formalism may be understandable. Yet, the narrowly circumscribed confines in which such doctrine is articulated should not blind us to the broader social context in which affirmative action operates. Antisubordination theory can help to fill this normative gap, eliminating needless ambiguities in existing doctrine.

The value of such an approach is most obvious under remedial rationales for affirmative action. For example, *Croson* tells us that cities can justify remedial preferences by inferring discrimination from racial disparities. Some courts, however, have regarded such disparities as merely *prima facie* evidence that can be rebutted by showing an absence of racially discriminatory intent.<sup>265</sup> By this logic, racial disparities arising from entrenched “old boy networks” would not be actionable so long as its

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<sup>264</sup> Hollinger, *supra* note XX, at 31-32; Power, *supra* note XX, at 158-59.

<sup>265</sup> Compare *Adarand Constructors, Inc.*, 965 F. Supp. 1556, with *Concrete Works*, 86 F. Supp. 2d 1042.

members discriminate based on insider status rather than race.<sup>266</sup> The fact that such practices perpetuate existing patterns of racial inequalities would be irrelevant so long as the inequalities sprang from sources of discrimination extrinsic to the context at hand.<sup>267</sup>

Viewing affirmative action through the lens of an antisubordination perspective would make such “rebuttals” untenable. The whole point of the remedy would be to overcome patterns of subordination. A showing of statistical disparities in the particularized context would still serve to meet *Croson*’s demand for a measurable nexus between injury and remedy. However, the cause of the disparities need no longer be the focus of judicial inquiry.<sup>268</sup>

Moving from a “perpetrator’s perspective” to a broader societal frame would eliminate much of the theoretical uncertainty that currently surrounds racially-targeted remedies.<sup>269</sup> Courts have struggled to reconcile the existence of such group remedies with the dominant reading of equal protection as an individual right.<sup>270</sup> As a group-based theory of equality, antisubordination would place group remedies on a more secure normative foundation. The result would be more straight-forward doctrine that would bypass the need to pretend to find “actual victims,”<sup>271</sup> obviate concerns over

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<sup>266</sup> In other words, such “old boys” would be deemed equal opportunity excluders.

<sup>267</sup> *Cf. Croson*, 488 U.S. at 503 (dismissing “dearth of minority participation [linked to] past societal discrimination in education and economic opportunities.”).

<sup>268</sup> In other words, the “by whom” question would become irrelevant.

<sup>269</sup> *Cf. Alan Freeman, supra* note xx, at 30.

<sup>270</sup> *Compare* *Int’l Brotherhood of Teamsters v. United States*, 321 U.S. 324, 364-67 (1977) (purpose of group remedy limited to reaching actual or potential victims of past discrimination) *with* *Local 28 of the Sheet Metal Workers’ Int’l Assoc. v. EEOC*, 478 U.S. 421, 449-50, 477 (1986) (broader prospective goals of reforming internal dynamics to remove ongoing barriers to minority advancement). *See also Croson*, 488 U.S. at 526-27 (opinion of Scalia, J., conc.) (rejecting idea of group remedies entirely since victims of race discrimination can be identified by the injury rather than their race).

<sup>271</sup> *Cf. Croson*, 488 U.S. at 508 (perpetuating fiction of individualized review to eliminate group members who have not suffered personally).

state action,<sup>272</sup> and eliminate the canard of the “innocent White.”<sup>273</sup>

Evidence of entrenched barriers preventing certain groups from entering the relevant market would be justification enough.

At the same time, the presumption that disparities imply discrimination should only apply to groups that are at least *plausibly* the victims of societal subordination. For example, if tomorrow Swedish contactors happened to be found statistically underrepresented in New York City, a court would hesitate to presume discrimination from such *prima facie* evidence because Swedes are not a racially subordinated group.<sup>274</sup> This same logic should be extended to non-European groups for whom indicia of subordination is equally lacking. Newly arrived immigrants often find themselves included in affirmative action despite a history of discrimination in the US. They may be underrepresented for all sorts of reasons pertaining to their immigrant status; yet, we presume that race is the culprit.<sup>275</sup>

Particularly in economic contexts such as public contracting, there

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<sup>272</sup> Existing doctrine requires disparities be linked to state action. Since its rare (post-*Brown*) for governments to engage directly in discrimination, theories of “passive participation” are needed to link private discrimination to state (in)action. See generally Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998). By avoiding blame games, an antisubordination approach bypasses such theoretical and evidentiary complexities.

<sup>273</sup> Cf. Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From Bakke to Grutter and Beyond*, 30 HASTINGS CON. L.Q. 445 (2003). One might still take account of injuries to settled expectations and avoid undue inflexibility in crafting a narrow tailored remedy. *Wygant*, 476 U.S. at 276. Yet, a full accounting of the social windfall conferred by White privilege would defuse much of the moral force behind such concerns. See Harris, *supra* note xx, at 286-88.

<sup>274</sup> There is precedent for making such a distinction in the analogous context of disparate impact theory under Title VII. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 528 (2003).

<sup>275</sup> Immigrant underrepresentation may reflect unfamiliarity with US customs, lack of social capital, linguistic hurdles, etc.—all things that have nothing to do with race and can be expected to disappear with the passage of time. See Graham, *supra* note xx, at 132 (describing the inclusion of immigrants as “a historical accident for which there is no possible justification”); see also Orlando Patterson, *supra* note XX, at 193 (1998); Edley, *supra* note xx, at 176 (relying on assumption of risk rationale).

seems little justification for awarding blanket preference to socio-economic overachievers such as East and South Asians.<sup>276</sup> The same argument applies to Iberians and South Americans. This is not to deny that even successful minority groups encounter incidents of racial prejudice.

However, existing discrimination law already affords them retrospective relief.<sup>277</sup> The mere *possibility* of localized discrimination does not justify entitlement to a proactive remedy in the absence of systemic bias. Arab-Americans also face discrimination; so do Hasidic Jews. But these groups are generally denied affirmative action because our current racial orthodoxy deems them White. Such classificatory formalism aside, on what basis can Spaniards or South Asians justify being treated differently?<sup>278</sup> The extraordinary remedy of voluntary affirmative action should be reserved for those who face more intractable racial barriers. It is the need to proactively root out such entrenched hierarchies that ultimately provides the most persuasive justification for affirmative action.

Making such distinctions obviously requires some ability to assess societal disadvantage. Formal determinations as to which groups qualify as subordinated would be problematic for the reasons stated above. However, identifying groups who are unquestionably *not* would be much easier and less controversial.<sup>279</sup> A more modest use of Indian methodology would therefore be to rely on societal data to rule out groups that are clearly *not* being held back on account of race and focus on those that *might* be. Such

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<sup>276</sup> See, e.g. Timothy Bates, *The Changing Nature of Minority Business: A Comparative Analysis of Asian, Nonminority, and Black-Owned Businesses*, 18 REV. BLACK POLI ECON. 25, *supra* note xx at 26 (1989) (“Asians are *not* a disadvantaged group: their eligibility for government minority business set-aside[s] . . . is completely inappropriate”).

<sup>277</sup> State and federal laws provide a panoply of statutory remedies to address proven instances of racial discrimination. See, e.g. Title VII; Fair Housing Act.

<sup>278</sup> Cf. Sunstein, *supra* note xx, at 2443 (equating Asian Americans with Jews).

<sup>279</sup> It is hardly stigmatizing to label a group as “advantaged.” A relatively high threshold could be set so that no one falling on the “advantaged” side of the line could credibly claim the contrary.

societal assessments could thus serve as a threshold test to refine the categories we count with in particularized contexts.<sup>280</sup>

For example, the dispute described above as to whether Iberians should count as Hispanic is one that almost every jurisdiction faces: deciding who qualifies as a “minority.” A societal disadvantage perspective, even if imperfect, would at least provide a metric to draw definitional lines that would be preferable to the uninformed intuition of judges and federal bureaucrats.<sup>281</sup> Even minor improvements in existing definitions could help to prevent the benefits of affirmative action from being disproportionately consumed by those who need them least.

Iberians represent an easy case being as much European as Hispanic. However, it’s time to challenge presumptions of affirmative action eligibility that turn solely upon “non-White” status. Counting heads using categories confined to at least plausibly disadvantaged minority groups would make *Croson*’s blind equation of underrepresentation with discrimination far more tenable.

To implement this “subordination light” approach need not entail a formalized rankings à la India, nor indeed should the socio-economic data be treated as dispositive. In fact, the problem with India’s approach may have as much to do with its reliance on high-profile, winner-takes-all contests as with its underlying aims. As a starting point, we could begin merely by gathering the necessary data and funding social science research to interpret it. Such research should also examine more carefully the links between immigration and ethnic disadvantage to help control for “immigration effects” and enable a more meaningful debate on immigrant

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<sup>280</sup> Thus, rather than using societal disadvantage to determine eligibility directly, we would apply such data at an initial definitional stage to reconstruct the basic categories by which beneficiaries are identified based on underrepresentation.

<sup>281</sup> *Cf.* Sunstein, *supra* note xx, at 1313-14 (urging emphasis on empirical facts in resolving affirmative action disputes).

participation in affirmative action.<sup>282</sup> Policy responses to the findings that emerge could then be determined on a program-by-program basis, primarily through legislative and/or administrative initiative rather than judicial fiat.

The relevance of an antisubordination perspective to a diversity rationale for affirmative action is less obvious, if only because diversity remains an amorphous concept embracing multiple aims.<sup>283</sup> These point in different directions as to the beneficiary groups you might select.<sup>284</sup> *Grutter*'s recent embrace, however, of a broader vision of diversity as an agent of societal legitimization and its explicit acknowledgement that "race unfortunately still matters" suggests that a societal disadvantage approach could feature prominently in the diversity context as well.<sup>285</sup> If nothing else, a subordination perspective offers a principled basis for privileging *racial* diversity above all other sources.

Although beyond the scope of this Article, incorporating an antisubordination perspective has important implications for other aspects of equal protection as well. As others have noted, antidiscrimination discourse often "conceals other values that do much of the work."<sup>286</sup>

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<sup>282</sup> See Hugh Davis Graham, *Affirmative Action for Immigrants: The Unintended Consequences of Reform*, in *COLOR LINES*, at 54-55 (noting dearth of scholarly analysis or empirical data exploring connections between immigration and affirmative action).

<sup>283</sup> Justice Powell's original account of diversity in *Bakke* emphasized the heuristic benefits of bringing diverse viewpoints into the classroom. *Grutter* shifts the focus from benefits to students to benefits to society at large by cultivating "a set of leaders with legitimacy in the eyes of the citizenry." Along the way, *Grutter* also defends diversity as providing a civics lesson in "cross-racial understanding," a response to globalization, and a public service to corporate recruiters. 539 U.S. at 306.

<sup>284</sup> For example, should foreign-born immigrants count for diversity purposes? It depends on what you think "diversity" is designed to accomplish. If it's to expose students to a kind of model UN which helps them compete in the global marketplace, then the more immigrants the better. And why limit it to immigrants of color? Alternatively, if it's the "unique experience of being a racial minority" *in the US* that we seek to bring into the classroom, then immigrants may not serve the purpose as well, if their formative years were spent elsewhere. *Grutter*, 539 U.S. at 333. As noted, this has become a controversial question. See *supra* text accompanying notes xx.

<sup>285</sup> *Grutter*, 539 U.S. at 332-33.

<sup>286</sup> Balkin & Siegel, *supra* note XX, at 13.

Acknowledging the relevance of antisubordination values could resolve doctrinal uncertainties such as whether Whites can bring disparate impact actions under Title VII<sup>287</sup> and whether discriminatory intent is actionable in a remedial context.<sup>288</sup>

### **B. India Revisited—à la Carte**

India's example suggests further grounds for improvement on current practice. For example, even if we continue to count heads under an underrepresentation model, it would not hurt to follow the Indian practice of disaggregating categories to their logical limit. Where underrepresentation is measured on a national scale, it makes no sense to collect data using only a few broad racial categories.<sup>289</sup> Even in local contexts, where particular ethnic groups have a strong presence and a distinct identity, cities should consider counting them separately where possible.<sup>290</sup>

Working with narrower categories would minimize definitional ambiguities: It's much easier to agree on who is Iberian or Argentinean than who is Hispanic, as national origin provides a stable reference point.<sup>291</sup>

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<sup>287</sup> On one view, disparate impact claims function as merely a procedural device to flush out hidden bias. The more robust interpretation sees disparate impact as serving an antisubordination function by eliminating the structures of racial hierarchy whether intentional or not. *See Primus, supra* note XX, at 527-529. Endorsing this latter view would obviously restrict the class of potential beneficiaries.

<sup>288</sup> In general, equal protection forbids government action that is intended to benefit certain racial groups at the expense of others. *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977). However, recent case law has suggested that race neutral forms of affirmative action might fall outside this rule, despite being intentionally designed to benefit underrepresented minorities. *See Primus, supra* note XX, at 540 (citing dicta in *Croson* and *Grutter*). An antisubordination viewpoint would legitimize such asymmetrical treatment.

<sup>289</sup> Incredibly, the federal government's most recent disparity study did not even bother to disaggregate that far. *See Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed Reg 26,042 (May 23, 1996) (calculating underrepresentation of "minorities" as a single masse).

<sup>290</sup> In other words, choose the narrowest categories of ethnic identity to which the sociopathology of stereotyping and discrimination might conceivably be responsive and for which statistically meaningful results can be obtained.

<sup>291</sup> There would admittedly still be definitional challenges posed by multiples migrations. *Cf. Bennun*, 941 F.2d at 173. However, such inevitable controversies can be

Counting with smaller units would also permit more narrowly-tailored remedies to be drawn, preventing Iberians from usurping benefits at the expense of Puerto-Ricans. The converse could also be true: Groups now excluded from affirmative action—e.g. Samoans and Laotians in the context of higher education—might benefit from being counted separately.

Some universities already make such distinctions. The University of Hawaii targets only selected Asian Pacific subgroups for diversity admissions. Stanford limits Hispanic eligibility to Chicanos and Puerto Ricans.<sup>292</sup> The University of Texas used to exclude African-American immigrants. Such practices should be expanded.

This is not to deny the relevance of broader racial identities or to attempt to replace race with ethnicity.<sup>293</sup> It is simply to recognize that the fault-lines of prejudice may only imperfectly track popular conceptions of race and may vary in ways that are contextually contingent. Disaggregation would also challenge the assumption that the quadrangle represents the only organizing paradigm by which race can be viewed, undermining monolithic assumptions about racial identities and perhaps helping us to transcend them.

India's example also underscores the importance of attentiveness to local context.<sup>294</sup> Affirmative action categories should reflect patterns of regional disadvantage, even if this means departing from quadrangular conventions. French-Acadians have a history in Louisiana that justifies distinguishing them from Whites. Likewise, counting Native Hawaiians

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resolved on a case by case basis.

<sup>292</sup> Brest & Oshige, *supra* note xx, at 892-93.

<sup>293</sup> Data compiled based on subgroups can always be reconstituted to provide a picture of the larger group.

<sup>294</sup> *Cf. Grutter*, 539 U.S. at 325 (context matters in racial equality cases).

separately makes sense in Hawaii. Even non-ethnic groups such as Appalachian Whites may deserve special attention.<sup>295</sup>

We've been painting our racial landscape in primary colors for too long. It's time to take a more chromatically differentiated view which takes note of the ever more diverse spectrum of hues represented in our citizenry. India's example offers a useful starting point to accomplish this.

### **C. The Meta-Question: Who Decides?**

Perhaps the more pressing challenge is not to decide *how* to answer the Who Question, but *who*. In allocating decisional authority between courts and political actors, India again offers an instructive example.

From an institutional standpoint, the construction of beneficiary categories is better suited to legislative and administrative bodies than to courts. The former have superior fact-finding capabilities and democratic legitimacy to balance competing policy interests and arrive at a comprehensive solution.<sup>296</sup> By contrast, as Justice Powell noted, courts are not institutionally suited to perform the "variable sociological analyses" to evaluate questions of comparative racial entitlement.<sup>297</sup>

Yet, the Supreme Court has blocked legislative efforts to enact societal remedies in part because it fears such remedies could devolve into a racial spoils systems that it would be unable to control.<sup>298</sup> The Who Question is thus caught in a catch-22. While courts remain loathe to tackle the imponderables of race and are ill-equipped to do so, strict scrutiny permits little leeway for them to defer to anybody else. The result has been a tenuous stalemate in which the Court has only partly constitutionalized the Who Question while remaining silent on its definitional aspects.

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<sup>295</sup> See *supra* notes xx and accompanying text.

<sup>296</sup> Sunstein, *supra* note xx, at 2440.

<sup>297</sup> *Bakke*, 438 U.S. at 297.

<sup>298</sup> See *supra* note xx and accompanying text.

Meanwhile, in the absence of judicial prodding, political actors lack any incentive to depart from the status quo.

The price of avoidance and ambiguity at the top has been judicial incoherence below. While the Supreme Court can rely on docket control to avoid answering awkward questions, lower courts have no such luxury. Their efforts to dispose of definitional challenges have been almost farcical.<sup>299</sup> Moreover, given the hydraulic pressure exerted by strict scrutiny to constitutionalize questions of race, the doctrinal lacuna bequeathed by the Supreme Court appears untenable. As we have seen, lower courts are increasingly challenging definitional assumptions underlying affirmative action under the rubric of narrow tailoring.<sup>300</sup>

Further constitutionalization of the Who Question is doomed to failure. Defining racial boundaries does not lend itself to precise judicial standards. Race is messy. To normalize it within fixed categories requires imposing an artificial rigidity on inherently fluid identities.<sup>301</sup> Such arbitrary decisions are not the sort of thing that can be easily justified under strict scrutiny.<sup>302</sup>

When it comes to constructing categories, is there an alternative between these equally unpalatable extremes of abdication and constitutionalization? India's solution demonstrates a useful midpoint: It defers most of aspects of the Who Question to administrative processes that operate only indirectly under judicial supervision. Although the Indian Supreme Court remains an active protagonist in shaping the constitutional

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<sup>299</sup> See *supra* note xx and accompanying text.

<sup>300</sup> See *supra* note xx and accompanying text.

<sup>301</sup> See Yanow, *supra* note xx, at viii, 150; cf. Jenkins, *supra* note xx, at 67-68 (making similar argument regarding classification of identities generally).

<sup>302</sup> If every disgruntled plaintiff can force a city to muster compelling evidence to justify its choice of affirmative action categories with respect to every possible subgroup, whether included or omitted, strict review would become effectively fatal in fact, contrary to *Adarand*'s assurances. The challenge is to find a principled stopping point short of that.

doctrine governing caste reservations, the Court has recognized that the selection of affirmative action beneficiaries is primarily a political decision. It has confined the role of the judiciary to articulating principles to bind the exercise of such political discretion and ensure that selection processes are conducted in an objective, transparent manner, pursuant to established standards.<sup>303</sup>

There is already a precedent in US equality law for this kind of “hands-off” approach to category-making in the case law on race-conscious voter districting.<sup>304</sup> The US Supreme Court has recognized that drawing election district lines is a political exercise in which courts should hesitate to intervene.<sup>305</sup> Instead, the Court will apply strict scrutiny only where racial considerations so override “traditional districting principles” that a racial gerrymander becomes manifest.<sup>306</sup>

US courts could undertake a similar role with respect to the Who Question: requiring only that affirmative action categories be chosen through a transparent process and conform to minimum standards of rationality and impartiality. Judicial interventions would be justified only when the results are manifestly inconsistent with these basic guidelines or otherwise exhibit indicia of favoritism.<sup>307</sup> The equivalent of “traditional districting principles” could gradually develop in common-law fashion. As a starting point, some of the suggestions this Article has made could be adopted: e.g. requiring disaggregation into subcategories where feasible,

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<sup>303</sup> See *Indra Sawhney*, 3 S.C.C. 217 (endorsing proposed weighting of 11 socio-economic factors as meeting constitutional requirement of an “objective” assessment of caste disadvantage, while not precluding comparable alternatives).

<sup>304</sup> Race-conscious voter districting is itself the political equivalent of affirmative action. See Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 924 (1994)

<sup>305</sup> See *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

<sup>306</sup> See *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993).

<sup>307</sup> Cf. *Jana-Rock*, 2006 U.S. App. Lexis 4050 at \*46 (scrutinizing construction of Hispanic category for signs of favoritism).

eliminating “forward” groups, controlling for immigration effects, and focusing on regional context.<sup>308</sup> Courts have already begun to tinker with several such steps.<sup>309</sup> This proposal would merely unify their efforts under a coherent doctrinal framework. As with the voter districting cases, the scope of such judicial review might prove erratic, although perhaps no worse than the status quo. In any case, this Article has already suggested that when it comes to the Who Question, there are benefits to ambiguity as well as costs.<sup>310</sup>

#### **IV. Conclusion**

Affirmative action sits at the fault-line between two diverging readings of equal protection. Existing doctrine configured around antidiscrimination theory remains incomplete, and continuing to count heads using outdated and overinclusive categories perpetuates an arbitrary and unfair distribution of benefits. If we are going to continue to do affirmative action by the numbers, we need to think about counting the ones that matter most. Yet, understanding the limitations inherent in the Who Question can also help us to appreciate the tradeoffs involved. As we strive for a harmonious integration of antidiscrimination and antidisubordination values, India offers an instructive model that we can usefully consider, both to emulate—and to avoid.

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<sup>308</sup> See *supra* notes xx and accompanying text.

<sup>309</sup> See *supra* notes xx and accompanying text.

<sup>310</sup> Cf. Sunstein, *supra* note xx, at 1315-16 (describing benefits of Supreme Court’s “casuistical, rule-free, fact-specific course in the context of affirmative action” as simultaneously provoking public debate through incremental rulings while leaving space for democratic resolution of underlying issues).

## APPENDIX- Census Data Summary

Population Group	Population Size	Education		Occupation	Property		Income	
		% earning degree Bachelors	Graduate	Managerial or Professional	Median Home Value	Home Ownership	Median Family Income	% below Poverty Level
<b>ALL US</b>	<b>281,421,906</b>	<b>15.5%</b>	<b>8.8%</b>	<b>33.6%</b>	<b>\$119,600</b>	<b>66.2%</b>	<b>\$50,046</b>	<b>12.4%</b>
<b>BLACKS</b>	34,658,190	9.5%	4.8%	25.2%	\$80,600	46.3%	\$33,255	24.9%
Jamaicans	736,513	13.3%	7.0%	30.1%	\$126,900	49.6%	\$44,668	13.5%
<b>ASIANS</b>	10,242,998	26.7%	17.3%	44.6%	\$199,300	53.2%	\$59,324	12.6%
Asian Indian	1,645,510	29.6%	34.3%	59.9%	\$210,200	46.9%	\$70,708	9.8%
Japanese	795,051	28.7%	13.1%	50.6%	\$238,300	60.8%	\$70,849	9.7%
Chinese	2,422,970	24.1%	23.8%	52.2%	\$232,200	58.4%	\$60,058	13.5%
Koreans	1,072,682	29.1%	14.6%	38.7%	\$209,500	40.0%	\$47,624	14.8%
Vietnamese	1,110,207	14.5%	4.8%	26.9%	\$151,400	53.2%	\$47,103	16.0%
Samoan*	85,243	7.5%	3.0%	18.6%	\$153,200	34.4%	\$41,091	20.2%
Tongan*	27,686	7.3%	1.3%	13.3%	\$149,100	48.1%	\$46,261	19.5%
Laotians	167,792	6.3%	1.4%	13.3%	\$100,500	52.4%	\$43,542	18.5%
Cambodian	178,043	6.9%	2.2%	17.8%	\$120,800	43.6%	\$35,621	29.3%
<b>HISPANIC</b>	35,305,818	6.7%	3.8%	18.1%	\$105,600	45.7%	\$34,397	22.6%
Spaniard	112,999	16.2%	13.7%	42.0%	\$162,100	57.0%	\$53,002	12.7%
Portuguese	1,176,615	13.0%	6.0%	29.9%	\$160,100	64.9%	\$55,100	8.1%
South American	1,419,979	14.5%	10.6%	27.7%	\$153,100	41.2%	\$42,824	15.0%
Argentinean	107,275	16.2%	19.0%	42.5%	\$180,000	51.9%	\$53,689	13.8%
Cuban	1,249,820	11.5%	9.6%	31.6%	\$135,700	58.0%	\$42,642	15.0%
Central American	1,811,676	6.2%	3.4%	13.3%	\$131,400	31.7%	\$34,150	19.9%
Puerto Rican	3,403,510	8.3%	4.2%	24.2%	\$112,500	34.0%	\$32,791	26.0%
Mexican	20,900,102	5.0%	2.4%	14.9%	\$95,300	48.0%	\$33,516	23.5%
<b>LEBANESE</b>	440,279	24.3%	17.0%	45.9%	\$159,000	68.9%	\$63,499	8.6%

\*Not included in Asian totals

Source: 2000 U.S. Census