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## Affirmative Action and Judicial Incoherence

Robert C Power, *Widener University - Harrisburg Campus*



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# Affirmative Action and Judicial Incoherence

ROBERT C. POWER\*

The most infuriating provision of the United States Constitution is the Equal Protection Clause. The elegance of its command—"No state shall . . . deny to any person within its jurisdiction the equal protection of the laws"<sup>1</sup>—is deceptive. The role of equality under our Constitution has been the subject of constant debate. While some controversies over the nature of constitutional equality appear to be settled, others continue to perplex scholars, courts, and the public. In the 1990s the most serious disagreements concern the constitutional status of affirmative action programs, which are designed to produce equality in the future by creating inequality in the present.<sup>2</sup>

Two major themes emerge from much of the recent thought about affirmative action. On one hand, practical reasoning about effective policy-making, American history, politics, and the spirit of equality suggest the propriety of, and perhaps the need for, affirmative action in many settings. On the other hand, abstract reasoning about "equality" calls most forms of affirmative action into question.<sup>3</sup> The 1991 appointment of Clarence Thomas to

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<sup>1</sup> U.S. CONST. amend. XIV, § 1.

<sup>2</sup> "Affirmative action" is necessarily a phrase with several different meanings. This Article uses it to refer to those programs that overtly favor members of one or more minority groups in matters such as employment, school admissions, or contracting.

Affirmative action is probably not the best term for such programs, as it euphemistically obscures the fact that racial discrimination is involved. My colleague, Widener law professor Harry Witte, points out that "reverse discrimination" is a better phrase, and that supporters of affirmative action have been unduly defensive in eschewing it. Discrimination means only "different treatment," but the reluctance of supporters to use the phrase allows opponents to suggest that the negative connotations of prejudice apply in this setting as well. See KENT GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* 15-16 (1983). This Article nonetheless uses the phrase affirmative action because the trend in discourse in the 1990s is for descriptive or neutral analyses to use that phrase while critical discussions continue to call it reverse discrimination.

<sup>3</sup> These statements are necessarily oversimplified. There are, of course, pragmatic concerns about some of the possible effects of affirmative action. These include increased racial polarization. Gary Charles Leedes, *The Richmond Set-Aside Case: A Tougher Look at Affirmative Action*, 36 WAYNE L. REV. 1, 7 (1989); Donald E. Lively, *The Supreme Court and Affirmative Action: Whose Classification is Suspect?*, 17 HASTINGS CONST. L.Q. 483, 487-89 (1990), and assumptions or self-doubt about ability, Shelby Steele, *A Negative Vote*

the Supreme Court illustrates these conflicting themes. Justice Thomas was named to replace Justice Thurgood Marshall, the first African American on the Court, and President Bush plainly recognized the symbolic and substantive value of his own race-conscious decisionmaking in this regard, his public statements to the contrary notwithstanding.<sup>4</sup> Yet, Justice Thomas is himself a strong opponent of affirmative action on legal grounds, as reflected in his conduct both before and after he joined the Court.<sup>5</sup>

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on *Affirmative Action*, N.Y. TIMES MAG., May 13, 1990, at 46, 48; Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 154-55. Still, support for affirmative action has focused on its practical utility in achieving a non-racist society. See, e.g., Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986).

<sup>4</sup> President Bush's statements about the Thomas nomination included assertions that Thomas was the best candidate for the position on the merits and that race was not a factor, but the fact that Thomas was an African American was "so much the better." *Excerpts from News Conference Announcing Court Nominee*, N.Y. TIMES, July 2, 1991, at A14. The *Washington Post* reported that "[a]dministration officials said Bush concentrated almost exclusively on minority or female candidates." John E. Yang & Sharon LaFraniere, *Bush Picks Thomas for Supreme Court*, WASH. POST, July 2, 1991, at A1. Neil A. Lewis of the *New York Times* suggested that the public recognized the President's denial of race-consciousness as "hyperbole common in such circumstances." Neil A. Lewis, *Thomas's Journey on Path of Self-Help*, N.Y. TIMES, July 7, 1991, at 12. Other commentators were less respectful of the President's claims. See, e.g., Joanne Jacobs, *Just Give Thomas Credit for Believing What He Believes*, ATLANTA CONST., July 10, 1991, at A9 (suggesting "Bush had his fingers crossed"); Mike Royko, *Read My Lips, No Quota for Court*, CHI. TRIB., July 2, 1991, at 3 (describing Bush as proving his support for racial quotas); *Should Race and Gender Be Factors in Choosing Justices?*, debate between Lynn Hecht Schafran and Bruce Fein, 77 A.B.A. J., 38-39 (1991). On balance, there can be little doubt that the President determined that Thomas was within the group of persons he deemed to be qualified for appointment, or that the President recognized the symbolic value and political benefit of selecting him over other potential nominees. Since affirmative action programs almost always require that beneficiaries be from a group of qualified persons, the President's action was akin to others he has attacked. Such ambivalence about affirmative action is not unique to this President. See Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 354 (1984) (noting the Reagan administration maintained a variety of racial set-asides and other preference programs). Sometimes even well-intentioned efforts along this line can appear to be awkward or patronizing. The press corps, among others, was amused at President Clinton's rigid (and repeated) insistence that his Attorney General be a woman, even though no one would openly fault him for seeking a more diverse cabinet. See, e.g., Stuart Taylor, *Washington Week in Review* (PBS television broadcast, Dec. 25, 1992) ("No males need apply").

<sup>5</sup> Press reports at the time of the nomination reported a variety of public statements hostile to affirmative action. E.g., Linda Greenhouse, *Bush Picks a Wild-Card*, N.Y. TIMES, July 2, 1991, at A1; Lewis, *supra* note 4, at 16; Yang & LaFraniere, *supra* note 4,

The Supreme Court's response to affirmative action has been incoherent. The instability of the law is evidenced by *City of Richmond v. J.A. Croson Co.*<sup>6</sup> (*Richmond*) and *Metro Broadcasting, Inc. v. FCC*<sup>7</sup> (*Metro*), two decisions in which the Court purported to settle the constitutional status of much affirmative action. *Richmond* struck down a local set-aside program for minority businesses, while *Metro* upheld Federal Communications Commission preferences for minority broadcasters. Although they can be reconciled on a technical level, the decisions in fact present dramatically different visions of the constitutional status of benign race-conscious decisionmaking. In short, they reveal that the Court is of several minds on this issue.

The competing visions seem incapable of resolution, and the underlying problem is not likely to disappear for many years. The consistent conservative majority on the Court may appear to end the legal debate by ruling consistently and decisively against most forms of affirmative action, but this will not fully resolve the matter for several reasons. First, the broad societal acceptance of some forms of affirmative action, which translates into political realities such as the Thomas appointment, means that governments will continue to enact affirmative action plans. Second, the incoherence of the Supreme Court's decisions will inevitably persist, with even determined majorities merely papering over strong philosophical differences among the Justices. And third, Supreme Court decisions are limited in effect. The affirmative action debate will necessarily continue through political decisions that the Court cannot review, such as judicial nominations and electoral politics. It will also exist in private-sphere decisions, which the Equal Protection Clause does not reach.

This is as it must be, and arguably as it should be. Even if the Supreme Court embraced all affirmative action plans, the societal debate would continue because the vision of equality that is hostile to affirmative action would survive in the context of the political process as well. One reason is simple—the issue does not tolerate clear winners and losers. Like abortion and *Miranda* warnings, affirmative action touches off a deep public disagreement that no line of Supreme Court cases can resolve. Other reasons are potentially more complicated, such as the analytical snares created by equal protection doctrine. In debates of this kind, the Justices of the Supreme Court are just nine more

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at 6; *Sidebar*, WASH. POST, July 2, 1991, at 7. In 1992, several months after Thomas's confirmation, the D.C. Circuit issued its ruling in *Lamprecht v. FCC*, 958 F.2d 382 (1992). In an opinion by Justice Thomas, the court struck down an affirmative action program that gave women an advantage in the radio licensing process, even though the program resembled the minority preference program upheld in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), addressed in Part II.B.

<sup>6</sup> 488 U.S. 469 (1989) [hereinafter *Richmond*].

<sup>7</sup> 497 U.S. 547 (1990) [hereinafter *Metro*].

participants in the dialogue.

This Article addresses affirmative action for what it reveals about the difficulties of crafting coherent legal doctrines. Part I briefly describes the nature of the equal protection guarantee and the inevitable disagreements surrounding its application to affirmative action. Part II examines the tiers of review, the Supreme Court's traditional tools in this area, and then focuses on *Richmond* and *Metro* to show the Court's inability to reach a stable consensus in this area. Part III examines several features of judicial decisionmaking to suggest that doctrinal coherency in general is elusive. It then studies *Richmond* and *Metro*, concluding that they reveal two of the Court's techniques for obscuring its inevitable incoherence, the false majority and the overgeneralized conclusion. Part IV suggests possible methods of reducing incoherence. It concludes, however, that the fundamental disagreements about affirmative action would prevent any of those methods from achieving its purposes, and takes solace in the fact that incoherence has its advantages.

## I. INCONSISTENT VIEWS OF EQUAL PROTECTION AND AFFIRMATIVE ACTION

### A. *Equality Theory*

If scholars and judges could agree on a single theory of equal protection, that theory might serve as the basis for resolution of the debate over the constitutionality of affirmative action. But no theory has found sufficiently widespread acceptance. The Fourteenth Amendment was plainly intended to prohibit the so-called Black Codes—laws that denied recently freed slaves and other African Americans the same rights granted to the dominant white majority.<sup>8</sup> This specific intent of the Reconstruction Congress, however, is of

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<sup>8</sup> Numerous articles address the history of the Fourteenth Amendment or its relevance to contemporary issues. See, e.g., Paul Brest, *Affirmative Action and the Constitution: Three Theories*, 72 IOWA L. REV. 281, 282 (1987) (explaining that affirmative action was not anticipated by framers, so it is not unconstitutional, and comparable laws were enacted); Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1295 (1982) (arguing that the original understanding was that the Fourteenth Amendment would provide special protection to African Americans); Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 228 (1991) (critiquing reliance on original intent); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1025–26 (1979) (stating that interpreters should begin analysis with the original understanding); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 754–85 (1985) (analyzing Reconstruction legislation that provided benefits for

relatively little assistance in gauging the constitutional validity of modern laws dealing with matters other than race or with affirmative action programs that give African Americans or members of other minority groups advantages over members of the still dominant white majority. Perhaps the closest scholars have come to agreement is the notion that the clause requires that "similar persons be treated in a similar fashion."<sup>9</sup> This adds little to our understanding; in effect, it merely shifts the conundrum from the meaning of "equal" to the

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African Americans); Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 831-34 (1983) (emphasizing Black Codes); Suzanna Sherry, *Selective Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 92-93 (1984) (stating that framers were color-conscious, but could not contemplate present programs); Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1367-70 (1990) (reviewing WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE*) (noting the "complex, multi-faceted" history of the amendment, the variety of its sources, and early indications of its meaning).

Federal civil rights statutes enacted in the Reconstruction era often provided specific benefits to former slaves, thereby indicating that absolute colorblindness was not intended by the framers of the Fourteenth Amendment. Nevertheless, serious problems pervade attempts to bootstrap this fact into an uncritical acceptance of laws benefiting minorities on a group basis. First, the Reconstruction legislation was far more clearly remedial than are most modern programs. Most African Americans of the period had recently been slaves and all were subject to official mandatory discrimination under the laws of most states. Second, this history provides no support at all for programs that benefit groups other than African Americans, yet the Court relatively early recognized its application to other racial groups. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Third, while the experiences of women and various other racial and ethnic groups have parallels to the history of African Americans, it demeans the unique nature of African-American slavery to generalize the experience of all disadvantaged groups. Most importantly, however, the problem with attempting to rely on original intent theory to justify affirmative action plans is that it is impossible to separate any intention to allow beneficial legislation from other intentions—such as the intention to permit continued segregation in public education and other public accommodations. As a nation we have relied on the general language of the Equal Protection Clause and far broader principles than those of the Reconstruction Congresses to define the constitutional guarantee.

<sup>9</sup> Laurence Tribe describes one aspect of the equal protection guarantee by noting, "equality can be denied when government classifies so as to distinguish, in its rules or programs, between persons who should be regarded as similarly situated in terms of the relevant equal protection principles." LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1438 (2d ed. 1988). See also Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over But the Shouting*, 86 MICH. L. REV. 524, 552 (1987) (describing affirmative action in "similarly situated" terms).

meaning of "similar."<sup>10</sup>

One response is to treat the equal protection guarantee as meaningless in the abstract. In the seminal work to this effect, *The Empty Idea of Equality*,<sup>11</sup> Peter Westen argues that assertions of equality ultimately collapse into assertions of other rights.<sup>12</sup> Equality itself is empty, Westen insists, because without governing definitions of those other rights, it is impossible to determine which persons are similar or how society should treat them.<sup>13</sup> This leads to several discouraging conclusions: equality as a legal concept is confusing; the rhetoric of equal protection obstructs analysis because it presupposes the critical inquiry—the determination of "similarity;" and it obscures differences among the underlying rights by subjecting all of them to one form of analysis.<sup>14</sup>

A variety of responses to Westen's ideas have enriched the debate by pointing out that other constitutional terms are as empty as "equality,"<sup>15</sup> and

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<sup>10</sup> Tribe acknowledges this in his description of the second aspect of equal protection: "equality can be denied when government *fails* to classify, with the result that its rules or programs do *not* distinguish between persons who, for equal protection purposes, should be regarded as differently situated." TRIBE, *supra* note 9, at 1438. The two aspects express only a general notion of equitable treatment, with the presence or absence of "similarity" disputable in actual cases. See Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 19–20 (1991) (characterizing affirmative action analysis as hindered by the need to distinguish between likes and unlikes); Michael J. Perry, *The Principle of Equal Protection*, 32 HASTINGS L.J. 1133, 1134 (1981) (describing the "similarly situated" concept as empty); Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 611 (1983) (equality requires that treatment be "identical in *all significant* descriptive respects"; the key factor is understanding what is significant) (emphasis added).

<sup>11</sup> Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982).

<sup>12</sup> *Id.* at 542. See *id.* at 547–60 (analyzing various equality theories and arguing that they represent aspects of other rights); see also DOUGLAS RAE, EQUALITIES 3 (1981) (agreeing that any simple notion of equality is formally empty); Perry, *supra* note 10, at 1134–35 (supporting the emptiness notion with respect to fundamental rights branch of equal protection doctrine); Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CAL. L. REV. 1687, 1690 (1986) (agreeing that equal protection is derivative of other rights to the extent it is a right not to be classified dissimilarly).

<sup>13</sup> Westen, *supra* note 11, at 547; see also *supra* note 10.

<sup>14</sup> Westen, *supra* note 10, at 604, 652 (recognizing that "equality" is confusing, largely because people presuppose similarity in their rhetoric); Westen, *supra* note 11, at 586 (criticizing judicial use of standards of review); see also *infra* notes 44–53 and accompanying text.

<sup>15</sup> See Steven J. Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 YALE L.J. 1136, 1148 (1982) (reasonableness and other terms are

that the main target of the equal protection guarantee is arbitrariness rather than the denial of any specific entitlement.<sup>16</sup> A detailed summary of the “emptiness” debate is beyond the scope of this Article, but the controversy has given rise to two opposing notions of the nature of equal protection. One view is simply that Westen is wrong—that equality itself has a moral value and substantive content.<sup>17</sup> The other embraces Westen’s views and treats the Equal Protection Clause as a vehicle for incorporating extra-constitutional values into enforceable constitutional rights.<sup>18</sup> The view that identifies equality as an independent value tends to favor governmental neutrality, while the view that sees equal protection as implementing other rights tends to favor specific entitlements intended to achieve equality.<sup>19</sup> The persistence of these views

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equally empty). The Constitution is full of terms potentially as empty as “equality.”

<sup>16</sup> Anthony D’Amato, *Is Equality a Totally Empty Idea?*, 81 MICH. L. REV. 600, 601 (1983) (in some settings, the only legitimate complaint is the lack of equality represented by an arbitrary classification); cf. Cass R. Sunstein, *Public Values, Private Interests, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127, 128 (the purpose of the Equal Protection Clause is “to prohibit unprincipled distributions of resources and opportunities”).

<sup>17</sup> Erwin Chemerinsky argues that equality is morally, analytically, and rhetorically central to constitutional values. Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575, 585–91 (1983). Various other theories or applications of theory identify core moral components of constitutional equality. See *infra* note 19 and accompanying text.

<sup>18</sup> See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 272–78 (1977) (arguing for a right against government to equal concern and respect); TRIBE, *supra* note 9, at 1514 (“The central concept of the clause, equality, requires the specification of substantive values before it has full meaning”); Sherry, *supra* note 8, at 98 (discussing the “substance model” of equal protection, which emphasizes extraconstitutional values such as equality of respect and conditions). It is indicative of the slippery nature of equality theory that adherents of one view can reach the same conclusion as their theoretical adversaries. Thus, a believer in equality having inherent value can argue that affirmative action serves equality, while other supporters of affirmative action can argue that the need to import societal values to give equality meaning justifies special treatment for minorities.

<sup>19</sup> Neither view provides a satisfactory approach for applying the Equal Protection Clause in all settings. The extreme “equality as a value” approach might well require absolute equality; all legislative classifications would be invalid. This is unthinkable.

All laws, all statutes, contain classifications. That is, they treat people or behavior differently or the same according to the characteristics the legislature deems relevant. But which things are the same and which are different is rarely—in human affairs never—a question of fact. Rather, it is always a question of perception, and perception is formed by a wide variety of factors.

ROBERT H. BORK, *THE TEMPTING OF AMERICA* 65 (1990). It also places too much value on



one kind of equality. The ramifications are sobering. A progressive income tax would probably be unconstitutional; the government would be required to assess all persons the same amount (not even the same percentage) to conduct its business. Some governmental services do work roughly this way. Public schools are open to all children, with no tuition required even from the wealthy. Similarly, national services such as lawmaking and defense are provided to all, as are local government's analogues of road maintenance and emergency services. At least at the national level, of course, such equal services are supported by a tax system that places greater absolute burdens on those who are wealthy. The existence of some governmental activity following this approach should not be taken to mean that it can provide a model for governmental services in general, let alone a constitutional requirement. By and large, these categories exist because there is no feasible or prudent method of limiting the class of recipients. The "lawmaking/defense" category fits only because such services are by definition provided to the entire public. The public education category works only to a limited extent, as children in wealthy communities somehow seem to receive a "more equal" education in important respects.

Another extreme view of equality has its roots in the second aspect of Professor Tribe's description of equal protection. See *supra* notes 9 & 10. Various descriptions of the positive aspects of equality focus on an entitlement to specific equal results. *E.g.*, C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 934 (1983) (describing the right to egalitarian outcomes); Ronald M. Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & EDUC. 3, 10–11 (1977) (right to treatment as an equal); cf. Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 854 (1985) (noting Dworkin's views and their limited success in the fundamental rights area). In effect, this view holds that disadvantaged persons have an entitlement to services or benefits to make up for the disadvantage. Baker, *supra*, at 939 (citing Rawls's concept of equal distribution of goods); Klarman, *supra* note 8, at 265–69, 285–86 (distinguishing the Warren from the Burger and Rehnquist courts on this approach to equal protection); Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. pt. 2, 157, 159–69 (1985) (asserting that society must recognize differences to avoid a "faulty" neutrality that advances the dominant group).

This model mandates equality of result. As with the "absolute neutrality" version of equality, some government policies seem to follow this approach. Welfare and other redistribution programs certainly seek to bring about greater equality of result, as does even the largely ungraduated federal tax system. Nevertheless, such drastic restructuring of our system cannot realistically be attributed to the Equal Protection Clause; such actions are almost inevitably the result of policy choices.

In constitutional areas, the limited scope of this version of equality is self-evident. For example, in the criminal legal services area, Congress and the states have responded to the mandate of *Gideon v. Wainwright*, 372 U.S. 335 (1963), by providing public defender offices or attorney's fees to private counsel. This results in two systemic inequalities. First, appointed attorneys are often less able than the best private criminal lawyers. Thus, those receiving appointed counsel receive adequate—but not truly equal—representation. Second, many who do not qualify for appointed counsel still cannot afford attorneys who are as

means that the debate over the constitutionality of affirmative action cannot be resolved simply through reliance on equality theory.

### B. *Eight Affirmative Action Issues*

A second obstacle to easy resolution of affirmative action issues is that the controversy itself tends to splinter into a variety of more specific issues. These issues, while to a great extent interdependent, create the potential for numerous approaches to equal protection analysis of affirmative action. Eight of these issues have been raised frequently in recent attempts to address affirmative action problems.

#### 1. *Class or Classification Analysis*

There is substantial disagreement over whether equal protection analysis should emphasize the government's classification or the class of persons claiming unequal treatment. This distinction is far more significant than it may appear. If the government's classification—race or sex or age, for example—is the key element in determining the application of the Equal Protection Clause, then all persons classified—whether “majority” or “minority”—should receive the same level of judicial protection. As shown below, race is the paradigmatic setting for strict judicial oversight,<sup>20</sup> thus all laws that classify by race would be disfavored regardless of whether they benefit or disadvantage minorities. If, on the other hand, the class disadvantaged by the governmental action is the critical factor, laws that disadvantage minority groups should still face judicial hostility because there is reason to suspect the motives of the lawmakers, but laws favoring such groups are more likely to be upheld because there is less

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skilled or experienced as those in most public defender offices. At bottom, equal protection in the criminal defense area is not really equal protection at all. It is more realistically characterized as a minimum standard of fairness pursuant to the due process clauses, which fits the notion of equal protection as itself empty and merely a vehicle for implementing other substantive values. In the absence of pure socialism, there will always be some who are unable to afford things that others possess as a matter of course. While it might be a good thing to provide everyone with sufficient resources to purchase all desired goods and services, the Constitution does not enact Karl Marx's *DAS KAPITAL* any more than it enacts Herbert Spencer's *SOCIAL STATICS*. See also Baker, *supra* at 944 (nor Nozick and Rawls); Hans A. Linde, *The Due Process of Lawmaking*, 55 NEB. L. REV. 197, 253 (1976) (making a similar point concerning the rational basis test).

There are simply too many worthwhile discussions of various aspects of equality to list. An interesting starting point is DOUGLAS RAE, *EQUALITIES* (1981), which points out the inconsistencies in most operating theories.

<sup>20</sup> See *infra* notes 46 and 69–71 and accompanying text.

reason for suspicion.<sup>21</sup>

## 2. Symmetry

Another issue that arises in affirmative action analysis concerns symmetry. Governmental action disadvantageous to minority groups is strongly disfavored under all views. Those who believe that the Equal Protection Clause is necessarily symmetrical in operation argue that governmental action disadvantageous to majority groups is necessarily subject to the same disapproval.<sup>22</sup> Affirmative action is likely to run afoul of the Equal Protection Clause under this view. A different notion, based on an antisubjugation principle, however, denies that symmetry is required.<sup>23</sup> This view redefines the core of the equal protection guarantee as a prohibition of the evils of racial inequality. Drawing on history, societal realities, and symbolism, proponents of this view identify racial antagonism, indifference to persons of other races, paternalism based on beliefs of inferiority, and stigma as such evils.<sup>24</sup>

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<sup>21</sup> The classification/class issue often arises in conjunction with deference issues relating to interpretation of footnote four of *Carolene Products v. United States*, 304 U.S. 144, 153 (1938). See *infra* notes 51–53 and accompanying text.

<sup>22</sup> In this view, the Equal Protection Clause applies to every individual, therefore it operates in the same manner with respect to all persons. The surface attractiveness of this notion is somewhat marred because the very existence of legislative classifications renders the syllogism inaccurate. Nevertheless, it is consistent with our society's ethos to state, along with former Reagan Justice Department official William Bradford Reynolds, that "distinctions on the basis of race have no place in a just and rational society." William B. Reynolds, *An Equal Protection Scorecard*, 21 GA. L. REV. 1007, 1007 (1987). The location or timing of that symmetry, however, is debatable. Although he is an opponent of affirmative action, Shelby Steele has stated: "In theory, affirmative action certainly has all the moral symmetry that fairness requires." Steele, *supra* note 3, at 23.

Another type of symmetry is found in laws that are neutral on their face but are motivated by racism or have the effect of racial classifications. For example, in *Palmer v. Thompson*, 403 U.S. 217 (1971), Jackson, Mississippi, closed its municipal swimming pools rather than integrate them. The Supreme Court upheld the action, largely because the decision treated blacks and whites identically, that is, it denied all persons access to public swimming pools. *Palmer*, 403 U.S. at 225; see *TRIBE*, *supra* note 9, at 1480–82. To strong believers in the symmetry principle, it can be both a necessary and sufficient condition of equal protection.

<sup>23</sup> It does, however, accept symmetry on a high level. As with other theories sympathetic to affirmative action, it permits nonsymmetrical methods in order to achieve a symmetrical end.

<sup>24</sup> Professor Tribe states that the antisubjugation principle "aims to break down legally created or legally reinforced systems of subordination that treat some people as second-class citizens." *TRIBE*, *supra* note 9, at 1515; see also Kennedy, *supra* note 3, at 1336 (describing

Affirmative action plans that do not manifest these characteristics do not violate the Equal Protection Clause under this view.<sup>25</sup>

### 3. Forward/Backward

Another controversy concerns the purpose of the government action under review. Remedial programs are “backward” because they constitute attempts to remedy past injustices. Programs designed to change future patterns or, more inspirationally, to improve the nature of society, are “forward.”<sup>26</sup> Even those most opposed to affirmative action on philosophical grounds accept the propriety of remedying specific injuries, though they are usually careful to deny that such remedies in fact constitute affirmative action.<sup>27</sup> Others take a

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modern racial discrimination law as based on a prohibition of racial subjugation). Terminology can be confusing in this area. “Antidiscrimination” is arguably the better term, for it connotes the negative attributes of the unacceptable classification without limiting it to subjugation, which is only one form of invidious action. Paul Brest seemed to have this notion in mind in his article, *The Supreme Court, 1975 Term—Foreward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976). There he identified the “heart” of the equal protection guarantee as the prohibition of actions to disadvantage minority groups, *id.* at 2, and argued that benign classifications such as affirmative action should be prohibited only to the extent they reveal such aspects as racial bias, indifference, stereotypes, or stigma, *id.* at 21. Nevertheless, Brest’s terminology has been used to describe the symmetrical theory that all racial classifications are equally suspect. *E.g.*, Devins, *supra* note 10, at 27; Rosenfeld, *supra* note 19, at 878. Accordingly, ant子jugation more precisely describes this theory that seeks to distinguish benign from malign discrimination.

<sup>25</sup> Opponents of affirmative action disagree with the ant子jugation principle on theoretical grounds. *See generally infra* Part I.B.5–6. They also distrust the principle on pragmatic grounds, believing it to be too readily manipulable by willful judges or other interested parties. *See, e.g.*, Brest, *supra* note 24, at 21 (describing criticisms of his antidiscrimination principle); Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 126 (1990) (describing the attempt to identify benign discrimination as “a subjective watching brief”).

<sup>26</sup> Perhaps the most accurate restatement of this controversy is to distinguish between remedial and all other permissible purposes. Remedies, whether in the form of affirmative action or not, are backward in the sense that they attempt to undo past wrongs. All laws that classify, whether or not they are remedial, must at least satisfy the minimum rationality requirements generally applicable under the Equal Protection Clause. This requires a legitimate public purpose, some version of the public welfare. *See generally* TRIBE, *supra* note 9, at 1440. Professor Sunstein, a supporter of forward-looking remedies, notes that courts should require that laws in fact serve legitimate public values if they are to make the equal protection guarantee work in all settings. Sunstein, *supra* note 16, at 129–31.

<sup>27</sup> This notion is central to Justice Scalia’s concurring opinion in *Richmond*, 488 U.S.

more generous view of affirmative action, but still insist that only backward-looking objectives such as class-based remedies are permissible. Still others accept forward-looking objectives, asserting that it is the job of legislatures to try to improve society in the future.<sup>28</sup>

#### 4. *Guilt*

Discussion of racist guilt permeates affirmative action analysis. Although no participant in the debate disputes our nation's history of pervasive intentional racism or the harm that it has inflicted on African Americans, substantial disagreement exists concerning racism's present (and future) effects.<sup>29</sup> Some see racism as largely a phenomenon of the past; under this

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469, 520-28 (1989). See *infra* notes 83-87 and accompanying text; see also Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 142 (1990) (arguing that racial classifications should be limited to remedies); see also Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1748 (1989) (discussing the Scalia view).

It is somewhat curious that opponents of affirmative action seize on the purpose of the program as a reason for disapproval. Notwithstanding Sunstein's arguments, courts traditionally have been exceptionally uninterested in examining the purposes of classifications in other settings, usually accepting the most general assertions of the public welfare. See *TRIBE*, *supra* note 9, at 1440. One ramification is that the objectives of affirmative action programs are more closely scrutinized than are those of most other classifications.

For an excellent example of a criticism of forward-looking objectives in the affirmative action area, see Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 15-18 (describing the goal as proportional representation and characterizing it as dangerous).

<sup>28</sup> See *Brest*, *supra* note 8, at 281 (describing the general objective of affirmative action as "to remedy the problem of a perpetual racial underclass in the United States"); Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222, 1223 (1991) (arguing that the strongest justifications for affirmative action are instrumental and forward-looking); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 723 (1974) ("If we are to have even a chance of curing our society of the sickness of racism, we will need a lot more Black professionals."); cf. *TRIBE*, *supra* note 9, at 1537-39 (criticizing the Court's emphasis on remedial justifications).

The attitude of the decisionmaker on this question is critical. If he or she deems the objective impermissible, the program violates the Equal Protection Clause even under deferential review. Conversely, if a program is well-attuned to improve future conditions, someone who accepts forward-looking objectives is likely to find it to be constitutional. This may be the real one-sentence synthesis of *Richmond* and *Metro*. See generally Part II.C.

<sup>29</sup> See, e.g., David Chang, *Discriminatory Impact, Affirmative Action, and Innocent*

view, present-day members of majority groups are innocent of racism and are therefore denied equal protection when they are subject to any disadvantageous treatment due to race.<sup>30</sup> Others disagree, citing one (or both) of two reasons. First, the advantages of past racial preferences did not vanish completely at some point in the past. Disparities in wealth, education, social class, and societal expectations tend to live on, with the result that it is likely that many persons today enjoy the advantages of racism without being racist themselves.<sup>31</sup> Second, it is unrealistic in any event to assume that racism is nonexistent today. The extent of unconscious racism in the legal sphere, for example, is

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*Victims: Judicial Conservatism or Conservative Justices*, 91 COLUM. L. REV. 790, 792 n.8 (1991) (general discussion of controversy); Jesse H. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 IOWA L. REV. 255, 255 (1987) (identifying major disagreement on this point on the Court); Devins, *supra* note 10, at 15 (describing opposing views on innocence and guilt). Kathleen M. Sullivan criticizes the Court's emphasis on guilt, which she describes as "a doctrine of sin doomed to partial success—a doctrine in search of perpetrators but not of victims, and open still to cries of white innocence." Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 95 (1987).

<sup>30</sup> Then-Professor Scalia addressed the problem at length in *The Disease as Cure*, *supra* note 3, at 152–54, noting that many whites are not only innocent of racism, but were also harmed by ethnic discrimination, yet are once again in a disadvantaged class. *See also* Brest, *supra* note 24, at 92–93 (recognizing that affirmative action imposes burdens on persons often no better off than the preferred class); Burt Neuborne, *Notes for the Restatement (First) of the Law of Affirmative Action: An Essay in Honor of Judge John Minor Wisdom*, 64 TUL. L. REV. 1543, 1549, 1551 (1990) (describing the burden on innocent persons as "morally troublesome" and suggesting a need to weigh such burdens in reviewing affirmative action plans); *cf.* Note, *The Supreme Court, 1988 Term*, 103 HARV. L. REV. 40, 225 (1989) (noting that the Court no longer treats racism as part of the setting, which thereby changes the factual context of the cases before it).

<sup>31</sup> *See, e.g.*, Brest, *supra* note 24, at 31–35 (describing present tangible and intangible injuries from past racism); Drew S. Days, III, *Concealing Our Meaning from Ourselves: The Forgotten History of Discrimination*, 1979 WASH. U. L.Q. 81, 82–85 (describing long and sad history of racism and erroneous assumption it is undone); Geoffrey C. Hazard, Jr., *Permissive Affirmative Action for the Benefit of Blacks*, 1987 U. ILL. L. REV. 379, 381 (noting the transgenerational effects of social and financial status); Rosenfeld, *supra* note 27, at 1782 (noting that long-term pervasive racism necessarily deprives people of equal opportunities); Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 310–16 (1990) (describing innocence rhetoric, but noting pervasive racism and lasting effects through constructs such as racial stereotypes); Schnapper, *Perpetuation*, *supra* note 8, at 830, 835 (identifying present harms from past discrimination); *cf.* Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751, 764 n.42 (1991) (noting the conundrum of "innocence," in which whites or men who were not responsible for discrimination have benefited from it).

unknowable.<sup>32</sup> As a result, the precise role of racism as a factor in equal protection analysis is necessarily ambiguous.<sup>33</sup> But the persistence of either racism or its effects militates in favor of affirmative action plans.

### 5. Injury

Injury is the other side of guilt. Again, while virtually all participants in the affirmative action debate agree on the existence of past injuries, the nature and extent of present injuries are more controversial.<sup>34</sup> For example, if

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<sup>32</sup> Professor Charles R. Lawrence argues that racism affects all persons in ways they cannot understand, which necessarily prevents courts from accurately weighing the existence or nature of racism or innocence. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 321-22 (1987). The article goes on to discuss some of the evidence of unrecognized racism. *Id.* at 339-42, 349-55; see also Ross, *supra* note 31, at 314-16 (analyzing unconscious racial stereotypes).

<sup>33</sup> If we cannot agree on the extent to which past racism has created present advantages, we cannot agree on the utility of forward or backward-looking affirmative action. This wild card is doubly pernicious, for it affects other points of the dispute as well. Symmetry provides a good example. To a believer in white innocence, symmetry probably requires race-neutral governmental action. To a believer in the continuing effects of racism (let alone a believer in continuing racism itself), true symmetry probably requires some form of affirmative action to equalize conditions for the future.

Moreover, the problem does not reduce itself to simple guilt versus innocence. As David Chang suggests, whites and blacks deprived of job opportunities are both innocent victims. Chang, *supra* note 29, at 791. However, a number of commentators argue that harming innocent persons may be an acceptable price for an effective affirmative action program. See Kennedy, *supra* note 3, at 1336 (describing such harm as an "incidental consequence" of appropriate programs); Neuborne, *supra* note 30, at 1551 (stating that the likelihood of such injuries mandates careful weighing); Schwartz, *supra* note 9, at 574-75 (noting that such injuries are tolerated in other areas as well).

<sup>34</sup> The arguments suggested in note 31 about the continuing effects of racism relate to the present injury to be remedied by affirmative action. *E.g.*, Schnapper, *Perpetuation*, *supra* note 8, at 830 (noting existence of present harms caused by past intentional discrimination); *id.* at 844 (using example of literacy test where blacks were previously denied education). To the extent that the controversy relates to the fact that some benefits presumably are given to persons who have been relatively fortunate, resolution largely turns on overinclusive/underinclusive analysis. The *remedy* is overinclusive, which is logically analogous to an underinclusive burden. Underinclusiveness is rarely a reason for judicial invalidation of a classification. See TRIBE, *supra* note 9, at 1447 n.4. Thus, if affirmative action programs are subject to heightened scrutiny because of overinclusiveness, it is another example of judicial hostility to such programs reflected in the stringency of judicial review. See generally *id.* at 1446-50 (discussing of under and over inclusiveness).

Once again, Justice Scalia provides the strongest antiaffirmative action argument,

suffering an actual, direct injury is a precondition to receiving benefits under an affirmative action plan, the plan must be drafted with exceptional specificity to be certain that the plan operates only to remedy such injuries. The opposing view, that the lingering effects of racism constitute a general injury to all members of minority groups, provides support for more aggressive programs.<sup>35</sup>

## 6. Symbolism

If the previous three controversies seem to relate to pragmatic concerns, the remaining three are more philosophical in nature. Proponents of affirmative action note the symbolic value of increased minority participation in businesses (or other entities or activities) and in positions of respect or authority.<sup>36</sup>

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stressing the unfairness of giving preferential admission to a son of a wealthy African American over a son of a recent refugee from Europe. Scalia, *supra* note 3, at 154. The wealthy black is, under this view, uninjured by racism, and the preferential treatment aggravates societal discrimination by exacerbating the hardship suffered by the white. *See* Fried, *supra* note 25, at 111 (describing Scalia's approach as premised on "a logic that is perhaps more rigorous than practical"); *see also* Brest, *supra* note 24, at 48-51 (noting the problems of group remedies and suggesting that most injuries are individual and should be remedied as such); Rex E. Lee, *Missing Pieces: A Commentary on Choper*, 72 IOWA L. REV. 275, 277-78 (1987) (describing the victim-specific problem as one of the issues requiring judicial resolution).

<sup>35</sup> There would seem to be two tracks here. The first is the notion of pervasive general injuries to all African Americans, even the wealthy college student Justice Scalia believes has suffered no injury. *See supra* note 34. Most commentators acknowledge such injuries. *See, e.g.,* Hazard, *supra* note 31, at 389 (describing the adverse consequences of being an African American); Lawrence, *supra* note 32, at 321 (noting that racism affects all persons); *see also* note 31 (additional statements). The second track simply recognizes the pervasive influence of race and the need to restructure society, as either a forward-looking objective or as a remedy for past injuries. *See supra* Part II.B.3; *see also* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1064-69 (1991) (arguing for benign race-conscious lawmaking outside of remedial contexts). Shelby Steele is typically iconoclastic on this issue, noting that the injuries from racism are pervasive and subtle but opposing affirmative action, in part because he believes such injuries cannot be remedied by existing programs. Steele, *supra* note 3, at 73-75.

<sup>36</sup> *See* Chemerinsky, *supra* note 17, at 590 (describing equality as a symbol with "tremendous emotive force"). Symbolism is not merely an emotional factor; at least in certain circumstances, it can be translated into the more utilitarian "role model" concept. *See, e.g.,* Delgado, *supra* note 28, at 1226-30 (discussing the role model concept as instrumental and forward-looking, but at bottom for the benefit of the majority). Ironically Justice Scalia is an evocative witness for the symbolic value of the successful "outsider." At his confirmation hearing, Justice Scalia agreed that it was a "good thing" to have an Italian



Symbolism plays other roles as well. If stigma—itsself a kind of symbol—is critical to determining whether a government program violates equal protection, then symmetry and classification analysis both would seem to be beside the point. Racial discrimination that stigmatizes would be unconstitutional, but racial discrimination that bears no symbolic badge of inferiority would probably be constitutional.<sup>37</sup> The symbolism of affirmative action can be turned around, however, and used by its opponents. They castigate affirmative action as “tokenism” and demean utilitarian justifications as trivial, or invoke the aid of another symbol to insist that the constitution is color-blind.<sup>38</sup> Here the ambiguities of the Equal Protection Clause are transformed into political philosophy by linking the word “equal” to notions of “blind justice” and absolute fairness.

### 7. Individualism

A related aspect of the debate concerns the nature of individualism.

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American on the Court. Scalia Nomination Hearing, Senate Hearing 99-1064, Serial No. J-99-119. Again, President Bush's nomination of Justice Thomas certainly suggests that political conservatives philosophically opposed to affirmative action recognize this symbolic value.

<sup>37</sup> See, e.g., Brest, *supra* note 24, at 16-17 (discussing the absence of stigma as evidence of the benign nature of discrimination). *Brown v. Board of Education*, 347 U.S. 483 (1954), is arguably consistent with this notion. Although the Court purported to disallow all racial segregation in public schooling, 347 U.S. at 493, its emphasis on the stigmatic effects on black children, 347 U.S. at 493-94 & nn.10, 11, suggests that different analysis might apply where such effects do not exist. Cf. Lawrence, *supra* note 32, at 355 (arguing that the presence of stigma is evidence of an invidious racial classification, even if it appears to be neutral or otherwise symmetrical).

Of course, affirmative action is potentially stigmatic. The existence of affirmative action can become an excuse for dismissing the accomplishments of minority group members. See, e.g., Scalia, *supra* note 3, at 154-55. There is something inappropriate, however, about placing much weight on this concern except when it is raised by a person subject to the alleged stigma.

<sup>38</sup> The color-blind metaphor was first used by Justice Harlan in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). It has long since made its way into affirmative action caselaw and scholarship. See Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting); RONALD DWORKIN, *LAW'S EMPIRE* 185 (1986) (equal protection decisionmaking should begin with the strict egalitarian ideal); Brest, *supra* note 8, at 284 (describing the color-blind notion as extra-constitutional, rooted “in our culture, traditions and psychology”); Kennedy, *supra* note 3, at 1334-35 (finding the metaphor attractive in “symmetry and simplicity” but not mandated by the Equal Protection Clause); Rosenfeld, *supra* note 27, at 1749 (arguing that all Justices believe ultimately in a color-blind society).

Opponents of affirmative action interpret the Equal Protection Clause as conferring an individual right rather than a group right, and claim that group-based classifications violate the principle that each "person" shall be treated equally.<sup>39</sup> This fits neatly with the innocence theory, as it underscores the injustice to the person denied the benefit. Innocence is a less effective argument without an emphasis on individualism; it is hard to characterize the entire class of majority persons as both innocent of racism and lacking the benefits of past racial advantages. At bottom this argument turns on the notion that merit is the only appropriate criterion for judgment. The argument thus invites proposals for some form of merit determination as an alternative to affirmative action.<sup>40</sup>

### 8. *Republicanism/Pluralism*

The individualism controversy runs parallel to another philosophical disagreement, this one over the nature of the political process. Special treatment for groups is at odds with most contemporary notions of

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<sup>39</sup> Professor Fried notes that the Supreme Court has almost always followed "a liberal, individualistic view" of equal protection, consistent with the "universal terms" of the Fourteenth Amendment. Fried, *supra* note 25, at 107. Caselaw generally supports his point. See, e.g., *University of California Regents v. Bakke*, 438 U.S. 265, 289 (1978) (quoting from *Shelley*); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights established are personal rights"); *McCabe v. Atchison, T. & S.F.R. Co.*, 235 U.S. 151, 161-62 (1914) (emphasizing that individuals are entitled to equal protection). Although this is "effective rhetoric," Chang, *supra* note 29, at 798, it is fairly deceptive, given the extent to which the law now operates through group classifications, with the approval of the Supreme Court. *Id.*; see also *supra* note 19.

<sup>40</sup> In an article focusing on age discrimination, *The Principle of Equal Protection*, Professor Perry argues that if the factor determining a classification does not relate to activities, talents, skills, or needs, it is morally irrelevant and violates the equal protection guarantee as a result. *Supra* note 10, at 1137-39. Under this view, such "merits" factors are the only legitimate decisionmaking considerations.

It is questionable, however, whether this is the case in reality or whether we could ever agree on the application of such a requirement. On one level, we would need to decide if definitions or perceptions of merit are racially (or otherwise) biased. On a second level, merit is necessarily contextual. A college's perceptions of needs, for example, star athletes or wealthy contributors, could give it an arguably morally relevant basis for choosing some applicants over others who would seem to most outsiders to be more qualified. The theoretically free market system applicable to employment would seem to be less susceptible to such wide-ranging merit factors. Still, it is evident that "schools attended" and "personal life-style" are often deemed relevant to hiring decisions, and reliance on such factors can obscure conscious or unconscious racism (or other biases). Perhaps the support for merit determinations is "little more than disappointed nostalgia for a golden age that never really existed." Kennedy, *supra* note 3, at 1332.

republicanism and civic virtue.<sup>41</sup> The concept of governmental decisionmakers acting for the common good despite the demands of special interest groups is a valued part of our national legend, and it meshes with the classical liberal insistence on individualized determinations of merit. Pluralistic theories counter these republican notions, holding that society gains when groups battle for benefits in the political marketplace.<sup>42</sup> To believers in pluralism, affirmative action does not differ in kind from any other government program, from tax deductions on real estate interest to protective tariffs for local industry.

### C. *The Incoherence of Multiple Issues*

The variety of issues underlying the affirmative action debate establish that there are numerous ways to look at the problem. To be sure, attitudes on some issues tend to go together. For example, those inclined to see the equal protection guarantee as symmetrical also tend to see the critical question as the classification used by the decisionmaker and tend, therefore, to disfavor all race-conscious laws. Nevertheless, different shadings and emphases result in a

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<sup>41</sup> See generally Daniel A. Farber, *Richmond and Republicanism*, 41 FLA. L. REV. 623, 624 (1989) (distinguishing republicanism, with its emphasis on the political community, from liberalism, with its individualistic emphasis); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-90 (1984) (characterizing equal protection and other constitutional requirements as designed to ensure that government act to promote the general public good rather than factional interests); Cynthia V. Ward, *The Limits of "Liberal Republicanism." Why Group-Based Remedies and Republican Citizenship Don't Mix*, 91 COLUM. L. REV. 581, 583 (1991) (explaining that interest group politics is inconsistent with republicanism).

<sup>42</sup> A number of commentators imply this view. See, e.g., Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 33-34 (1985) (suggesting that two responses to factions are to accept pluralism as an appropriate "market theory" and to protect disadvantaged groups in a pluralistic society); Patricia J. Williams, Comment, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 528 (1990) (supporting multi-culturalism in broadcasting).

As with the antisubjugation principle, terminology can be deceptive. Professor Ward calls her version of pluralism "interest group liberalism," which requires a "very self-focused pursuit of rigid, predetermined interests." Ward, *supra* note 41, at 589. She describes such politics as alienating and destructive of the political community. *Id.* at 597. Professor Farber, on the other hand, finds some support for affirmative action in republican theory. It recognizes, for example, that exclusion causes group and individual injuries, and that racial minorities feel like outsiders. Farber, *supra* note 41, at 634-35. Society must accordingly act aggressively to include such outsiders in all aspects of society. *Id.* at 635. Professor Williams points out that our nation's ethos of individualism is pervasive, unrecognized, Williams *supra* at 530-31 & n.25, and ultimately false. *Id.* at 534 ("fashion, a collective aesthetic, a species of mass behavior wrapped in the discourse of self-interest").

range of governing attitudes from aggressive support of exceptionally broad programs based on general ideas of pluralism to flat repudiations of any racially conscious government action. It is no wonder that in the words of one scholar, "[t]he constitutionality of affirmative action has been perhaps the most divisive and difficult question of contemporary constitutional jurisprudence."<sup>43</sup>

## II. AFFIRMATIVE ACTION AT THE SUPREME COURT

Both the academy and the practicing bar have looked to the Supreme Court for a theory of affirmative action to which most persons can subscribe. The Court, however, like all other players in the equal protection game, has been unable to construct a unitary theory of equality that commands broad respect or even to choose sides on the eight issues discussed above with much consistency. Worse yet, the Court has done most of its work through the tiers of judicial review, which have little logical connection to the constitutionality of affirmative action. This section summarizes the Court's use of the tiers in equal protection cases and then addresses *Richmond* and *Metro*, which together illustrate the incoherence of the Court's affirmative action analysis.

### A. *The Evasive Techniques of Constitutional Analysis*

In deciding affirmative action cases, courts might have come to grips with the meaning of equality and sought to define the constitutional guarantee of equal protection. Instead, they have developed constitutional doctrines that operate through the stand-in of standards of judicial review. As in some other areas of constitutional doctrine, this involves means-ends analysis.<sup>44</sup> The means is the deliberate "inequality"—the action that treats some persons differently from others. The end is the governmental purpose—the supposed justification for the unequal treatment. In theory, any minor variation in treatment would constitute an equal protection violation if no justification were presented, and an enormous variation in treatment would comply with equal protection if a

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<sup>43</sup> Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 389 (1989).

<sup>44</sup> Professor Sunstein analyzes the interrelated mean-ends tests of the Equal Protection, Due Process, Privileges and Immunities, Commerce, Contract, and Just Compensation Clauses in *Naked Preferences and the Constitution*, with particular attention to the relationship between equal protection and due process. *Supra* note 41, at 1717–18; *see also* Linde, *supra* note 19, at 201 (noting the connection between equal protection and due process); Westen, *supra* note 11, at 570 (noting the need to show a purpose for a classification and noting the relation to substantive due process). *See generally* JOHN E. NOWAK, ET AL., CONSTITUTIONAL LAW 525–43 (3d ed. 1986) (summarizing equal protection analysis).

sufficiently convincing justification were presented.<sup>45</sup>

Means-ends analysis is somewhat less amorphous in fact than in appearance due to the judicial creation of tiers of review. Some classifications are deemed "suspect"; they violate equal protection unless "necessary to a compelling purpose."<sup>46</sup> Most other classifications are subject only to a "rational basis" requirement: they comply with equal protection unless they have no rational relationship to a legitimate purpose.<sup>47</sup> A middle tier, so-called intermediate scrutiny, also exists; it requires that a classification have a substantial relationship to an important governmental purpose.<sup>48</sup> The use of the

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<sup>45</sup> For example, if a state were to require persons whose names begin with letters A to L to file tax returns on April 15 and those whose names begin with M to Z to file on April 22, and were to provide absolutely no reason for the different treatment, the classification would be arbitrary and apparently violate equal protection, despite the minimal burden imposed by the classification. *Cf. supra* note 16 (identifying arbitrary classifications as a breach of equal protection). A relatively minor reason, such as administrative convenience, would probably justify such a classification. On the other hand, the World War II Japanese internment case involved exceptional hardships imposed on Japanese Americans, yet the Court found the national security reasons to be sufficient. *Korematsu v. United States*, 323 U.S. 214, 218-20 (1944).

<sup>46</sup> Suspect classifications include race, *Palmore v. Sidoti*, 466 U.S. 429 (1984), and ethnic origin, *Korematsu v. United States*, 323 U.S. 214 (1944), and (arguably) alienage, *see* *TRIBE*, *supra* note 9, at 1544-53. One of the major disagreements in this area is whether the use of strict scrutiny should be determined by the classification or the class of persons disadvantaged. *See* Sherry, *supra* note 8, at 105-06; *see also supra* Part I.B.1. For a general discussion of strict scrutiny, *see* NOWAK, *supra* note 44, at 530-31. Strict scrutiny is also applicable to classifications with respect to fundamental rights. *See id.* at 721-88; *TRIBE*, *supra* note 9, at 1455-65.

<sup>47</sup> Innumerable cases apply the rational basis test. *E.g.*, *Vance v. Bradley*, 440 U.S. 93 (1979) (mandatory retirement); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (exclusion from employment for drug use). *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955) (business regulation). Sunstein argues that the test is a "trivial restraint," *supra* note 41, at 1698, and describes it as a rhetorical construct to mask the absence of meaningful judicial review, *id.* at 1715-16. Klarman suggests, however, that in the equal protection setting the Court often misuses the test, striking down or criticizing wrong but not irrational classifications. *See* Klarman, *supra* note 8, at 233. This may in effect be simply another way of describing a different level of scrutiny that often uses the language of rational basis. *See infra* note 48. On the rational basis test generally, *see* *TRIBE*, *supra* note 9, at 1439-43, and NOWAK, *supra* note 44, at 530.

<sup>48</sup> In the equal protection area, intermediate scrutiny is most clearly applicable to gender classifications, *see* *Craig v. Boren*, 429 U.S. 190 (1976), but it has also been used in illegitimacy cases, *e.g.*, *Lalli v. Lalli*, 439 U.S. 259 (1978), and alienage cases, *e.g.*, *Plyler v. Doe*, 457 U.S. 202 (1982). And as a result of *Metro*, it has been applied to certain federal affirmative action programs as well. *See infra* Part II.B.2. Three standards of judicial review would seemingly be enough for everyone to handle, but the Supreme Court

tiers provides all persons with a minimal degree of protection, consistent with the universal language of the Equal Protection Clause, but reserves close judicial scrutiny for those classifications most likely to be abused.<sup>49</sup>

The notion of suspect classifications has led some scholars to advocate greater emphasis on the process of decisionmaking by the legislature (or other governmental body) that adopted the classification.<sup>50</sup> This is because one of the

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has given commentators good reason to question the matter. For example, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), the Court insisted that it was using rational basis scrutiny to review a local zoning regulation that disadvantaged group homes for the retarded, *id.* at 446, but plainly scrutinized the classification with greater care than the test had traditionally prescribed, *id.* at 447–50. Tribe discusses *Cleburne* and other such examples under the rubric “covertly heightened scrutiny.” See TRIBE, *supra* note 9, at 1443–46; see also Devins, *supra* note 27, at 148 (noting that the “rational basis” test can in some settings appear to be more demanding than strict scrutiny). Professor Schwartz adds to the roster of tests a “less strict scrutiny” applicable to affirmative action. Schwartz, *supra* note 9, at 550. Although *Richmond* was decided after Schwartz’s article and purported to deny the existence of this standard, aspects of the decision suggest that it might be one of the practical results. See *infra* notes 140–43 and accompanying text. For a general discussion of intermediate scrutiny and the somewhat raggedy tier between it and rational basis, see NOWAK, *supra* note 44, at 531–43.

<sup>49</sup> Sunstein argues that heightened scrutiny is appropriate where there is a strong basis to fear a bad motive by the lawmaker, Sunstein, *supra* note 16, at 140, but also notes concerns with lack of political power, Sunstein, *supra* note 41, at 1700, thereby suggesting the process concerns addressed in the next paragraph of the text. See also Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 44, 73 (1989) (describing “tiered jurisprudence” as encompassing a presumption in favor of rational basis review, with heightened scrutiny only if some special reason is identified).

In practice, true rational basis analysis is rarely more than a rubber stamp, see, e.g., TRIBE, *supra* note 9, at 1443, while strict scrutiny almost invariably results in judicial disapproval, see Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (it is “‘strict’ in theory and fatal in fact”). In an odd way, this formulaic application of ends-means analysis comes close to implementing at least some of the original premises of the Equal Protection Clause. Official discrimination against racial or ethnic minorities is the paradigmatic suspect classification; through the virtually unmeetable requirements of (true) strict scrutiny, the Equal Protection Clause in effect prohibits any governmental classifications that discriminate against such groups. At least one of the framers’ specific intentions—that African Americans not suffer from legal disabilities due to their race—is therefore satisfied.

<sup>50</sup> The major figure in this school is John Hart Ely, who developed a representation-reinforcing theory of judicial review premised on deference to decisions in which the political process works as intended, but greater scrutiny of decisions in which the political process appears to be flawed. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73–104

theoretical premises of deferential review is trust in the legislative process. In his opinion for the Court in *United States v. Carolene Products*,<sup>51</sup> Justice Stone defended the Court's deferential review of the economic legislation before the Court on this basis, but went on to suggest that more searching review would be appropriate for statutes "directed at particular religious . . . or national . . . or racial minorities."<sup>52</sup> Both his approach and the more traditional use of the standards of review support careful judicial scrutiny of laws disadvantaging racial minorities. His approach deviates from the facially symmetrical standards, however, when government classifies on the basis of race but favors a minority group. If a decisionmaker disadvantages itself (or a group to which a majority of the lawmakers belong), there is no reason to distrust the process,

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(1980); Ely, *supra* note 28, at 733-37 (elaborating on problems in the legislative process and possible judicial responses). As one of the primary flaws of the legislative process is its failure to weigh properly the interests of outsiders such as racial minorities, this aspect of process theory works in tandem with the more established premises of strict scrutiny. *See supra* notes 46, 49. Various other commentators note the relevance of process theories to equal protection analysis. *See, e.g.,* Cover, *supra* note 8, at 1304-09 (noting the importance of the political process and majoritarianism in race issues); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 685-88 (1991) (summarizing aspects of processes approaches and noting flaws in the underlying political theories); Klarman, *supra* note 8, at 284-85, 309 (noting different political process theories pertinent to equal protection analysis); Linde, *supra* note 19, at 222-42 (supporting judicial review of the legislative process rather than mean-ends analysis). *But see* Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1064 (1980) (calling Ely's argument "lucid" but disagreeing with the heavy emphasis on process rather than substantive rights).

<sup>51</sup> 304 U.S. 144 (1938).

<sup>52</sup> *Id.* at 153 n.4. The footnote also suggested the need for careful review of legislation appearing to be in violation of a specific constitutional prohibition, legislation restricting the political processes, or otherwise directed at "discrete and insular minorities." *Id.*

The rationale for deference to the legislature is that it acts without prejudice; deference is therefore inappropriate where that assumption is unwarranted. The footnote remains controversial today. *See generally* BORK, *supra* note 19, at 58 (describing theories premised on the footnote as "pernicious"); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (challenging the premises of minority group weakness in politics); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281 & n.16 (1989) (listing articles on the footnote and its progeny); Cover, *supra* note 8, at 1291 ("Footnote four combined a textual and a functional justification for the differing standards of review."); Farber & Frickey, *supra* note 50, *passim* (analyzing the footnote in various respects), *id.* at 690 (ascribing to it "much of the ensuing half-century of constitutional law"); Klarman, *supra* note 8, at 220 (arguing that the Court has not relied on *Carolene Products* in equal protection cases).

and deferential review would be appropriate.<sup>53</sup>

### B. *The Cases*

The Supreme Court has considered numerous cases that concern affirmative action under the Equal Protection Clause.<sup>54</sup> Only a shameless apologist could characterize the opinions in those cases as representing an evolution of doctrine. After the first handful of decisions, Justice Scalia, then a professor at the University of Chicago Law School, described the situation as follows:

Here, as in some other fields of constitutional law, it is increasingly difficult to pretend to one's students that the decisions of the Supreme Court

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<sup>53</sup> Decisionmakers are not prejudiced against themselves and presumably would not act against their own interests without adequate justification. *See generally* Devins, *supra* note 10, at 34 (noting distinction between classifications burdening minorities and classifications helping minorities); Ely, *supra* note 28, at 733–41 (there is nothing suspicious when the majority helps a minority); Sherry, *supra* note 8, at 105–06 (noting that the Court has wavered between the Ely approach and a classification-based approach). *But see* Rosenfeld, *supra* note 27, at 1743 (noting that process theories will not provide agreement on affirmative action issues).

<sup>54</sup> Five decisions through 1990 addressed the merits of affirmative action under the Equal Protection Clause. *Metro*, 497 U.S. 547 (1990), *see infra* Part II.B.2; *Richmond*, 488 U.S. 469 (1989); Part II.B.1; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (layoffs of public school teachers); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (federally funded public construction contracts); *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (minority admissions quota). Numerous articles address one or more of these decisions. *See, e.g.*, Robert A. Bohrer, *Bakke, Weber, and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 IND. L.J. 473 (1981) (discussing various cases); Choper, *supra* note 29, at 256–60, 271–74 (addressing constitutional and statutory cases through 1987, focusing on views of individual Justices); Drew S. Days, III, *Fullilove*, 96 YALE L.J. 453 (1987) (analyzing *Fullilove*); Fried, *supra* note 25 (analyzing *Metro*, discussing others); Rosenfeld, *supra* note 27 (analyzing *Richmond*, discussing others); Ross, *supra* note 31, at 302–07 (discussing *Bakke*, *Fullilove*, *Wygant*, *Richmond*); Schnapper, *Affirmative Action*, *supra* note 8, at 789–96 (discussing *Bakke* and *Fullilove*); Schwartz, *supra* note 9 (analyzing *Wygant* and statutory cases from 1986 and 1987). There are also numerous statutory cases, most involving Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1989), which provide some insight into the thinking of the Justices on the equality themes. *E.g.*, *Johnson v. Transp. Agency*, 480 U.S. 616 (1987) (an affirmative action plan may lawfully result in preference over an otherwise more qualified person); *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (holding Title VII's prohibition of racial discrimination did not prohibit all private voluntary racial classifications).



are tied together by threads of logic and analysis—as opposed to what seems to be the fact that the decisions of each of the Justices of the Court are tied together by threads of social preference and predisposition.<sup>55</sup>

This description remains accurate today. The opinions in *City of Richmond v. J.A. Croson Co.*<sup>56</sup> and *Metro Broadcasting, Inc. v. FCC*,<sup>57</sup> decided only seventeen months apart by the same nine Justices, reveal inconsistent visions of the constitutional status of affirmative action.

### 1. Richmond

In 1983, Richmond, Virginia adopted an ordinance that required affirmative action in the awarding of city construction contracts.<sup>58</sup> The Minority Business Utilization Plan provided that prime contractors must subcontract to Minority Business Enterprises (MBEs) at least thirty per cent of the contract. The affirmative action plan was a “set-aside,” modeled in most respects on a federal statute that the Supreme Court upheld against an equal protection challenge in *Fullilove v. Klutznick*.<sup>59</sup> As in the federal statute, the ordinance defined “Minority Group Members” as “[c]itizens . . . who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”<sup>60</sup> The City Council enacted the ordinance after a public hearing at which the low level of minority participation in the construction business was discussed, including assertions and denials of public and private discrimination. The ordinance had two interrelated purposes: it was both “remedial” and designed to “promot[e] wide participation by minority business enterprises in the construction of public projects.”<sup>61</sup> The J.A. Croson Company was a prime contractor on a city plumbing project that was subject to the affirmative action program. Croson found it difficult to find an MBE willing to subcontract for what the company

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<sup>55</sup> Scalia, *supra* note 3, at 147. Part III.C indicates that, at least in this respect, Justice Scalia accurately describes affirmative action law.

<sup>56</sup> 488 U.S. 469 (1989).

<sup>57</sup> 497 U.S. 547 (1990).

<sup>58</sup> The factual description is from Justice O'Connor's opinion. *See Richmond*, 488 U.S. at 477–86. No Justice appeared to disagree with her on this point, although the context of the Richmond program was hotly debated. *See id.* at 528–35 (Marshall, J., dissenting); *infra* notes 88–96 and accompanying text. For descriptions of the Richmond program, see Aleinikoff, *supra* note 35, at 1072–73, and Douglas D. Scherer, *Affirmative Action Doctrine and the Conflicting Messages of Croson*, 38 KAN. L. REV. 281, 309–14 (1990).

<sup>59</sup> 448 U.S. 448 (1980), upholding section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, 42 U.S.C. § 6705(f)(2) (1989).

<sup>60</sup> RICHMOND, VA., CITY CODE, §12-23 (1985).

<sup>61</sup> *Id.* at § 12-158(a).

believed was a reasonable price. When the company's request for a waiver of the set-aside was denied, it challenged the ordinance as unconstitutional. A majority of the Supreme Court ultimately agreed.<sup>62</sup>

In one sense, *Richmond* constituted an improvement in the Court's treatment of constitutional affirmative action cases; for the first time,<sup>63</sup> parts of one opinion officially spoke for a majority. Careful reading of the opinions reveals, however, that this minor level of agreement with Justice O'Connor's lead opinion was accompanied by substantial disagreement among the Justices. Roughly half of the O'Connor opinion was supported by a majority; different pluralities supported other portions; three Justices dissented. In effect, the Court spoke with eight different voices.<sup>64</sup>

Although Justice O'Connor's majority/plurality opinion was the strongest in the sense that it represented the views of the most Justices, it has been accurately described as "a remarkably tortured piece of work."<sup>65</sup> Indeed, her

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<sup>62</sup> The district court upheld the plan and was affirmed by the Fourth Circuit. *Richmond*, 779 F.2d 181 (4th Cir. 1985). The Supreme Court vacated and remanded the case back to that court for reconsideration under *Wygant*. *Richmond*, 478 U.S. 1016 (1986). The Fourth Circuit then invalidated the plan. *Richmond*, 822 F.2d 1355 (4th Cir. 1987), *aff'd*, 488 U.S. 469 (1989).

<sup>63</sup> In *University of California Regents v. Bakke*, 438 U.S. 265 (1978), what was in essence a tie between two four Justice coalitions was broken by Justice Powell's vote to invalidate the minority admissions quota but leave room for race-conscious admissions programs. *Id.* at 319-20. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court again essentially broke down into three groups, with three Justices setting the prevailing view by voting to uphold a racial set-aside. *Id.* at 453-92. Finally, in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), only a plurality could agree on the reason to strike down a race-based plan to lay off public school teachers. 476 U.S. at 269-84.

<sup>64</sup> *Richmond* is "one of the most complex 'scorecards' of the Justices in history." Ross, *supra* note 43, at 395. Technically, Part I (facts of case), *Richmond*, 488 U.S. at 477-86; Part III.B (factual premises of Richmond's plan), *id.* at 498-506; and Part IV (means analysis), *id.* at 507-11, of Justice O'Connor's opinion were a majority opinion, as they also represented the views of Chief Justice Rehnquist and Justices White, Stevens, and Kennedy. Part II (discussion of *Fullilove*), *id.* at 486-93, represented the views of Justice O'Connor, the Chief Justice, and Justice White. Part III.A (standard of review), *id.* at 493-98, represented the views of the latter three Justices and Justice Kennedy. Justice Stevens issued an opinion concurring in part, *id.* at 511-18; Justice Kennedy also issued an opinion concurring in part, *id.* at 518-20. Justice Scalia issued an opinion and concurred in the judgment. *Id.* at 520-28. Justice Marshall issued a dissent, *id.* at 528-61, joined by Justices Brennan and Blackmun. Justice Blackmun issued a dissent. *Id.* at 561-62. The eight different voices are the "three" O'Connor opinions (a majority and two different pluralities), the three concurrences, and the two dissents.

<sup>65</sup> Ross, *supra* note 43, at 391. Perhaps unnecessarily, given the eight different voices, Professor Ross goes on to note that it is "impossible to discern a coherent legal structure to

attempt to maintain a majority may well have rendered the opinion labored and unclear. The two analytical sections that commanded majority support are fact-dense and subject to different interpretations, while, oddly, two sections that did not command a majority may have established the most reliable precedent.

The first plurality portion of the opinion confronted *Fullilove*, noting that the earlier decision had stressed Congress's unique power to fashion legislation to enforce the Equal Protection Clause. This portion concluded that states and local governments have less leeway than Congress to attack society-wide discrimination through broad legislation.<sup>66</sup> Justice Scalia also purported to accept the federal/state distinction, but no other Justice appeared to accept it.<sup>67</sup> Nevertheless, *Metro* confirmed the distinction a year later.<sup>68</sup>

A second, different, plurality supported Justice O'Connor's conclusion that strict scrutiny was the appropriate standard of review. This portion of the opinion asserted that all racial classifications should receive strict scrutiny because equal protection is an individual right and because only such scrutiny identifies those governmental actions that are based on racial stereotypes or prejudice.<sup>69</sup> Justice O'Connor briefly addressed the *Carolene Products* argument that strict scrutiny is necessary only to protect minorities, but did so largely to suggest problems in applying such an approach, noting that the population of Richmond was almost evenly split by race, and that a majority of the members of the City Council were African Americans.<sup>70</sup> Although unwilling to sign even this portion of Justice O'Connor's opinion, Justice

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which a majority of the Court commits." *Id.* Professor Farber is somewhat kinder, describing the O'Connor opinion as "a deeply republican opinion centering on concerns about political deliberation and civic community." Farber, *supra* note 41, at 624.

<sup>66</sup> *Richmond*, 488 U.S. at 486-93.

<sup>67</sup> Justice Scalia's acceptance of this distinction was grudging, *see id.* at 521-24, although he did find theoretical support for it in the notion that racial discrimination is less likely at the national level than at the state or local level, *id.* at 523. Justice Stevens did not mention the distinction in his concurring opinion, *id.* at 511-18, but he pointedly did not join this section of Justice O'Connor's opinion. Justice Kennedy described the distinction as "a difficult proposition for me," *id.* at 518, but felt the question was not before the Court, *id.* The dissenters, of course, denied the distinction, as they voted to uphold the City's action. *See id.* at 557-61 (Marshall, J., dissenting) (noting breadth of state powers to remedy discrimination).

<sup>68</sup> *See infra* note 104 and accompanying text.

<sup>69</sup> *Richmond*, 488 U.S. at 493-98.

<sup>70</sup> *Id.* at 495-96. The significance of the makeup of the City and its Council was sharply disputed in dissent. *Id.* at 553-55 (Marshall, J., dissenting). *See also* Rosenfeld, *supra* note 27, at 1773-76 (disputing Justice O'Connor's conclusion that such analysis must be symmetrical and mandates strict scrutiny in the *Richmond* setting).

Scalia fully supported use of strict scrutiny,<sup>71</sup> thereby creating in effect a majority on the standard of review issue.

The first portion of the O'Connor opinion that technically spoke for a majority concerned whether Richmond had established its compelling interest in remedying past discrimination in the construction industry.<sup>72</sup> Here the Court emphasized the inadequacy of the record before the City Council. Characterizing the existence and effects of racial discrimination in terms such as "sheer speculation,"<sup>73</sup> "generalized assertion,"<sup>74</sup> and "unsupported assumption,"<sup>75</sup> the Court concluded that no compelling purpose in eradicating discrimination had been established.<sup>76</sup> While less philosophical here than in other portions of the opinion, Justice O'Connor did draw on equality theories to note that affirmative action in settings in which it was not justified would

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<sup>71</sup> His opinion began with stating his agreement on this point, notwithstanding his unwillingness to join even this part of the O'Connor opinion. *Richmond*, 488 U.S. at 520. Justice Scalia's version of strict scrutiny is quite strict; the difference within the Court on the meaning of strict scrutiny presents one of the difficulties in finding coherence in this area. *See infra* notes 140-46, 259-60 and accompanying text.

<sup>72</sup> Although the Richmond plan had forward-looking as well as remedial aspects, *see supra* text accompanying note 61, the Court looked at it only as a remedial program. In large part this was a result of the majority's equation of generalized assertions of past discrimination with the "role model" justification for racial preferences found insufficient in *Wygant*. *Richmond*, 488 U.S. at 498-99 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986)). There are two problems with this fairly straightforward discussion. First, it seems inextricably bound to the federal/state distinction with respect to authority to remedy societal discrimination, and that distinction did not have majority support. *See infra* notes 126-132 and accompanying text. Second, in at least some (arguably distinguishable) settings, "diversity," a stand-in for "role models," has been found by a majority to be a permissible objective. *See University of California Regents v. Bakke*, 438 U.S. 311-15 (1978) (Justice Powell's opinion); *see also infra* notes 105-06 and accompanying text (regarding *Metro*).

<sup>73</sup> *Richmond*, 488 U.S. at 499.

<sup>74</sup> *Id.* at 500.

<sup>75</sup> *Id.* at 502.

<sup>76</sup> *Id.* at 505. Moreover, the Court refused to allow Richmond to "piggyback" on the congressional findings of racial discrimination in the construction industry, which it had found sufficient in *Fullilove*. *Richmond*, 488 U.S. at 504-05. This must have been exceptionally frustrating for the City, for it is apparent that the drafters, like any other capable attorneys, relied on the Court's approval of the findings and program structure in *Fullilove* as a good indication of how they should formulate the Richmond plan. Here too, however, the action by the purported majority seems to depend on the *plurality's* distinction between federal and state power, thereby again undercutting the rationale. *See id.* at 504 (noting Congress's special powers in this area as a reason not to allow the City to use the *Fullilove* findings).

mean that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."<sup>77</sup> This section of the opinion ended by criticizing Richmond for including in the MBE definition groups never shown to be subjects of discrimination by the City.<sup>78</sup> Thus, the Court attacked Richmond's pluralistic view of policymaking.

Justice O'Connor again spoke for a majority in examining the ordinance under the "narrowly tailored" component of the strict scrutiny standard. The thrust of this discussion was that governments must attempt to use race-neutral devices to remedy past racial discrimination and that quotas are repugnant to constitutional equality. An affirmative action program is a "deviation from the norm of equal treatment of all racial and ethnic groups,"<sup>79</sup> and is accordingly limited to the most extreme exigencies.

The concurring and dissenting opinions were more deeply rooted in equal protection philosophy. Justice Stevens, a noted maverick in constitutional analysis,<sup>80</sup> agreed that the Richmond ordinance was invalid. Much of his opinion, however, rested on concerns about the propriety of legislative attempts to remedy past racial discrimination.<sup>81</sup> He expressed a strong preference for forward-looking legislation, which is in sharp contrast to the working

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<sup>77</sup> *Id.* at 505-06.

<sup>78</sup> "There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry . . . . It may well be that Richmond has never had an Aleut or Eskimo citizen." *Id.* at 506. Again, it seems somewhat harsh for the Court to be so dismissive, as it is evident that Richmond acted in the not unreasonable belief that the most appropriate action it could take would be to duplicate the federal program in all important respects.

<sup>79</sup> *Id.* at 510. This last conclusion comes from Part V of the O'Connor opinion, which was not supported by a majority.

<sup>80</sup> See, e.g., ROBERT JUDD SICKELS, JOHN PAUL STEVENS AND THE CONSTITUTION: THE SEARCH FOR BALANCE ix-x (1988) (describing Justice Stevens as the most pragmatic and independent member of the modern Court); Fried, *supra* note 25, at 126 (noting Stevens's views in affirmative action cases but suggesting they have no discernible pattern); Comment, *The Emerging Constitutional Jurisprudence of Justice Stevens*, 46 U. CHI. L. REV. 155, 232 (1978) (noting that Stevens "is often willing to depart sharply from the courses taken by his fellow Justices and to reformulate judge-made rules of constitutional law in a manner closer to his perceptions of the fundamental principles of the Constitution."). As shown below, his unique views (on the Court) concerning standard of review and permissible objectives of affirmative action programs created a false majority in *Metro* on some issues. See *infra* notes 115-17, 131, 136-39, 262-64 and accompanying text.

<sup>81</sup> *Richmond*, 488 U.S. at 513-14.

majority's insistence on backward-looking (or remedial) purposes. He also parted company with his colleagues by arguing that standard of review analysis is inappropriate in equal protection cases. Justice Stevens did, however, agree in part with the others who voted to overturn the ordinance, as he voiced concerns about race-conscious decisionmaking that results from reliance on stereotypes and stigmatizes both the disadvantaged and advantaged classes.<sup>82</sup>

Justice Scalia's concurrence<sup>83</sup> called for the strictest scrutiny of *all* racial classifications and revealed him to have the greatest resistance to affirmative action programs. His opinion set out the philosophical bases of the "color-blind" view of equal protection, but added a tinge of utilitarianism:

The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects, which is the tendency—fatal to a nation such as ours—to classify and judge men and women on the basis of their country of origin or the color of their skin.<sup>84</sup>

Justice Scalia's description of his version of the Equal Protection Clause reveals the depth of his commitment to the symmetry notion. He concluded that race-conscious actions are permitted only to undo, as precisely as possible, past or present constitutional violations,<sup>85</sup> or as a temporary measure in "a social

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<sup>82</sup> *Id.* at 514–17. Justice Stevens pointedly ended his opinion with a lengthy extract from his dissenting opinion in *Fullilove*, which again underscores the difficulty in ascribing much weight to the *Richmond* "majority's" distinction of *Fullilove*. Justice Stevens's treatment of permissible objectives, *Id.* at 511–13 & nn.1, 2, and standard of review, *id.* at 514–15 & nn.5, 6, are not shared by any other Justices. See *supra* note 80 and *infra* notes 131, 136–39 and accompanying text.

<sup>83</sup> *Richmond*, 488 U.S. at 520–28.

<sup>84</sup> *Id.* at 520.

<sup>85</sup> *Id.* at 524–25. Justice Scalia then pointed out that states have much more power to act against discrimination when they use methods other than racial classifications. This may further fray the doctrine resulting from *Richmond*. If the problem is "means" not "ends," then forward-looking programs against general societal discrimination would not seem to be outside of state authority, as long as they avoid racial classifications. This would seemingly undercut the denigration of such objectives by essentially the same group of Justices in dissent in *Metro*. See *infra* note 121 and accompanying text. A further problem suggested by Justice Scalia's analysis here (and arguably by the majority's preference for alternative approaches as well) is that neutral legislation with the intention of having a racial effect would seemingly violate equal protection no less than an overt racial classification. See, e.g., *Washington v. Davis*, 426 U.S. 229, 241 (1976) ("A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race."); see also Aleinikoff, *supra* note 35, at 1107 (suggesting that the Court invites minority-dominated cities to evade careful scrutiny through a sham race neutrality); Lively, *supra* note 3, at 501

emergency rising to the level of imminent danger to life and limb. . . ."<sup>86</sup> While they reveal that he is not an absolutist, his examples of permissible racial classifications indicate the special status he accords to them. Significantly, Justice Scalia's opinion concluded with references to the injuries that racial quotas inflict.<sup>87</sup>

If the Scalia opinion sets the right end of the spectrum, Justice Marshall's dissent sets the left. The dissent begins with symbolism of its own: "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst."<sup>88</sup> After disputing the majority's conclusions concerning the quality and quantity of evidence before the Richmond City Council, Justice Marshall selected intermediate scrutiny as the appropriate standard of review for race-conscious classifications of a remedial nature.<sup>89</sup> He thus plainly rejected the view that equal protection analysis is necessarily symmetrical.

Focusing first on the "ends" aspect of intermediate scrutiny, the Marshall opinion notes two sufficient governmental interests: one backward-looking remedial objective and the other a more forward-looking interest in preventing governmental contracting practices "from reinforcing and perpetuating the exclusionary effects of past discrimination."<sup>90</sup> The premise of this second point

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(noting that Scalia's suggestion "may be vulnerable to the criticism that neutrality merely is a disguise for race consciousness"); cf. Chang, *supra* note 29, at 800 ("One might read *Davis* as suggesting that certain racially-oriented programs are impermissible per se."); Devins, *supra* note 10, at 31 (even "neutral purposes [may] cloak discriminatory motives"). But see *James v. Valtierra*, 402 U.S. 137 (1971) (stating state constitutional provision applicable to all low-rent housing not treated as racially motivated).

<sup>86</sup> *Richmond*, 488 U.S. at 521. Justice Scalia is therefore not color-blind, despite his quotation of Justice Harlan in *Plessy v. Ferguson*. *Id.* (quoting from *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)). Advocates of affirmative action, however, would probably characterize Justice Scalia as color-short-sighted.

<sup>87</sup> *Richmond*, 488 U.S. at 526-28. At this point, Justice Scalia is drawing on the themes of guilt and innocence to justify his limited view of permissible remedial action. See *supra* Part I.B.4. Justice Kennedy's concurrence noted his philosophical agreement with Justice Scalia on racial classifications. *Id.* at 518-19. He noted, however, that Justice O'Connor's opinion was acceptable because some flexibility is needed in order to assure that remedies are adequate, and her approach provided for extremely careful judicial review. *Id.* at 519. His lukewarm support therefore weakens the "majority" even further.

<sup>88</sup> *Richmond*, 488 U.S. at 528. Thomas Ross describes the Scalia and Marshall opinions as the essential stories underlying the controversy. Ross, *supra* note 43, at 381, 390. While Justice Scalia's opinion is "abstract" and "vivid," *id.* at 390-91, 400-04, Justice Marshall's is personal and rich in details, *id.* at 391, 398, 405-08.

<sup>89</sup> *Richmond*, 488 U.S. at 535-36.

<sup>90</sup> *Id.* at 537. Justice Marshall's discussion of the remedial objective does not acquiesce in the O'Connor opinion's notion that *Fullilove*'s approval of a general authority to remedy

is that past racism has present effects—the fact that even assuming the lack of present-day racism, those who benefited in the past maintain economic advantages.<sup>91</sup> Justice Marshall then challenged the notion that the proof of past discrimination was inadequate, relying on the record, congressional findings, and inferences from indisputable facts.<sup>92</sup> Central to his argument was a challenge to the majority's apparent insistence on formal findings of fact; both precedent and the nature of the inquiry mandated a more practical evaluation of the factual underpinnings of the program.<sup>93</sup>

Justice Marshall then addressed the “substantially related” prong of intermediate scrutiny.<sup>94</sup> He emphasized both the similarity of the ordinance to the federal program upheld in *Fullilove* and the existence of a number of factors that lessen the apparent stringency of the thirty percent set-aside. The implication of his analysis was that the majority exaggerated the effects of the program to imply that it was so extreme that it would not result in greater equality, but was instead a new injustice that would aggravate existing inequalities, if with different victims.

The final section of the Marshall opinion returned to philosophy to challenge some of the majority's assumptions. Its underlying theme was the inescapable history of racism and the need for further remedial action.<sup>95</sup> This

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past racial discrimination is limited to the federal government. *Id.* at 536–37, Part III.C of his opinion challenges this notion directly. *Id.* at 555–61.

<sup>91</sup> *Id.* at 537–39. This discussion provides legal and logical support to the notion that government must act to correct societal discrimination. It also points out ways in which the guilt/innocence dichotomy misses the point of the harmful impacts of racism. *See supra* Part I.B.5, 6. In contrast, the O'Connor, Scalia, and Kennedy opinions seem to treat racism as ancient history. *See Aleinikoff, supra* note 35, at 1073–74 (noting the history of racism in Virginia); Leedes, *supra* note 3, at 26–30 (discussing the majority's treatment of the evidence of racism in *Richmond*); Rosenfeld, *supra* note 27, at 1761–69 (attributing the majority's dismissal of racism to the fact that the Justices evaluated facts separate from their context); Note, *supra* note 30, at 225 (*Richmond* reveals that “[t]he Court no longer assumes a backdrop of racism”); *cf.* Ross, *supra* note 43, at 406 (Justices O'Connor and Scalia see past racism as irrelevant to present law); Williams, *supra* note 42, at 529–30 (suggesting white Americans do not recognize the dominance of white culture).

<sup>92</sup> *Richmond*, 488 U.S. at 539–48.

<sup>93</sup> *Id.* at 539. The dissenting opinion argued that the federal findings and local evidence constituted sufficient proof of the nature and extent of discrimination in Richmond area construction, and noted the statistical significance of the extreme disparity between the races in city contracting. *Id.* at 540–43. While in some respects the opinion veers into the esoterica of proof theory and federalism issues relating to local reliance on federal fact-finding, the bulk of this discussion constitutes a down-to-earth explanation of the evident need for governmental action to address racial discrimination in this industry.

<sup>94</sup> *Id.* at 548–51.

<sup>95</sup> *Id.* at 552–53. Once again, this discussion reinforces the distinction the dissenters



theme was underscored by an examination of Richmond politics and an argument for judicial tolerance of state and local attempts to protect civil rights.<sup>96</sup> Compared to the majority's description of the facts and governing law, Justice Marshall's account appears to be a description of a different case from a different country.

## 2. Metro

After *Richmond*, both scholarly and popular journals published articles suggesting that the decision effectively invalidated affirmative action programs.<sup>97</sup> Reality intervened on the last day of the Court's next term when it decided *Metro Broadcasting, Inc. v. FCC*.<sup>98</sup> In this decision, the Court upheld two minority preference programs of the Federal Communications Commission. While the federal/state dichotomy recognized in *Richmond* provides a technical, legal distinction between the cases,<sup>99</sup> *Metro* departed from *Richmond* in both philosophy and in governing legal theory.

In 1978, the FCC adopted a policy intended to increase diversity in broadcasting. One feature of the policy was that the Commission would grant a preference for minority ownership and management in weighing competing applications for new broadcasting licenses. Another was that minority businesses would be permitted to purchase the licenses of companies whose

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identified between malign and benign discrimination, a distinction that the majority accepted only to the extent that they agreed sufficient proof of past discrimination provides a permissible objective for a race-conscious remedy. A malign classification, on the other hand, would apparently fail strict scrutiny (or even less demanding judicial review) because it has no permissible objective and would therefore be unconstitutional regardless of its methods. *Cf. supra* note 45.

<sup>96</sup> *Richmond*, 488 U.S. at 553–55. Justice Blackmun's short dissenting opinion also stressed the real world of history and politics that mandates affirmative action. *Id.* at 561–62.

<sup>97</sup> See, e.g., Devins, *supra* note 4, at 358 (noting various responses to *Richmond* that conclude that the matter is resolved); Farber, *supra* note 41, at 624 n.8 (noting responses to *Richmond*); Leedes, *supra* note 3, at 1 (describing *Richmond* as a "significant turning point"); Rosenfeld, *supra* note 27, at 1731 (noting its significance in clarifying the Court's views); Charles Krauthammer, *Exit Affirmative Action*, WASH. POST, Feb. 3, 1989, at A25 (analogizing affirmative action after *Richmond* to Custer after Little Big Horn). One suspects that someone would have described the matter as "it's all over but the shouting," except for the fact that Herman Schwartz published an article under that title in 1987. It too assumed too much from seemingly clear Supreme Court decisions. See Schwartz, *supra* note 9.

<sup>98</sup> 497 U.S. 547 (1990).

<sup>99</sup> See *supra* notes 66–68 and *infra* notes 104, 126–32 and accompanying text.

qualifications were under review. In each instance, of course, the minority enterprise had to be qualified in order to obtain a license. Under the comparative hearing preference, however, a minority business might obtain a license over a nonminority business that scored somewhat higher on other relevant factors; and only minority businesses were permitted to buy licenses from owners undergoing review.<sup>100</sup>

Both of these programs were challenged in litigation brought by nonminority applicants that were denied licenses ultimately issued to minority businesses. After protracted administrative and judicial proceedings, the D.C. Circuit issued separate decisions upholding the comparative hearing preference but invalidating the distress sale policy.<sup>101</sup> These apparently inconsistent results in two of the first post-*Richmond* cases in the lower courts evidently piqued the Supreme Court's interest, and the Court promptly granted review and issued a single decision upholding both programs.

The majority opinion was Justice Brennan's final opinion for the Court. Writing for himself and for Justices White, Marshall, Blackmun, and Stevens,

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<sup>100</sup> The FCC acted through its Statement of Policy on Minority Ownership of Broadcasting Facilities. In *re* Minority Ownership of Broadcasting Facilities, Policy Statement, 68 F.C.C.2d 979 (1978). Prior to this action, the FCC primarily considered diversification of ownership and control, whether ownership actively participated in management, proposed programming, past record in broadcasting (if any), efficiency in engineering, and character. *See* *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601, 604-07 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985). Henceforth, the FCC would treat minority ownership and management as a plus in weighing these factors to the extent that the owners participated in management. *See* *WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (D.C. Cir. 1978). The portion of the policy relating to the sale of licenses is called the "distress sale" policy. Under standard FCC rules, a licensee under review by the agency may not transfer or assign its license. The distress sale policy is an exception that allows such licensees to sell to qualified businesses with predominantly minority ownership at a price of less than the market value. *See In re Minority Ownership*, 68 F.C.C.2d at 983.

<sup>101</sup> *Metro Broadcasting, Inc.* challenged the FCC's reliance on the minority preference program for new broadcasting licenses to grant a license to a business with ninety per cent Hispanic ownership. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (Rev. Bd. 1984). After a remand for agency reconsideration of all such programs, the D.C. Circuit upheld the issuance of the license and the preference program, *see infra* note 112. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347 (D.C. Cir. 1989); *see Metro*, 497 U.S. 547, 558-61 (1990).

*Shurberg Broadcasting of Hartford, Inc.*, a broadcasting licensing applicant, challenged a distress sale of a television station in Hartford, Connecticut, to a minority applicant. *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984). After a remand for the same agency reconsideration involved in the *Metro Broadcasting* proceedings, a different panel of the D.C. Circuit invalidated the distress sale policy. *Shurberg Broadcasting v. FCC*, 876 F.2d 902 (D.C. Cir. 1989); *see Metro*, 497 U.S. at 561-63.

Justice Brennan set out a holding plainly receptive to affirmative action. This attitude is evident from the outset of the opinion—a clear statement of the standard of review and the nature of permissible objectives:

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.<sup>102</sup>

A majority of the Justices thus approved use of intermediate scrutiny and reliance on forward-looking governmental objectives, both of which were seemingly disapproved on theoretical and doctrinal grounds the year before in *Richmond*.<sup>103</sup>

The distinction between the two cases, of course, lies in the phrase “mandated by Congress.” The Court recognized different standards for affirmative action (and necessarily for equal protection) by state and federal governmental entities. The distinction was not new in *Metro*, as the *Richmond* plurality relied on it to impose strict scrutiny on state and local action without overruling *Fullilove v. Klutznick*.<sup>104</sup> In this sense, at least, it is fair to say that the *Richmond* plurality was responsible for the line drawn by the *Metro* majority. Yet the federal/state dichotomy is hard to justify as applied in these cases and, more importantly, it is a dichotomy in which the Supreme Court did not really believe.

The Brennan opinion went on to apply intermediate scrutiny to the FCC’s programs. The federal government had an important interest in increased diversity of broadcast programming, as shown by congressional and FCC policy statements and judicial descriptions of the agency’s mission.<sup>105</sup> This

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<sup>102</sup> *Metro*, 497 U.S. at 564–65 (footnote omitted). Compared to *Richmond*, the judicial lineup was apparently quite clear. Justice Brennan’s entire opinion spoke for the five Justice majority. *Id.* at 552–601. Justice Stevens issued a brief concurring opinion, *id.* at 601–02; Justice O’Connor issued an opinion that spoke for all dissenting Justices, *id.* at 602–31; Justice Kennedy issued a dissenting opinion that also spoke for Justice Scalia, *id.* at 631–38. As shown below, however, the majority opinion may be more artificial than real, and the law of affirmative action was not substantially clarified by *Metro* any more than it had been by *Richmond*. See *infra* Parts II.C, III.C.

<sup>103</sup> See *supra* notes 69–78 and accompanying text. In *Metro*, the Court concluded that *Richmond* in effect reaffirmed *Fullilove* to approve federal affirmative action on comparatively lenient terms. *Metro*, 497 U.S. at 563–66.

<sup>104</sup> *Fullilove*, 448 U.S. 448 (1980); see *supra* notes 66–67 and accompanying text.

<sup>105</sup> *Metro*, 497 U.S. at 566–68.

portion of the opinion was not particularly controversial within the Court; the dissenters' real concerns were with the use of the "important" rather than the "compelling" standard.<sup>106</sup>

Justice Brennan's conclusion that the programs were substantially related to that interest was more controversial. The opinion tracked FCC and congressional conclusions that having a larger number of minority group members involved in broadcasting would result in greater programming diversity.<sup>107</sup> The majority argued that in assessing the relationship between the program and the government's interest, the Court "must pay close attention to the expertise of the Commission and the factfinding of Congress. . . ."<sup>108</sup> By deferring to the other branches on the sufficiency of the means-ends relationship, the Court in effect further lessened the intensity of its review, arguably to near the rational basis level.<sup>109</sup> Much of the remaining discussion in the majority opinion explains the Court's reasoning process on the "substantially related" question. It first noted the nature of the conclusions by the FCC and Congress on the effects of increased minority involvement in the industry. The opinion dismissed claims that the agency's decision constituted racial stereotyping, and pointed to other settings in which racial diversity is believed likely to produce a greater mix of opinions and attitudes.<sup>110</sup>

The opinion then turned to process. Here the discussion followed two

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<sup>106</sup> See *id.* at 603 (O'Connor, J., dissenting) ("The Court abandons this traditional safeguard against discrimination for a lower standard of review, and in practice applies a standard like that applicable to routine legislation."). Justice Kennedy did challenge the importance of broadcasting diversity, characterizing it as "trivial." *Id.* at 633.

<sup>107</sup> *Id.* at 569-79.

<sup>108</sup> *Id.* at 569.

<sup>109</sup> That is, by deferring to Congress and the FCC to such a degree, the Court acted much as it does in rational basis cases. Having found broadcasting diversity to be "important," its next job under intermediate scrutiny was to see whether diversity in ownership was "substantially related" to that objective. See *supra* note 48 and accompanying text. Deference to the factual findings concerning the connection in this setting was tantamount to finding that Congress and the agency acted rationally in concluding that the means were substantially related to broadcasting diversity. Neal Devins argues that the majority's use of intermediate scrutiny was "pure sophistry," Devins, *supra* note 27, at 145, and Charles Fried notes that the Court had never before used such a weak standard, Fried, *supra* note 25, at 112.

<sup>110</sup> See *Metro*, 497 U.S. 547, 579-84 (1990) (addressing stereotyping and various respects in which ownership and management influence broadcasting content). The majority accurately pointed out that the Court had endorsed racial diversity as a vehicle for achieving a diversity of ideas, *id.* at 579-80 (citing *University of Cal. Regents v. Bakke*, 438 U.S. 265, 313 (1979)); for assuring fair criminal trials, *id.* at 583 (citing *Holland v. Illinois*, 493 U.S. 474 (1990)); and for yielding more representative legislative bodies, *id.* (citing *United Jewish Orgs. v. Carey*, 430 U.S. 144 (1977)).

major tracks. First, these were not hastily drawn programs; there was every indication that they were implemented only after careful study and attempts to reach their objectives without the use of racial preferences.<sup>111</sup> Second, the Court noted the procedural steps available to force reconsideration by the agency or to ensure appropriate implementation of the programs.<sup>112</sup> The final discussion in the majority opinion drew heavily on one of the equal protection themes, the burden on innocent persons. The majority acknowledged the relevance of burden, but found it relatively insubstantial under these programs. No license holder would be deprived of its license; no applicant has a legitimate expectation of receiving a license; and these preferences had apparently resulted in only a relatively small number of agency decisions.<sup>113</sup> The Court took care to note, however, that the appropriate test is whether the program "impose[s] *undue* burdens on nonminorities."<sup>114</sup>

Justice Stevens wrote a brief concurring opinion emphasizing two points. In accordance with his views in *Richmond*, he noted with approval the Court's "focus on the future benefit, rather than the remedial justification,"<sup>115</sup> of such race-conscious legislation. He then discussed why racial classifications are appropriate in this setting, focusing on the fact that no stigma or value

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<sup>111</sup> *Metro*, 497 U.S. at 584-94.

<sup>112</sup> *Id.* at 594-96. There is an irony to this discussion. Affirmative action in broadcast licensing was instigated by the D.C. Circuit, which directed the FCC to develop suitable programs. *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974). Then, also in response to a D.C. Circuit decision, *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), the agency began an inquiry into its various programs to enhance diversity in broadcasting ownership and management. Notice of Inquiry on Racial, Ethnic or Gender Classifications, 1 F.C.C.Rcd. 1315 (1986) (Docket 86-484). Appropriations legislation enacted by Congress prohibited the FCC from using government funds to reconsider these policies. Continuing Appropriations Act for Fiscal Year 1988, Pub.L. 100-202, 101 Stat. 1329-31; *see Metro*, 497 U.S. at 560 & n.9. The FCC accordingly ended its reconsideration. Reexamination of Racial, Ethnic or Gender Classifications, Order, 3 F.C.C.Rcd. 766 (1988); *see* 497 U.S. at 627-29 (O'Connor, J., dissenting) (challenging the sufficiency of FCC and congressional consideration of pertinent issues); *cf. Devins, supra* note 27, at 136-41 (criticizing the nature of congressional action concerning the FCC's programs).

<sup>113</sup> *Metro*, 497 U.S. at 596-606.

<sup>114</sup> *Id.* at 597. This, of course, has two effects that are capable of causing confusion in future cases. It acknowledges the relevance of such burdens, thereby adding to the issues that must be considered. In addition, the majority's somewhat abstract treatment of burden is likely to make the issue more divisive than necessary in future cases, as a burden that is slight in the abstract may appear to be severe to other observers who examine the issue in a different context. Here, for example, Justice O'Connor described the burdens imposed on nonminority broadcast applicants as very severe. *See id.* at 630-31.

<sup>115</sup> *Id.* at 601.

judgment results from the classification.<sup>116</sup> Significantly, he continued to eschew the language of the tiers of judicial review, thereby undercutting the impression that a majority of the Court really supported use of intermediate scrutiny.<sup>117</sup>

The four remaining Justices dissented. All signed a lengthy opinion by Justice O'Connor, the author of the plurality opinion in *Richmond*. Their *Metro* dissent began with an emphasis on the individual nature of the equal protection guarantee and an insistence on use of strict scrutiny.<sup>118</sup> In light of the *Fullilove-Richmond* federal/state dichotomy, it was necessary for the dissenters to distinguish *Fullilove*. The O'Connor opinion did this by means of both technical legal analysis and argument based upon equal protection principles. The dissent's technical argument was that *Fullilove* did not set a rule for federal race-conscious legislation in general, but instead set a narrow principle applicable only to congressional actions taken under section five of the Fourteenth Amendment "that seek to remedy identified past discrimination."<sup>119</sup> The somewhat arid tone of this discussion in both the majority and the dissent belies a depth of feeling that is revealed by the use of code words drawn from the equal protection debate. Justice O'Connor suggested, for example, that the majority "endorse[s] race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."<sup>120</sup>

The next sections of the O'Connor opinion challenged the propriety of affirmative action for nonremedial purposes, in essence insisting on backward-looking programs. This discussion too is less a scholarly examination of legal doctrine concerning compelling purposes than an essay on the negative aspects of race-conscious decisionmaking. In order to underscore the amorphousness of the majority's diverse viewpoints rationale, Justice O'Connor restated the need

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 601-02. Because Justice Stevens's vote was necessary to form a majority, his opposition to reliance on the tiers of judicial review means that no true majority existed on the standard of review. See *infra* notes 135-38, 261-63 and accompanying text. He did note, however, that he "join[ed] both the opinion and the judgment of the Court." *Id.* at 602.

<sup>118</sup> *Id.* at 602-03.

<sup>119</sup> *Id.* at 607. The O'Connor opinion further challenged the majority on the synthesis of *Fullilove* and *Richmond*. She pointed out that *Fullilove* did not utilize intermediate scrutiny, *id.* at 608-09, that *Bolling v. Sharpe*, 347 U.S. 497 (1954), see *infra* note 128, established that the federal government was subject to the same equal protection restrictions as the states, *Metro*, 497 U.S. at 604, and that the approval of the racial set-aside in *Fullilove* was explicitly premised on its remedial objectives, *id.* at 607-08.

<sup>120</sup> *Metro*, 497 U.S. 547, 603 (1990). Notions of stigma, discrimination, individualism, and community pervade this discussion. *Id.* at 603-10.

for a remedial justification.<sup>121</sup> She went on to criticize the connection between diversity of ownership and diversity of programming, again stressing several of the underlying themes of equal protection analysis. These included the FCC's (and the majority's) conclusions about likely programming differences, which the dissenters saw as racist and based on stereotypes, the failure to consider other, less offensive, methods of achieving the desired result; and the burden on innocent persons.<sup>122</sup> The dissenters thus concluded that the programs failed equal protection analysis, even under the ground rules of fairly lenient scrutiny established by the majority.<sup>123</sup>

In accordance with their particularly vehement disapproval of affirmative action in *Richmond*, Justices Kennedy and Scalia submitted a second dissenting opinion. Their analysis was very firmly rooted in themes from the equal protection debate. The opinion repeatedly characterized the majority as revitalizing *Plessy v. Ferguson*'s<sup>124</sup> tolerance for racial inequality, alluded to Nazi laws defining racial classes, and quoted the benign, multicultural

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<sup>121</sup> *Id.* at 610–16. Justice O'Connor recognized that minorities are substantially under-represented in broadcasting ownership and management, but pointed out that the FCC's programs were never perceived as remedial, and therefore could not meet the "narrowly tailored" requirement by definition. *Id.* at 610–12. This section takes on the majority's approval of generally benign programs, describing their indeterminate basis:

Divorced from any remedial purpose and otherwise undefined, "benign" means only what shifting fashions and changing politics deem acceptable. Members of any racial or ethnic group, whether now preferred under the FCC's policies or not, may find themselves politically out of fashion and subject to disadvantageous but "benign" discrimination.

*Id.* at 615.

<sup>122</sup> *See id.* at 618–22, 625–29 (discussing inappropriate relationship between race and behavior); *id.* at 622–25 (discussing need to consider alternative means of achieving broadcast diversity); *id.* at 630–31 (discussing burden on non-minority broadcast applicants).

<sup>123</sup> *Id.* at 631. The dissenters necessarily would find that the FCC programs fail strict scrutiny as well as intermediate scrutiny. In *Richmond*, Justice Marshall similarly challenged the majority on both the standard of review and the merits. He argued for intermediate scrutiny, but then suggested that the Richmond ordinance would satisfy the more demanding scrutiny used by the majority. *Richmond*, 488 U.S. 469, 535–36 (1989) (identifying compelling purposes); *id.* at 548–51 (noting respects in which the program appears to be narrowly tailored). The fact that these groups of Justices can apply the standards of review so differently suggests the extent to which choice of standard of review no longer appears to dictate the outcome. *See supra* note 49; *see also infra* notes 140–46, 248, 259–60, 265–69 and accompanying text.

<sup>124</sup> 163 U.S. 537 (1896).

assertions of South African Apartheid Policy.<sup>125</sup>

### C. Legal Synthesis

*Richmond* and *Metro* ended as they began, with a winner and a loser in each case but no evident consistency within the Court. Of greater concern, both the anger and the apparent lack of respect for opposing viewpoints seemed to be getting stronger.

It is possible, of course, to reconcile the two cases. In the process, however, the Supreme Court's treatment of affirmative action becomes even more artificial than before. The principle that reconciles the cases as a matter of legal doctrine is that Congress has much more leeway than states or local governments in enacting affirmative action programs. *Richmond*'s vigorous requirements of proof of past discrimination and narrow tailoring indicate that few state programs will be found to be constitutional; *Metro*'s less demanding level of scrutiny, combined with its deference on factual issues, suggests that most federal programs are likely to withstand judicial review.

This distinction is facially attractive as a compromise, but it constitutes both an untenable reading of the various opinions and an idiotic interpretation of the Equal Protection Clause. The majority in *Richmond* made it clear that the ordinance not only failed to be sufficiently effective to justify the extreme remedy of a racial set-aside, but was insidious in concept and destructive in operation.<sup>126</sup> Such faults do not disappear merely because it is the federal government that has enacted the policy. On the other side, the majority in *Metro* indicated their support of all properly motivated plans with a reasonable chance of meeting approved objectives.<sup>127</sup> There is no serious argument that they would think differently about state or local plans.

If the federal/state line *does* differentiate between compliance with and

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<sup>125</sup> See *Metro*, 497 U.S. 457, 631, 635 (1990) (references to *Plessy*); *id.* at 633 n.1 (Nazi laws and South African policy); *id.* at 635 (Apartheid).

<sup>126</sup> Various portions of the O'Connor opinion reveal the Court's hostility. See, e.g., *Richmond*, 488 U.S. at 493 ("the purpose of strict scrutiny is to 'smoke out' illegitimate uses of racism" and to describe the set-aside as a "highly suspect tool"); *id.* at 506 (describing preferences as "contrary to both the letter and spirit of a constitutional provision whose central command is equality"); *id.* at 510 (noting the danger that a purportedly benign classification "is merely the product of unthinking stereotypes or a form of racial politics"); see also text accompanying *supra* note 77.

<sup>127</sup> The Brennan opinion suggests the Court's openness to benign laws. See, e.g., *Metro*, 497 U.S. at 564 n.12 (noting that benign race conscious programs are well established); *id.* at 566-68 (describing the benefits of diversity to the entire public); *id.* at 572 (noting a "long history of congressional support for minority ownership policies"); *id.* at 579-80 (asserting that diversity of views will result in the aggregate).



violation of the Equal Protection Clause, it is a new legal theory. For nearly forty years the Court has interpreted the Fifth Amendment's Due Process Clause as incorporating the equal protection guarantee and imposing the same obligations on the federal government as on the states.<sup>128</sup> Perhaps this was a mistake,<sup>129</sup> but the Court was not trying to correct it in these cases, even if that is the practical result of its decisions.

Poorly reasoned decisions, even those that inadvertently change long-established constitutional principles, are nothing unusual. What is worth noting about the federal/state distinction is that a majority of the Justices themselves repudiate it in these very cases. A comparison of *Richmond* and *Metro* reveals that seven of the nine Justices voted consistently—either to uphold or to invalidate both programs.<sup>130</sup> Of the two remaining Justices, Justice Stevens's votes appear to be unconnected with whether the federal or a state government was involved. Instead, his preference for forward-looking rather than remedial legislation seemed to be dispositive.<sup>131</sup> Only Justice White apparently agreed with the federal/state dichotomy; his unique views on the question establish the doctrine only because of the peculiar nature of legal interpretation by majority vote.<sup>132</sup>

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<sup>128</sup> In *Bolling v. Sharpe*, 347 U.S. 497 (1954), a companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court invalidated the segregated school system of the District of Columbia. The Court held that the Fifth Amendment's Due Process Clause imposed on the federal government an equal protection responsibility indistinguishable from that of the Fourteenth Amendment. *Bolling*, 347 U.S. at 497.

<sup>129</sup> Robert Bork sharply criticizes *Bolling* as a rewriting of the Constitution, which imposes the equal protection obligation only on the states. BORK, *supra* note 19, at 83. He agrees with the *Bolling* Court that it would be outrageous for the federal government to operate a segregated school system, but believes it is Congress's duty to act. *Id.* at 84. Of course, Bork is himself willing to sacrifice constitutional theory for "good" results, as he suggests he would rely on the *Bolling* principle to invalidate federal affirmative action. *Id.* Bork's own inconsistency on the constitutional equal protection responsibilities of the federal government in affirmative action cases differs from those of the Justices, but is consistent with their inability to render coherent decisions. See generally *infra* Part III.

<sup>130</sup> Justices Brennan, Marshall, and Blackmun voted to uphold both programs. See *Richmond*, 488 U.S. at 528; *Metro*, 497 U.S. 457, 550 (1990). Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy voted to invalidate both programs. See *Richmond*, 488 U.S. at 476, 520; *Metro*, 497 U.S. at 602.

<sup>131</sup> Neither of his opinions indicates any approval of the federal/state dichotomy. Both, however, reaffirm his doubts about legislatively drafted remedies and his support for race-conscious actions to serve other public objectives. See *Richmond*, 488 U.S. at 511-14 & nn.1-3; *Metro*, 497 U.S. at 601-02. Moreover, Justice Stevens dissented in *Fullilove v. Klutznick*, 448 U.S. 448, 532-54 (1980), a position to which he adhered at least through *Richmond*, 488 U.S. at 511 n.1, 517.

<sup>132</sup> See *infra* Part III.B, C.

The Court only exacerbated this problem by couching its analysis in both cases in terms of the standards of review. The debate over the constitutionality of affirmative action programs has relatively little to do with the standards of review. At best the standards suggest a mood: deference, hostility, or something in between. Part of the problem may be that their utility as shorthand has encouraged the Court to rely on them more than wisdom would suggest. As Mark Yudof has suggested, by the 1970s the Court often seemed to forgo careful analysis of individual problems and instead allowed its decisionmaking to become "obscured by a philosophical and ideological fixation on 'suspect' classifications."<sup>133</sup> If reliance on the tiers had worked, at least we would have fairly consistent doctrine. But in fact the use of such gross categorizations does not work where there is fundamental disagreement about the factors that determine the level of scrutiny.<sup>134</sup>

This has several ramifications, each evident in the various opinions in *Richmond* and *Metro*. First, the Court falsely implied that there is doctrinal clarity. The *Metro* majority opinion provides a good example. It asserts that intermediate scrutiny applies to benign discrimination in federal programs.<sup>135</sup> Yet Justice Stevens's concurring opinion suggests that this assertion is erroneous. First, his consistent disparagement of use of the tiers of review<sup>136</sup> means that the Court was actually split four-four on the issue, with Justice Stevens's "nontiered" approach just happening to coincide in the outcome reached by the other majority Justices, who used intermediate review. Second, his prior decisions and his concurring opinions in these two cases reveal that he would not be deferential to legislative attempts to remedy prior

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<sup>133</sup> Yudof, *supra* note 8, at 1405.

<sup>134</sup> If everyone could agree that a case required strict scrutiny, for example, all of the Justices would give the case close attention; if they believed rational basis was appropriate, they would be deferential. There would be disagreements about the application of these tests to specific facts, *cf. supra* note 123, but the disagreements would be more readily containable and there would be fewer possible reasoning paths. With disagreement about the appropriate tier of review, theoretical disagreements and possible results multiply. *See infra* Part III.C.

<sup>135</sup> *Metro*, 497 U.S. at 564-65; *see supra* text accompanying note 102.

<sup>136</sup> As with the problem of remedies as opposed to forward-looking objectives, *see supra* note 131, Justice Stevens repeated his attitude toward the tiers in his concurring opinions in both *Richmond* and *Metro*. *Richmond*, 488 U.S. at 514-15 & nn.5-6; *Metro*, 497 U.S. at 601 n.3. Both cases refer to his concurring opinion in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), *see supra* note 48, in which Justice Stevens described the appropriate inquiry in all cases as "rational basis." *Cleburne*, 473 U.S. at 452-53; *see Note, Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146, 1147 (1987) (summarizing and praising the Stevens approach).

discrimination.<sup>137</sup> It is thus likely that even a federal *Richmond*-like program would have failed in the Supreme Court in 1990; Justice Stevens would in all likelihood have joined the four *Metro* dissenters to invalidate the program, even though the language of the *Metro* holding would seem to approve of such programs.<sup>138</sup>

Further problems exist with respect to the application of the standards of review. It is arid enough to debate whether a legislative purpose is "compelling," (the lesser) "important," or (the mere) "legitimate." But aridity turns to incoherence when such characterizations mask serious disagreements.

This state of affairs is evident in Justice Stevens's unusual view of permissible objectives for affirmative action programs. The difference between forward and backward-looking programs does not reflect the distinction between "important" and "legitimate." The balance tipped simply because one Justice who believes "forward" is better than "backward" (Stevens) broke an apparent tie between four who find both acceptable (the other majority Justices in *Metro*) and four who find both unacceptable, at least in this setting (the dissenters).<sup>139</sup>

Incoherence is also evident on the other side of the Court's internal dispute over affirmative action. For example, the agreement of five Justices in *Richmond* to use "strict scrutiny" did not necessarily reflect any agreement on its component parts. For example, the "narrowly tailored" component of strict scrutiny appears to have no clear meaning. It may be significant that Justice O'Connor did not use the more common term, "necessary;" her analysis certainly reveals a means inquiry less demanding than traditional strict scrutiny.<sup>140</sup> Justice Scalia's concurrence, on the other hand, called for very

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<sup>137</sup> See *supra* note 131.

<sup>138</sup> See *supra* text accompanying note 102.

<sup>139</sup> More specifically, a "federal and forward" program can succeed in Supreme Court litigation because

THREE (the *Richmond* dissenters who are consistently open to affirmative action)

PLUS ONE (Justice White, who appears to accept the federal/state dichotomy, see *infra* notes 249-55 and accompanying text)

PLUS ONE (Justice Stevens, who rejects the dichotomy but supports programs that are forward-looking)

EQUALS FIVE.

Given the nature of all of the other opinions in these cases, it is likely that Justice Stevens is the only Justice who favors forward-looking to remedial purposes. Such a "tipping" vote, however, can make "law" even if the critical distinction is rejected by a strong majority. See *infra* Part III.

<sup>140</sup> Part V of Justice O'Connor's opinion purports to explain how state and local

rigorous scrutiny, which would invalidate race-conscious decisionmaking except in "a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates."<sup>141</sup> This is plainly a more traditional conception of strict scrutiny.<sup>142</sup> One possible ramification of the split within the Court is that litigants (and lower courts) will try to water down strict scrutiny by adopting the O'Connor approach in cases that deserve the more rigorous traditional test.<sup>143</sup> In any event, even though Justice Scalia pointedly refused to join this portion of Justice O'Connor's opinion, thereby preventing an official majority on the standard of review analysis, the overgeneralizations inherent in the use of categorizations such as "necessary" and "narrowly tailored" are more likely to

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governments can act to remedy past racial discrimination, *Richmond*, 488 U.S. at 509–11, including "some form of narrowly tailored racial preference . . . to break down patterns of deliberate exclusion." *Id.* at 509. Her reluctance to use the "necessary" terminology so consistent with virtually automatic invalidation, *see supra* note 49, is seemingly inconsistent with the majority's insistence on symmetry and their refusal to distinguish benign from malign classifications. *Richmond*, 488 U.S. at 493–95. It may well be that the same Justices implicitly recognize a distinction in motivation, and that distinction leads to their softening the means portion of the test. Several commentators argue that a somewhat weaker version of strict scrutiny is applied in such settings. *See, e.g.,* TRIBE, *supra* note 9, at 1452 n.2 (describing the Court as using a lesser standard than strict scrutiny); Choper, *supra* note 29, at 261 (suggesting that the "narrowly tailored" requirement may be less than the "necessary" requirement); Schwartz, *supra* note 9, at 546, 550 (noting some Justices do not use traditional strict scrutiny and seeing two separate standards in this regard); *cf.* Leedes, *supra* note 3, at 13–14 (recognizing various levels of strict scrutiny but suggesting that *Richmond* uses "extremely strict scrutiny"). *But see* Farber, *supra* note 41, at 626 (using "necessary" to describe the *Richmond* standard).

<sup>141</sup> *Richmond*, 488 U.S. at 520. Justice Kennedy also appears to adhere to that view. *See id.* at 518–19.

<sup>142</sup> *E.g.,* *Palmore v. Sidoti*, 466 U.S. 429 (1984) (stating a racial classification must be truly necessary to promote a compelling interest); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (stating traditional strict scrutiny used to review state welfare law); *Kramer v. Union Free School Dist.*, 395 U.S. 621, 632 (1969) (stating limitation fails to have "sufficient precision" to meet necessity prong of strict scrutiny).

<sup>143</sup> *See, e.g.,* Scherer, *supra* note 58, at 340 (the use of strict scrutiny in *Richmond* will weaken the test or be limited in application); Schwartz, *supra* note 9, at 551 (raising concerns that the lesser strict scrutiny used in affirmative action cases will affect cases involving invidious discrimination); *cf.* Williams, *supra* note 42, at 526–27 (noting different versions of necessity arising out of *Metro*). Schwartz's concern is a serious one. If the courts review invidious laws under the same test, some may erroneously be upheld. This seems unlikely as a practical matter because of the still existing "compelling interest" aspect of the test, but reveals the potential for harmful confusion that results from the interpretation of incoherent decisions.

obstruct than to further the search for doctrinal clarity.

An additional problem relates to the grouping of issues under standard of review analysis. When a court invalidates government action as unnecessary to a compelling interest (or not tailored narrowly enough), the extent of agreement on the particular flaws of the law may be unclear.<sup>144</sup> For example, the majority components of Justice O'Connor's *Richmond* opinion catalog ways in which the city's set-aside program was deficient. These include the failure of the city council to make adequate factual findings concerning discrimination in Richmond's contracting industry, its reliance on irrelevant evidence, the inclusion of racial groups and ethnic groups not subject to past discrimination, the failure to consider race-neutral alternatives, and the apparent racial balancing.<sup>145</sup> But the structure of the majority's analysis begged the most important question. We learn that the law violates equal protection if *all* of these things are true, but we can only guess the status of a law that has only some of these flaws. At least in this setting, "not narrowly tailored" is only an umbrella characterization that describes a conclusion reached on evaluating "the totality of the circumstances." We know that five Justices found that this ordinance did not satisfy strict scrutiny, but we do not know—and cannot know from such opinions—how critical a particular deficiency was to the outcome.<sup>146</sup>

A final problem with opinions such as those in *Richmond* and *Metro* is that they endeavor to reduce significant moral and philosophical questions to artificial calculations of utility and levels of evidence. The constitutionality of the Richmond program should not turn on how much evidence of past

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<sup>144</sup> In theory, this is not the case where a decision upholds a law. *Each* aspect of the law must satisfy *all* requirements of the standard or else it would be struck down in whole or in part. It is likely, however, that some differences are obscured, at least where one or more Justices is using a less rigid version of strict scrutiny. Thus, five (or more) Justices might believe that a particular aspect of the law is flawed, but if only four of them determine that the flaw is sufficient on its own to invalidate the law, a decision upholding the law may well hide the fact that five Justices found fault with a part of it. This may be true of *Metro* in some respects. See *infra* notes 265–69 and accompanying text.

<sup>145</sup> *Richmond*, 488 U.S. at 495–96, 498–508; see also *supra* text accompanying note 79 and note 140 and *infra* notes 259–60 and accompanying text.

<sup>146</sup> For example, it might be that if the city had tried nonracial alternatives that failed, or if the set-aside were somehow more limited, two Justices would have switched sides to vote to uphold the program notwithstanding the other flaws. In this setting, it is exceptionally difficult to state whether a particular aspect of a program, such as Richmond's unsupported inclusion of groups other than African Americans, is inconsistent with the Equal Protection Clause. See generally Rosenfeld, *supra* note 27, at 1732 (noting that no majority can agree on what is acceptable); cf. *Scholar's Reply to Professor Fried*, 99 YALE L.J. 163, 164 (1989) ("[T]he law in this area contains complex guidelines and enumerates relevant and irrelevant factors rather than absolute rules.").

discrimination the city council's record contained, or on a rough measurement of the weakness of the means-to-ends fit.<sup>147</sup> And the validity of the FCC's preference programs should not turn on the likelihood that minority licensees will broadcast third world music.<sup>148</sup> If these were the *real* legal conclusions of the Justices, we could accept them despite serious misgivings. But that is not what is really going on in these cases. Instead, it is evident that the decisions are based on different answers to fundamental questions of morals and the philosophy of our form of government. The standards of review and their phraseology are merely the forms into which Justices (and other lawyers) pour their answers to the deeper questions. The forms obscure reality much as the old common law forms of action obscured the real facts of a dispute.<sup>149</sup> The reality can still be found in the details—the philosophical language that leaks

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<sup>147</sup> In this sense, the dissent's elaboration of the undisputed facts of racial discrimination seems sufficient to justify some governmental action in this regard as a simple matter of moral duty. See *Richmond*, 488 U.S. at 529–35; see also Rosenfeld, *supra* note 27, at 1763 (noting that the history of official and societal discrimination in Richmond was pervasive and systemic, and that tracing the causes of present effects is impossible). At that point, some pragmatic reflections on efficient mechanisms would probably reveal that use of the sorts of flexible and limited set-asides upheld in *Fullilove* should be permitted to states and local governments as well. At a minimum, opponents should be required to establish that other mechanisms would be equally effective in ending the effects of discrimination. Cf. *Scholar's Reply*, *supra* note 146, at 166 (characterizing *Richmond* as “pragmatic and particularistic” at bottom).

<sup>148</sup> Such justifications recognize pluralism in one sense, but deny the importance of justice in defining the extent of pluralism that is appropriate. Cf. Delgado, *supra* note 28, at 1222, 1230–31 (characterizing the role model notion as largely for the benefit of the majority). It is beneficial to all segments of society to have diversity in broadcasting, and diversity probably serves First Amendment policies as well, but if that were all the minority preferences were about, there would seem to be easier and less controversial ways to achieve them. See Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 357–60 (1991) (noting flaws in the Court's assumptions about the efficacy of the FCC's programs). The more significant issue has to do with fighting subjugation by seeking to instill confidence in and encourage efforts by “outsiders,” largely racial minorities. As Patricia Williams points out, in this country, “the most obvious means of tearing down . . . exclusivities is dispersion of ownership.” Williams, *supra* note 42, at 537. This would seem particularly important in “high profile” businesses such as broadcasting.

<sup>149</sup> For descriptions of the old system of writs and other forms of litigation, see FLEMING JAMES ET AL., *CIVIL PROCEDURE* 140–41 (4th ed. 1992) (describing “compromises and fictions” involved in common law pleading); JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 237–39 (1985) (describing writ system); JOSEPH H. KOFFLER & ALISON REPPY, *HANDBOOK OF COMMON LAW PLEADING* 31–67 (1969) (chapter entitled “The Development of the Common Law Forms of Action”).

into opinions and in the very different worlds that these opinions describe. The "law" set forth in the opinions, and especially the "law" that emerges from the intersection (or collision) of the two cases, however, is not a reliable guide to the Constitution or even to the Justices' views as to its meaning.

*Richmond* and *Metro* epitomize the practical difficulties of evaluating Supreme Court opinions. Each case purports to present the views of a majority of Justices, yet each fails to do so. *Richmond*'s true majority is limited to aspects of the case that were inextricably fact-bound, and while it is possible to cobble together a working majority of five Justices approving use of strict scrutiny, the strictness of that scrutiny is open to question.<sup>150</sup> *Metro* does present a complete majority opinion, yet it is a fuzzy majority that may not really agree on very much.<sup>151</sup> The intersection of the two cases reveals further anomalies. First, the legal reconciliation of the two holdings appears to be supported by only one Justice.<sup>152</sup> Second, and more tellingly, the cases speak different languages about affirmative action. The fact that different groups of Justices set the tone of the prevailing opinions in the two cases is borne out by the fact that, notwithstanding any technical rationalization of the holdings, one opinion expresses hostility toward affirmative action while the other expresses support.

### III. JUDICIAL DECISIONMAKING AND AFFIRMATIVE ACTION

Scholars routinely chastise the Court for its splintering. Constitutional law professors bemoan each new plurality opinion, amorphous majority, or doctrinal zigzag.<sup>153</sup> Our students are generally and understandably baffled. While the problem is not a new one, it is becoming more serious.<sup>154</sup> The first

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<sup>150</sup> See *supra* notes 140–43 and accompanying text.

<sup>151</sup> See *supra* notes 135–38 and accompanying text.

<sup>152</sup> See *supra* note 139 and *infra* notes 249–55 and accompanying text.

<sup>153</sup> Most of the sources identified in the notes to this Section indicate some dismay with the Court's apparent inability to draw straight doctrinal lines. In particular, see Laura K. Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 820 (1990) (criticizing splintered decisions as undercutting the Court's role); John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 64 (noting the lessened impact of cases with no majority opinion); Ralph S. Spritzer, *Multiple-Issue Cases and Multi-Member Courts: Observations on Decision Making by Discordant Minorities*, 28 JURIMETRICS J. 139, 141–45 (1988) (addressing several exceptionally confusing decisions, including *Apodaca v. Oregon*, 406 U.S. 404 (1972), see *infra* notes 238–41 and accompanying text).

<sup>154</sup> See Davis & Reynolds, *supra* note 153, at 260 (pointing out that plurality opinions were not common until the last several years of the Warren Court); Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 147 (1990) (noting major increase

two sections of this Part trace some of the possible reasons for incoherence, while the final section synthesizes these theories and applies them to *Richmond* and *Metro*.

### A. *Opinions, Holdings, and Precedent*

American judicial practice in appellate decisionmaking follows neither the British nor the continental model. Under the British "seriatim" model, each judge expresses his or her individual reasoning.<sup>155</sup> The continental model is at the opposite extreme; one anonymous opinion for the Court explains its collective judgment.<sup>156</sup> Our nation's tradition is somewhere in the middle. Chief Justice Marshall established the practice of issuing one opinion for the Court, but there are no limitations on separate opinions or dissents.<sup>157</sup>

One result of this compromise is the uncertain role of the individual Justice. On one hand, a Justice is a member of a deliberative body with a culture that points toward the development of stable doctrine. This is in keeping with the Marshall model, which depends on consistent reasoning and reliance on precedent to provide a stable, predictable body of law.<sup>158</sup> As a

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in multiple opinions at the Supreme Court); Ray, *supra* note 153, at 778 (noting a major increase in concurring opinions); Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 756 (1980) (noting increase in plurality opinions); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1129 (1981) (stating that plurality decisions used to be rare).

<sup>155</sup> Justice Ginsburg's article, *Remarks on Writing Separately*, addresses the English model and contrasts it to standard United States practices. Ginsburg, *supra* note 154, at 134-35.

<sup>156</sup> See Maurice Kelman, *The Forked Path of Dissent*, 1985 SUP. CT. REV. 208 (suggesting that our system of opinions is in a formal sense the opposite of the European model); see also Ginsburg, *supra* note 154, at 133-34 (arguing that the European system remains focused on the myth of the right answer).

<sup>157</sup> Early Court decisions tended to follow the English model. See, e.g., *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). Justice Ginsburg suggests that the Marshall Court's approach took some of the strengths of the English system and joined them with the more bureaucratic aspects of the civil law tradition. See Ginsburg, *supra* note 154, at 136-39. She argues that the hybrid nature of our system has its positive aspects, such as the accountability that results from publicly revealed votes and authors, and the heightened impact of the occasional unsigned per curiam decision. *Id.* at 139; see also Kelman, *supra* note 156, at 209 (noting that in reality American judges achieve a substantial degree of agreement on core issues).

<sup>158</sup> Numerous commentators address the values of a system based on precedent. See, e.g., ARTHUR J. GOLDBERG, *EQUAL JUSTICE* 75-76 (1971) (pointing to uniformity, practical confidence, protecting judges by reliance on objective standards, helping private entities to organize their activities, reduced litigation, and eliminating unfair surprise); Frank H.



result, a judicial ethos developed against issuing separate opinions in most instances. In the past, Justices often decided not to write separately or chose to issue concurrences limited to an enigmatic statement of agreement with the judgment.<sup>159</sup> Yet the refusal to adopt the continental model permitted Justices to set forth and maintain individual views,<sup>160</sup> and modern Justices have been far less willing than their predecessors to suppress their individual views. In part this is rooted in changing perceptions of the duty of the individual members of the Court in applying law,<sup>161</sup> but it also seems to relate to the

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Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422, 422-23 (1988) (citing easier judicial decisionmaking and greater equality); Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 70 n.8, 76-77, 83-89 (1991) (discussing of tangible and intangible benefits of a precedent-based legal system); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597-602 (1987) (addressing the values of predictability, efficiency, stability); Christopher E. Smith, *The Supreme Court in Transition: Assessing the Legitimacy of the Leading Legal Institution*, 79 KY. L.J. 317, 335 (1990-91) (noting that stare decisis is deeply rooted, and helps achieve stability and predictability); James C. Rehnquist, Note, *The Power that Shall be Vested in Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 B.U.L. REV. 345, 347-48 (1986) (explaining that the American version of stare decisis is largely based on equal justice, predictability, economy, and stability); cf. Earl M. Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 472-80 (discussing of some of the adverse effects of the breakdown of stare decisis).

<sup>159</sup> See, e.g., *Wyman v. James*, 400 U.S. 309, 326 (1971) ("Justice White concurs in the judgment" and portions of the Court's opinion); *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142 (1968) (four Justices concur in three separate statements totaling eight lines of print); *Swain v. Alabama*, 380 U.S. 202, 228 (1965) (Justice Black concurring in result); *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 495 (1962) ("Mr. Justice Black concurs in the result"). See generally Ray, *supra* note 153, at 779 (comparing past and present practices in this regard).

To some degree, the problem may be less one of general trends than of individual styles. Justices Black and Harlan, very different in constitutional views but both deeply committed to the nature of the Court's mission and the judicial process, were frequent concurers. Justice White, of course, remained on the Court until 1993 and was as provocative by his silent acquiescences in majority opinions as by his silent concurrences, as in *Wyman*. See *infra* note 255 and accompanying text.

<sup>160</sup> See Novak, *supra* note 154, at 760 (pointing to increased flexibility, innovation, and creative analysis as side benefits of judicial freedom in responding to precedents); Aimee Imundo, Note, *Paradoxical Voting in the Supreme Court*, 3 GEO. J. LEGAL ETHICS 867, 879 (1990) (noting disagreements about the duties of individual Justices in following precedent and the adverse effects of repressing disagreement on the Court).

<sup>161</sup> Kelman describes such Justices as "soloists," who generally vote in accordance with their own theories, regardless of the views of other members of the Court or prior decisions. See *supra* note 156, at 263.

changing nature of the questions presented to the Court.<sup>162</sup>

### 1. *Stare Decisis*

Commentators routinely cite the advantages of a system of stare decisis,<sup>163</sup> but recent years have witnessed an enormous increase in the amount of overruling done by the Supreme Court.<sup>164</sup> The increased willingness of Justices to set forth their individual views may in part be attributed to this decline in the vitality of stare decisis. That principle has always existed in tension with the notion that a court should correctly decide cases before it. The tension was usually resolved through principles that account for the value of prior decisions, but do not require courts to honor all implications or logical corollaries of those decisions. One example is the common practice of limiting a previous case to its facts.<sup>165</sup> Lawyers recognize the practice for what it often is: jettisoning a prior holding without admitting that to be the case.<sup>166</sup> Another,

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<sup>162</sup> See *infra* notes 187–88, 244–46 and accompanying text; see also Ginsburg, *supra* note 154, at 147–48 (noting that the Supreme Court issues more non-unanimous decisions than in past years, and attributing this in part to the Court's certiorari policy, which leaves only the most controversial cases on the Court's docket); Novak, *supra* note 154, at 759 (stating that the increased number of highly controversial issues coming before the Court means Justices will adhere to their views in more cases, resulting in fewer majorities and more pluralities).

<sup>163</sup> See, e.g., Gerhardt, *supra* note 158, at 73 (characterizing precedent as part of a dialogic system of law); Linda Greenhouse, *The Supreme Court, A Telling Court Opinion*, N.Y. Times, July 1, 1992, at A1 (noting importance of stare decisis as part of judicial restraint to the three Justice plurality in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992)); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 750 (1988) (describing stare decisis as one of the "passive virtues"); see also *supra* note 158.

<sup>164</sup> See Gerhardt, *supra* note 158, at 120–21 (discussing overrulings in several 1991 criminal cases); Maltz, *supra* note 158, at 467 (tracing the Court's openness to overruling precedents back to 1937); Monaghan, *supra* note 163, at 742 (analyzing the Court's willingness to overturn precedent); Rehnquist, *supra* note 158, at 345 (analyzing the Court's willingness to overturn precedent, focusing on *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985)).

<sup>165</sup> Justice Goldberg criticized the practice of "narrowly defining the rule of a case in order to distinguish the precedent to tatters," and suggested that the Court must follow the spirit of prior decisions if it is properly to follow precedent. GOLDBERG, *supra* note 158, at 76; see also Easterbrook, *supra* note 158, at 424 (describing such manipulation of doctrine as inevitable but usually wrong).

<sup>166</sup> Cf. Imundo, *supra* note 160, at 879 (suggesting that inconsistent decisions are inevitable *because* stare decisis is necessarily manipulable). This is, in essence, Judge Easterbrook's position, expressed through his use of Arrow's Theorem. See *infra* Part III.B.

even less candid approach, is to distinguish the indistinguishable—to assert that *this* case differs from a previous case and rely on the finality of Supreme Court decisions to avoid further debate on the matter.<sup>167</sup> These techniques work as long as a majority is willing to honor the group action. As many as four dissenters can claim as loudly as possible that a prior decision mandates a different result, but five beats four every time on the Court.

Disingenuous techniques reflect the authority of a court rather than the strength of its legal reasoning. The irony is that several legitimate arguments support a limited role for stare decisis in constitutional decisionmaking. First, stare decisis has never been a particularly strong doctrine in constitutional litigation. Unlike errors of statutory interpretation, for example, which can be corrected by Congress, errors of constitutional interpretation can be corrected in no other forum. Some Justices, therefore, have suggested that the Court is not even theoretically bound by the doctrine in constitutional cases.<sup>168</sup> The underlying premise of constitutional interpretation helps to shape the argument: the Court is interpreting and applying the document itself, not previous opinions that merely interpreted it at some earlier time.<sup>169</sup> In theory then,

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<sup>167</sup> See, e.g., Rehnquist, *supra* note 158, at 374 (noting the Court's sorry history of reconciling and distinguishing precedents in the various "free speech at shopping centers" cases of the 1970s). This also seems to be Justice Goldberg's point. If Justices (or courts) can evade precedents simply by announcing that this case is different from the previous case, all of the values of a precedential system vanish despite maintaining the system as a matter of form.

<sup>168</sup> See generally Ginsburg, *supra* note 154, at 141 (noting Justice Brennan's practice); Maltz, *supra* note 158, at 468 (critiquing the Brandeis view); Monaghan, *supra* note 163, at 741 (noting general weakness of stare decisis in constitutional law); Rehnquist, *supra* note 158, at 351 (noting Justice Brandeis's approach); Note, *Constitutional Stare Decisis*, 103 HARV. L. REV. 1344, 1346–48 (1990) (discussing views of Justices Brandeis, Douglas, and Scalia). But see Easterbrook, *supra* note 158, at 429–32 (challenging the conventional wisdom, noting the value of stare decisis in constitutional cases).

<sup>169</sup> See, e.g., Charles S. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 405 (1988) (characterizing stare decisis as a common law principle); Rehnquist, *supra* note 158, at 365–66 (focusing on the written nature of our Constitution and Chief Justice Marshall's explanation of judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–80 (1803) (setting out the premises of constitutional supremacy)). This notion is, of course, underscored by originalist theories. See Robert A. Burt, *Precedent and Authority in Antonin Scalia's Jurisprudence*, 12 CARDOZO L. REV. 1685, 1687 (1991) (noting that Justice Scalia is not deferential to precedent because the original intent of the framers is the only legitimate source of constitutional interpretation); Gerhardt, *supra* note 158, at 133 (noting that originalist theories have the least respect for precedent). Other modern views concerning the judicial role are also consistent with this denigration of precedent. E.g., Spritzer, *supra* note 153, at 140 (arguing that "the ultimate responsibility to render a judgment in accordance with one's

derogating precedent is "turning back from a wrong turn" rather than "changing the law," as it is sometimes characterized.<sup>170</sup>

Such attitudes toward stare decisis have changed the nature of the debate. In the past the question seemed to be, was the previous court so wrong that we should disregard precedent? In the present the question is more likely to concern whether there is a coherent theory for the "intermittent invocation of stare decisis."<sup>171</sup> At bottom, stare decisis seems to serve as just one additional factor to support the side that would prevail under a consistent ruling.<sup>172</sup> The notion that often appears to govern is that stare decisis should be binding "absent a showing of substantial countervailing considerations."<sup>173</sup>

Today, Justices sometimes seem to see those countervailing considerations whenever they disagree with a prior decision. Federal Judge Frank Easterbrook writes: "Today's Justices cast their votes as if prior cases did not exist, adding for good measure (often with transparent insincerity) that 'even if the earlier case were binding on me, I would still vote the same way because . . .'"<sup>174</sup>

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conception of the law is individual and non-delegable").

<sup>170</sup> See, e.g., Cooper, *supra* note 169, at 408 (arguing that the Court should not extend erroneous holdings). This theory has strength only as long as one presupposes that the prior decision in fact was wrong. The prevailing option in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), presents a different outlook. Justices O'Connor, Kennedy, and Souter suggested that they might not have voted with the majority in *Roe v. Wade*, 410 U.S. 113 (1973), but nonetheless accepted it as precedent. *Casey*, 112 S. Ct. at 2808-12.

<sup>171</sup> Monaghan, *supra* note 163, at 743.

<sup>172</sup> See generally Note, *Constitutional Stare Decisis*, *supra* note 168, at 1346-47 (discussing standard arguments). Other views largely boil down to some form of this idea, with various different triggering factors. E.g., GOLDBERG, *supra* note 158, at 74 (arguing that stare decisis has "uneven force"—nearly absolute when the Court is asked to limit rights against the government but "markedly less restrictive" when the opposite is at stake); cf. Gerhardt, *supra* note 158, at 141-42 (addressing the Israel approach); Jerold H. Israel, Gideon v. Wainwright, *The Art of Overruling*, 1963 SUP. CT. REV. 211, 219-26 (identifying three "techniques of overruling"—factors that justify departing from precedent); Kelman, *supra* note 156, at 234-36 (noting that there are reasons for and against deferring to recent precedents); Maltz, *supra* note 158, at 371 (describing various factors for determining whether changing the law is appropriate); Rehnquist, *supra* note 158, at 371 (suggesting stare decisis should be applicable only when its invocation serves the doctrine's purposes).

<sup>173</sup> Monaghan, *supra* note 163, at 757. Professor Monaghan's theory is a strong one, as noted by Michael Gerhardt. Gerhardt, *supra* note 158, at 141. Still, it suffers from the underlying problem it attempts to solve—indeterminacy. At best, "substantial countervailing considerations" suggests a mood of deference rather than a workable definition of which precedents should be binding.

<sup>174</sup> Easterbrook, *supra* note 158, at 429. Similar judicial straddles can be seen in other respects. For example, a Justice may say that even under the majority's analysis, its result is

This attitude is neither new nor particularly well hidden,<sup>175</sup> but it is consistent with the newest fashions among legal theorists. Commentators suggest, for example, that *stare decisis* came into being more through habit than design,<sup>176</sup> and is therefore dispensable upon a showing of disutility. One such argument stresses the difficulty of amending the Constitution, with a resulting need to accomplish constitutional changes through judicial fiat.<sup>177</sup> And in a setting in which conservative Justices have been increasingly able to dominate the Court's business, it is no surprise to find conservative legal theorists challenge the underlying premises of *stare decisis* in order to take the opportunity to revisit liberal precedents. Thus, former Reagan Justice Department official Charles Cooper argues that *stare decisis* has two critical failings: it is "inherently subjective" and its only purpose is to "shelter error."<sup>178</sup>

Conservatives have no monopoly on attacks on *stare decisis*, however. When the Supreme Court was overturning well-established conservative decisions to enunciate new constitutional doctrines supported by political

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wrong. This occurred, for example, in *Metro*, in which Justice O'Connor disputed use of intermediate scrutiny, but then argued that even if such scrutiny were appropriate, the FCC's preference programs were unconstitutional. In addition, a Justice may dissent in a case but accept that it is binding precedent, and then in later cases describe its holding much more narrowly than he or she did in the original dissent. In this respect, for example, the *Fullilove-Richmond-Metro* distinction between federal and state affirmative action changes shape case-by-case as different Justices found themselves playing the reconcile/distinguish game. See *supra* notes 126-29 and *infra* notes 249-57 and accompanying text.

<sup>175</sup> See William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1954) (indicating little respect for precedents he would have decided differently); see also Burt, *supra* note 169, at 1685-86 (suggesting that Justice Scalia relies on precedent only when it concurs with his views); Gerhardt, *supra* note 158, at 130 (noting that Chief Justice Rehnquist respects only those precedents with which he agrees); Smith, *supra* note 158, at 337, (noting that the Court's new conservative majority is very willing to find reasons to ignore precedent); Note, *Constitutional Stare Decisis*, *supra* note 168, at 1348-49 (noting that to some persons, the reasons to overrule always outweigh precedent). But see *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803-16 (1992) (opinion of Justices O'Connor, Kennedy, and Souter).

<sup>176</sup> Rehnquist, *supra* note 158, at 349. The author also notes that Grant Gilmore concluded that the English system of precedent was far more flexible than our system that developed under Chief Justice Marshall. This occurred because the use of one opinion for the court limited opportunities for creative interpretations in later cases, while barristers making careful and tactical selections from the several opinions underlying an English judgment could more easily weave the "precedent" in unanticipated ways. *Id.* at 348 n.23 (citing GRANT GILMORE, *THE AGES OF AMERICAN LAW* 10 & n.10 (1974)).

<sup>177</sup> See Rehnquist, *supra* note 158, at 364.

<sup>178</sup> Cooper, *supra* note 169, at 404.

liberals, the sides were simply reversed.<sup>179</sup> In essence then, devotion to precedent is largely a losing side's gambit.

Attempts to formulate a neutral theory of constitutional stare decisis generally fail due to an inability to prescribe the strength of the principle. Perhaps the most accurate formulation describes stare decisis today as a presumption in favor of precedent—one that reminds judges to consider history and context and not to overrule a prior decision in the absence of a "powerful, fully articulated rationale."<sup>180</sup> In reality, however, that justification can probably be found whenever a majority of Justices interpret constitutional language differently from their predecessors. In this setting, stare decisis degenerates to just another argument—one more reason to reach a particular result.<sup>181</sup>

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<sup>179</sup> See, e.g., *id.* at 403. Justice Goldberg differentiated between decisions overruling precedents to extend rights, in which stare decisis is of little importance, and decisions retracting them, in which stare decisis is properly a major obstacle. See *supra* note 172. James Rehnquist challenges the notion of principled overruling, characterizing Supreme Court decisionmaking as "a war of attrition," Rehnquist, *supra* note 158, at 346, and suggests that virtually any decision can be attacked or defended under the various formulations of principled standards, *id.* at 358. The Supreme Court's recent sally into the war over principled overruling in *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), provides no further help in this regard. Chief Justice Rehnquist's description of appropriate reasons to overrule prior decisions is not significantly different from Justice Marshall's. Compare *id.* at 2609–11 (majority) with *id.* at 2621–25 (dissent). In application, however, they differ dramatically, and it is safe to assume that *Payne* is not the only case in which their views as to the application of such tests would differ.

My colleague, Widener law professor Leigh Greenhaw, argues that Justice Goldberg's view presents a workable and principled test for distinguishing between the Warren Court's derogation of precedent and more recent practices in the conservative direction. While this may work for some issues, it does not appear to be any less result-oriented than other formulations for others. Most cases are not simply two-sided, with "rights" amassed against governmental "power." The interests of others, from crime victims to consumers to competitors, ultimately defeat any attempt to isolate sacrosanct "rights" from retractable "non-rights." Affirmative action cases reveal the twists at the root of this problem. Are decisions that recognize equal protection rights for nonminorities and strike down affirmative action plans, such as *Richmond*, essentially immune from reconsideration, while decisions denying such constitutional rights, such as *Metro*, deserve little precedential effect? Justice Goldberg's approach would seem to require this result, but it is hard to believe that many adherents of his theory would choose to apply it in this fashion.

<sup>180</sup> Note, *Constitutional Stare Decisis*, *supra* note 168, at 1354.

<sup>181</sup> Justice Goldberg restated this notion into the equally general "respect for precedent." GOLDBERG, *supra* note 158, at 78; see also Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1032 (1990) (noting that arguments from precedent may have limited importance but are clearly pertinent in all settings); Schauer, *supra* note 158, at

## 2. *Plurality Decisions*

Plurality decisions make an even greater contribution to incoherence. Once rare, pluralities have now become common.<sup>182</sup> Commentators have identified numerous causes for the increase, none of which exclude the others. Some of the more mundane factors suggested include the Court's workload and the length of its opinions.<sup>183</sup> Another factor, as suggested above, is the weakening of stare decisis. When one or more Justices declines to acquiesce in a prior decision, the Court becomes likely to split into three or more camps. This occurs because such reconsideration of a position defeated in a previous case creates an additional issue in the case before the Court. Where that issue resolves the case for one or more Justices, less than a full Court is left to consider the problem the Court intended to address when it granted review. This makes it more likely that no opinion can command a majority.<sup>184</sup> In short, the more issues, the less likely is a clear majority.

There is little agreement about the propriety of Justices continuing to assert their individual views. What can be seen by some observers as stubbornness or a failure to seek reconciliation of viewpoints within the Court<sup>185</sup> can also be

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571; *cf.* Gerhardt, *supra* note 158, at 127 (arguing that even if the Justices agreed on any particular formulation of the standard, they would disagree on when it had been satisfied). Such views leave only an amorphous notion of precedent meaning "something" in the constitutional calculation, and that "something" is unmeasurable.

<sup>182</sup> See, e.g., Novak, *supra* note 154, at 756 (noting that there are now many more plurality decisions than in the past); Ray, *supra* note 153, at 811 (noting that pluralities were rare before 1955 but are now common); Note, *Plurality Decisions*, *supra* note 154, at 1127 (noting that such opinions are now common).

<sup>183</sup> See, e.g., Novak, *supra* note 154, at 759 (noting workload, issues, personalities); Note, *Plurality Decisions*, *supra* note 154, at 1136 (arguing that long opinions can result in pluralities as they provide more opportunities for a Justice to find an idea with which he or she disagrees). Justice Ginsburg suggests that the increased number of law clerks and the ease of writing opinions by computer have possibly exacerbated this problem. Ginsburg, *supra* note 154, at 149.

<sup>184</sup> One Justice stubbornly voting in adherence with a previously defeated position leaves only eight Justices to address the question that is properly before the Court. Five votes are still necessary to constitute a majority; it is harder to find five votes out of eight than five out of nine. The matter is exacerbated if two (or more) Justices refuse to confront the issue the rest of the Court perceives to be presented, as five votes from the Court are still necessary to constitute a majority. See Spritzer, *supra* note 153, at 141-45 (addressing various cases in which such decisionmaking occurred); see also *infra* notes 238-41 and accompanying text.

<sup>185</sup> See Smith, *supra* note 158, at 327 (noting the importance of personality in affecting group decisionmaking); Note, *Plurality Decisions*, *supra* note 154, at 1130 (criticizing the

seen as following principle.<sup>186</sup> Aggravating these problems—and perhaps the root cause of the tendency of Justices to hold to individual views—is the nature of the issues regularly confronting the modern Court. Pluralities are most likely to occur in cases presenting fundamental constitutional issues, and Justices are more likely to continue to follow deeply held beliefs in these cases than in those presenting technical problems of statutory interpretation.<sup>187</sup> There is no social consensus in this nation over many issues, and the open-ended clauses of the Constitution are increasingly their battlegrounds.<sup>188</sup> The lack of clear resolution manifested by plurality opinions is therefore hardly surprising.

One commentator suggests that pluralities be separated into three categories: false, illegitimate, and true.<sup>189</sup> In the false category, there is really a majority on dispositive issues, and any additional opinions merely set forth additional ideas.<sup>190</sup> Illegitimate pluralities arise when one or more Justices prevents agreement on the reasoning of a decision simply by refusing to acquiesce in prior holdings that still command majority support.<sup>191</sup> Finally, there are true pluralities, which reflect a failure of a majority of the Court to agree on the applicable principles.<sup>192</sup> The opinions in *Richmond* and *Metro* have elements of these categories as well as of a fourth, the constructive plurality, in which a plurality appears in the guise of a majority.<sup>193</sup>

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“tendency of some Justices to cling dogmatically to their initial views on an issue, and the concomitant inability of the Court to settle that issue with any degree of finality”).

<sup>186</sup> See, e.g., Kelman, *supra* note 156, at 257 (noting that deep conviction is an appropriate reason for adhering to a dissenting view); Spritzer, *supra* note 153, at 140 (stating that a Justice’s “ultimate responsibility [is] to render a judgment in accordance with [his or her] conception of the law . . .”).

<sup>187</sup> See, e.g., Davis & Reynolds, *supra* note 153, at 80 (noting that Justices cannot resolve and come to clear majorities in constitutional cases presenting strong opposing views); Kelman, *supra* note 156, at 248, 253 (noting that sustained dissents occur most often in the most controversial constitutional areas, such as death penalty and First Amendment issues); Novak, *supra* note 154, at 759 (noting that plurality opinions occur most often in the most controversial areas).

<sup>188</sup> See Note, *Plurality Decisions*, *supra* note 154, at 1138 (referring to increased litigation over the application of such clauses to our modern, nonconsensus society).

<sup>189</sup> *Id.* at 1130. See also *infra* notes 200–05 and accompanying text (discussing Professor Ray’s categories of concurring opinions).

<sup>190</sup> *Id.* at 1130–33.

<sup>191</sup> *Id.* at 1133–35. The author describes the illegitimate plurality as a “particularly extreme example of judicial indulgence.” *Id.* at 1133.

<sup>192</sup> *Id.* at 1135–39.

<sup>193</sup> A constructive plurality is the opposite of a false plurality. In a false plurality, a majority position is hidden by the failure of a fifth Justice to support an opinion that he or she agrees with in substance. For example, by insisting on his rigorous version of strict scrutiny and therefore failing to join Justice O’Connor’s four Justice opinion in *Richmond*,



A very natural tendency of legal scholars is to declare that plurality opinions are undesirable. Pluralities do not provide much guidance and necessarily carry little precedential weight.<sup>194</sup> They can also yield paradoxical results in which the “winner” of the case loses on each issue considered separately.<sup>195</sup> Sometimes they have the practical effect of placing too much importance on the views of swing Justices or those with idiosyncratic views.<sup>196</sup> Perhaps most fundamentally, however, pluralities undercut the Court’s role under the Constitution. By representing only the views of individual Justices rather than “*the Court*,” they diminish the Court’s status as the body that provides content to the airy phrases of the Constitution.<sup>197</sup> Pluralities announce something like: “We agree on who wins, but we cannot agree on the role of the Constitution in this setting.”

Diminished status for the Court in general would fundamentally change the

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Justice Scalia prevented an official majority on the application of strict scrutiny to affirmative action, even though his version plainly encompassed the O’Connor version. A constructive plurality, on the other hand, has what purports to be a majority opinion that upon examination turns out to represent different views sheltered under one rubric. Portions of *Richmond* and *Metro* fall into this category. In this sense, the Court’s two techniques for obscuring its incoherence, the false majority and the overgeneralized conclusion, *see infra* notes 249–69 and accompanying text, are both really versions of the constructive plurality.

<sup>194</sup> See, e.g., Davis & Reynolds, *supra* note 153, at 62 (noting that such opinions have little weight and provide little guidance); Ginsburg, *supra* note 154, at 148–49 (describing the problem and noting that multiple opinions in general can confuse lower courts and attorneys); Note, *Plurality Decisions*, *supra* note 154, at 1127 (criticizing plurality opinions as inadequate pronouncements, guides, and statements); *cf.* Novak, *supra* note 154, at 756–58 (plurality opinions cause problems for lower courts and are at odds with the underlying notion that reasoning is critical to American jurisprudence).

<sup>195</sup> This occurs where different coalitions of Justices on different issues result in a majority judgment that is logically supported by arguments that are themselves defeated. For example, assume that there are two different defenses arguably present in a case, such as a limitations period and immunity. Six Justices may believe that the limitations period has not run, and six Justices may believe that there is no immunity, leading to the “legal” conclusion that neither defense is valid. But as long as the three Justices believing that the period *has* run and the three Justices believing that the defendant *is* immune are at least five different persons, a majority favors dismissing the action, despite two to one majorities denying the validity of each defense.

<sup>196</sup> One commentator notes that analyzing cases to determine the narrowest views supported by a majority “vest[s] disproportionate power in the ‘swing’ Justice or Justices by according their ‘narrow’ opinion controlling weight, even though the reasoning expressed does not reflect a true consensus of the Court.” Novak, *supra* note 154, at 765.

<sup>197</sup> See Davis & Reynolds, *supra* note 153, at 61–66 (arguing that it is the Court and not the arithmetic of the views of individual Justices that has a role in society to provide leadership on constitutional and other legal questions).

nature of American government. Diminished status in the resolution of some issues in certain areas, however, is not necessarily a bad idea. Plurality decisions suggest that the case presents a problem that requires further study. Rather than papering over disagreement with a weak and inconclusive but apparent majority, it is probably preferable for the Court to admit some doubt, and thereby to extend its consideration of the issues in question.<sup>198</sup> To a great extent the affirmative action cases prior to *Richmond* and *Metro* communicated these messages.<sup>199</sup> It is doubtful that the two cases provide any clearer statements of law, but by producing "majorities" they give the illusion of having done so.

### 3. *Separate Opinions*

The proliferation of nonprevailing opinions, concurrences and dissents, highlights the confusion engendered by contemporary judicial practices. My colleague, Widener law professor Laura Ray, has identified four categories of concurring opinions: the limiting concurrence, the expansive concurrence, the emphatic concurrence, and the doctrinal concurrence.<sup>200</sup> The limiting concurrence, the most common form, takes a position narrower than that of the majority;<sup>201</sup> its converse is the expansive concurrence, which takes a broader

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<sup>198</sup> See, e.g., Novak, *supra* note 154, at 760, 780–81 (pointing out that false agreements are not helpful and that plurality decisions serve to keep issues open and allow further development); Ray, *supra* note 153, at 812–13 (noting that in some areas it may be better "to prolong debate when the alternative is an uneasy compromise").

<sup>199</sup> The failure of the Court to issue even incoherent majority decisions in *University of California Regents v. Bakke*, 438 U.S. 265 (1978), *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), meant that supporters and opponents of affirmative action could continue to reshape their arguments to reach positions that would attract majority support on the Court.

Changes on the Court necessarily exacerbate this process. To analogize to target shooting, if one shoots and misses to the left, one aims a bit more to the right and tries again. Changes on the Court make it a moving target, however, and for the last twenty-five years it has been moving to the right, like the ducks in a shooting gallery that are hard to hit no matter how carefully one aims.

<sup>200</sup> Ray, *supra* note 153, at 780. Professor Ray describes concurring opinions as "hybrids," and notes that the four categories serve very different roles. *Id.* One recent study of concurring opinions from a recent Court term concluded that most did one of three things: point out what issues remain open, express concerns about the majority's reasoning, or provide an explanation that should be dispositive in cases as a result of the votes of the Justices. David O. Stewart, *A Chorus of Voices*, 77 A.B.A. J. 50 (1991).

<sup>201</sup> Ray, *supra* note 153, at 784–93. Limiting concurrences are "expressions of ambivalence." *Id.* at 785.

view.<sup>202</sup> The emphatic concurrence usually expounds on one aspect of the majority opinion to stress its importance or explain its scope.<sup>203</sup> Finally, the doctrinal concurrence in essence rejects the majority's analysis but joins in the judgment.<sup>204</sup> Whatever their structure, concurrences present analytical difficulties. Concurrences that purport to explain the majority's analysis are particularly problematic,<sup>205</sup> but where accurate, such attempts at restatement can clarify a decision or aid later attempts to apply it.<sup>206</sup> Most commentators call for restraint in issuing concurrences, suggesting that Justices avoid the tendency to unnecessary self-expression and limit concurrences to cases in which future legal analysis will be furthered.<sup>207</sup>

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<sup>202</sup> *Id.* at 793-96.

<sup>203</sup> *Id.* at 796-800.

<sup>204</sup> *Id.* at 800-09. Ray notes that on the present Court only Justices Stevens, O'Connor, and Scalia regularly issue doctrinal concurrences. *Id.* at 803-07. Both Stevens and Scalia did so in the affirmative action cases. *See supra* notes 80-87, 115-17 and accompanying text.

<sup>205</sup> Ray points out that such opinions sometimes bring about odd results, such as the combination of "losing" positions that add up to a "winning" judgment. *See id.* at 800-01; *see also supra* note 195. Justice Ginsburg also concludes that separate opinions that purport to explain a majority opinion tend to be confusing and present obstacles to legal analysis. Ginsburg, *supra* note 154, at 149.

<sup>206</sup> If accurate, such opinions can provide useful guidance to lower courts and litigants. *See* Ginsburg, *supra* note 154, at 143 (noting separate opinions may help clarify the opinion of the Court and aid trial courts); Maltz, *supra* note 158, at 488-89 (noting these opinions often explain how to comply with the law); Novak, *supra* note 154, at 774-77 (stating sometimes one opinion becomes treated as authoritative, either through inadvertence or because the author must be convinced for later litigants to prevail).

It is not surprising that Justice Powell is often cited for performing this function in his separate opinions. *E.g.*, Maltz, *supra* note 158, at 488-89; Novak, *supra* note 154, at 775. Justice Powell was a pragmatic and careful judge, who often found positions somewhere between those of his more ideologically-oriented colleagues. This is his legacy from *University of California Regents v. Bakke*, 438 U.S. 265 (1978), in which his opinion in effect became the Court's opinion and remains a major precedent in the area even though no other Justice joined in the critical portions of his opinion. *See infra* notes 277-78 and accompanying text. Justice Harlan also issued helpful concurring opinions. His concurring opinion in *Katz v. United States*, 389 U.S. 347, 360-62 (1967), formulated the Fourth Amendment concept "reasonable expectation of privacy," that has now become the central premise of the Court's analysis, rendering the eight Justice majority opinion a historical anomaly. *See* Robert C. Power, *Technology and the Fourth Amendment*, 80 J. CRIM. L. & CRIMINOLOGY 1, 10-14 & nn.39-43 (1989).

<sup>207</sup> *See, e.g.*, Ginsburg, *supra* note 154, at 143, 150 (noting Justice Brandeis's practice and calling for more restraint in issuing separate opinions); Ray, *supra* note 153, at 823-29 (favoring separate opinions, but noting problems that result from unnecessary opinions).

One particularly nettlesome aspect of concurrences involves paradoxical voting. This occurs when Justices deviate from their own views to vote with an actual (or working) majority. Justices may do this for one or more of the following reasons: to defer to the majority, to make a clear statement, to break a tie on the Court, or to reach a particular result.<sup>208</sup> Paradoxical voting seems to be uncommon and therefore should rarely cause logically inconsistent judgments.<sup>209</sup> Ironically the reverse practice, in which a Justice joins an opinion that he or she does not really support, can hide the Justice's real views and itself lead to inconsistent decisions.<sup>210</sup> In any event, concurrences that deviate in material respects from a majority opinion tend to lessen the impact of a decision, and may strip it of significance if the existence of the majority depends on the support of the concurring Justice.

Dissents can also cause confusion. On one level, of course, a dissent is nothing more than a losing analysis directed as much to those who can change the law as to the rest of the Court or the parties. A dissent can have significance for future cases, however, especially if it announces agreement in the principle but disagreement in the application of the principle to the case before the Court. More often, of course, dissents serve as statements of principle for future, different, majorities, and provide a vehicle for keeping an issue open as long as possible.<sup>211</sup> There seem to be few impediments today to

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<sup>208</sup> See Imundo, *supra* note 160, at 868–74. In a sense, Justices voting to adhere to precedents they believe to have been wrongly decided fit into this third category, because the Justice votes in opposition to his or her individual interpretation of the law. Commentators do not generally include such behavior in their analyses, and instead restrict themselves to examining votes that differ from a Justice's reconciliation of interpretive sources, including precedent. See *id.* at 867; John M. Rogers, "I Vote This Way Because I'm Wrong:" *The Supreme Court Justice as Epimenides*, 79 KY. L.J. 439, 439–41 (1990–91) (suggesting that such action reveals the inconsistency of multimember courts).

<sup>209</sup> See Rogers, *supra* note 208, at 440; Spritzer, *supra* note 153, at 145 ("skewed decisions of this kind are unusual"). Of course, voting *consistently* with one's views of the case can also cause results that are logically inconsistent. See *infra* Part III.B.

<sup>210</sup> Cf. Imundo, *supra* note 160, at 879–80 (pointing out that if Justices repress their disagreements by failing to set forth their views when they differ from their votes, they make the law appear to be settled when in fact it is unsettled, also suggesting that paradoxical votes perform a real function by serving as a compromise that allows a decision to be made); Kelman, *supra* note 156, at 239–47 (discussing the related problem of the sustained dissent). Part III.B includes a lengthy analysis of Judge Easterbrook's theory that inconsistency is inevitable notwithstanding paradoxical voting or sustained dissent, and Part III.C concludes that *Richmond* and *Metro* reveal the same problem.

<sup>211</sup> See, e.g., Kelman, *supra* note 156, at 254 (noting this to be one of the positive aspects of modern judicial practice in this regard). This is also true of other separate opinions. Professor Ray notes, for example, that this is the case with doctrinal concurrences. See Ray, *supra* note 153, at 802–03; *supra* note 204 and accompanying text.

issuing dissenting opinions. Consistent with the modern trend of derogating stare decisis, Justices often dissent at length and restate their views in case after case.<sup>212</sup> In any event, understanding multiple opinions is necessarily a part of contemporary legal analysis.

### B. *Public Choice Theory*

The various opinion writing practices described above comport with analytical models associated with Public Choice Theory. Central to our legal culture is the notion that group decisions are better than individual decisions. Trial judges sit as individuals, but this is largely for practical reasons, and group factfinders, better known as juries, are constitutionally required for many determinations.<sup>213</sup> Appellate courts are group bodies; the paradigm appellate case involves a group that considers written and oral arguments, debates the merits at a conference, and issues a decision after careful deliberation. Contemporary caseloads and personal styles of judging may prevent reality from meeting that image,<sup>214</sup> but the notion that a group will do better than a single judge is as much an underlying premise of our system as the idea that judges should apply the law rather than their own policy beliefs.

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<sup>212</sup> Professor Kelman suggests three actions Justices can follow after dissenting in one case. They can abandon their dissent, maintain their dissent in all future cases, or temporarily acquiesce and await a propitious occasion to reinstate their earlier vote. *See* Kelman, *supra* note 156, at 230–33, 248–50, 258–63. Kelman suggests that each of these responses has advantages and disadvantages, but that sustained dissents are increasingly common. *Cf.* Spritzer, *supra* note 153, at 145–46 (accepting persistent dissents as proper unless the rest of the Court is equally divided).

In this setting, the traditional conservative approach to issuing dissents seems anachronistic. Chief Justice Taft argued, consistent with the then existing Canons of Judicial Conduct, that Justices should conform their views to those of the majority whenever possible and firmly follow the precedent thereafter. *See* Kelman, *supra* note 156, at 240 & n.46; *see also id.* at 282 (showing Justice Harlan as the most recent consistent follower of this approach); Imundo, *supra* note 160, at 876–77 (discussing changes in ethical obligations of judges). Justice Brandeis's more selective practice of restraining his desire to dissent in cases with only a narrow majority and not likely to result in seriously flawed doctrine, *see* Ginsburg, *supra* note 154, at 143, seems more in keeping with statutory cases than constitutional cases.

<sup>213</sup> *See* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. VI (criminal cases); U.S. CONST. amend. VII (civil cases). The Sixth Amendment right has been incorporated into the Fourteenth Amendment and applies to state criminal cases as well. *Duncan v. Louisiana*, 391 U.S. 145 (1968); *see infra* notes 235–36 and accompanying text. Most state constitutions also recognize a right to a jury in civil cases.

<sup>214</sup> *See supra* Part III.A.

The preference for group decisions overlooks one severe defect; groups do not render decisions that are both coherent and consistent. Judge Frank Easterbrook first applied this notion to judicial decisionmaking in his 1982 article, *Ways of Criticizing the Court*.<sup>215</sup> He relied on Public Choice Theory, which analyzes voting behavior to prove that legislative voting schemes do not result in outcomes responsive to majoritarian preferences.<sup>216</sup> Or, as Professors Daniel Farber and Philip Frickey state the problem: "Majority rule is its own worst enemy."<sup>217</sup> Easterbrook's conclusion was that it is useless to criticize the Court for inconsistency or incoherence because all institutional decisionmaking has those attributes.<sup>218</sup>

Easterbrook's article begins by describing some of the common criticisms of the Supreme Court's output. It notes the usual suspects—plurality decisions, too many dissenting opinions, the difficulty of the cases, and the extent of the Court's workload—but suggests that the traditional solutions would themselves lead to inconsistent results and would be ineffective in various respects.<sup>219</sup>

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<sup>215</sup> Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

<sup>216</sup> See *id.* at 813–14. Rather than including his own lengthy discussion of Public Choice Theory, Easterbrook relies on Dennis Mueller's treatment of the subject. See DENNIS C. MUELLER, *PUBLIC CHOICE* (1979). Similar avoidance is appropriate in this Article; Easterbrook's analysis is sufficient to understand the Court's confusion in the affirmative action cases.

<sup>217</sup> Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 901 (1987). This article updates Easterbrook's in some respects and addresses several attempts to apply Public Choice Theory to the judicial and legislative processes.

<sup>218</sup> Easterbrook characterizes such criticism of the Court as "in some circumstances . . . worthless." Easterbrook, *supra* note 215, at 803. His summary of the major theories of commentators on inconsistency acknowledges that the various flaws they identify in Supreme Court decisionmaking do in fact exist, but implies that all these analyses recognize results rather than causes. *Id.* at 804–11. The article recognizes, however, that individual Justices are properly criticized for being inconsistent. *Id.* at 803. This does not appear to be a significant issue in the affirmative action cases, or even equal protection generally. Individual Justices are fairly consistent; the search for common ground, or the false assertion of a majority, however, has rendered their collective decisions inconsistent.

<sup>219</sup> *Id.* at 804–11. For example, Easterbrook rebuts the notion that "skeletal opinions" would result in more agreement among the Justices. *Id.* at 808–09. He points out that lengthy opinions may present more "targets" for dissenters, but they also provide more guidance to lower courts and attorneys. Brief, conclusory opinions only suppress the results of disagreement to create an illusion of group agreement.

If in *Richmond* the majority had merely stated that the city's set-aside did not satisfy strict scrutiny, it would presumably have garnered the support of five Justices for all portions (all Justices voting to strike down the program except Justice Stevens). See *supra*

Easterbrook's diagnosis is that the Supreme Court, and by implication, any multimember court, suffers from the flaws inherent in collective decision-making: "Inconsistency is inevitable, in the strong sense of that word, no matter how much the Justices may disregard their own preferences, no matter how carefully they may approach their tasks, no matter how skilled they may be."<sup>220</sup> This conclusion is rooted in his application of Arrow's Impossibility Theorem<sup>221</sup> to legal decisionmaking. In essence, Arrow's Theorem proves that no voting system can meet each of five conditions simultaneously.<sup>222</sup> Easterbrook's theory then establishes that four of those conditions necessarily apply to appellate decisionmaking in which at least three principled choices are

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notes 69-71 and accompanying text. This would merely have prevented the rest of the world from learning about the Court's internal disagreement about the meaning or application of that standard until some future case in which votes would shift. The various opinions of *Richmond* are messy, but at least they help observers recognize the lack of clear agreement on this issue.

<sup>220</sup> Easterbrook, *supra* note 215, at 813.

<sup>221</sup> KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963). As explained in Easterbrook's article and in more recent works, such as Farber and Frickey's treatment of public choice in legal analysis, *see supra* note 217, Arrow's Theorem reveals a fundamental but little recognized aspect of legal reasoning. It is that the group dynamics of a judicial body do not differ significantly from those of a policy making body. While we are socialized to accept and expect bargain and compromise in the policy making sphere, we are less comfortable with it in the legal sphere. The combination of ambiguous precedents of uncertain force, our profession's unexceeded skill at presenting (at least) three sides of a two-sided question, and the inevitable compromises that result from deciding "law" as we do "policy," on majority votes in which two possible outcomes may conceal a multiplicity of reasons for those outcomes, all suggest that we may be lucky to have as much coherence as now exists.

<sup>222</sup> As summarized by Easterbrook, the five conditions are:

(1) Unanimity: If all people entitled to a say in the decision prefer one option to another, that option prevails.

(2) Nondictatorship: No one person's views can control the outcome in every case.

(3) Range: The system must allow every ranking of admissible choices, and there must be at least three admissible choices with no other institution to declare choices or rankings out of bounds at the start.

(4) Independence of Irrelevant Alternatives: The choice between options A and B depends solely on the comparison of those two.

(5) Transitivity: If the collective decision selects A over B and B over C, it also must select A over C. This is the requirement of logical consistency.

Easterbrook, *supra* note 215, at 823. *See also* ALFRED F. MACKAY, *ARROW'S THEOREM, THE PARADOX OF SOCIAL CHOICE* (1980).

available and may be ranked in any order.<sup>223</sup> The fifth condition, logical consistency, therefore, cannot be satisfied.<sup>224</sup> Issues such as affirmative action, of course, present *more* than three principled choices; the existence of eight different views in *Richmond* suggests the extent of the inevitable deadlocks.<sup>225</sup>

Much of Easterbrook's analysis concerns those paradoxes of voting that illustrate the inherent inconsistency of group judicial decisionmaking. One problem is "cycling." This occurs where Justices hold three or more legal conclusions, no one of which has majority support, which they rank in different orders of preference (multi-peaked preferences). In this setting, stability is impossible because a majority will reject each conclusion.<sup>226</sup> A second problem is path dependence, in which the final result of a series of decisions depends on the order in which the decisions are made.<sup>227</sup> Judge Easterbrook explained the mischievous relationship of path dependence and precedent: "Majority voting plus stare decisis is thus a formula under which the Court may produce any outcome favored by any number of Justices, however small, even though a majority of Justices would reject that rule if they could do so on the basis of first principles."<sup>228</sup> Finally, strategic voting, the conscious decision to deviate from one's preferences to avoid the least favored result, creates its own irreconcilable results.<sup>229</sup> The article argues that such voting is not improper, but notes that its use is governed by no consistent principle and that one effect

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<sup>223</sup> Easterbrook, *supra* note 215, at 824-30.

<sup>224</sup> *Id.* at 830-31.

<sup>225</sup> See *supra* note 64 and accompanying text.

<sup>226</sup> See Easterbrook, *supra* note 215, at 815-17. Easterbrook's example is based on three different views of the meaning of the Establishment Clause. U.S. CONST. amend. I, cl. 1. He proves that if the Justices rank their preferences differently, no stable position can result, and that decisions will depend more on the fortuity of the particular questions presented than on a coherent understanding of the pertinent legal principles. He pointedly notes that such instability is not limited to plurality decisions, but also applies to cases in which a majority of the Court acquiesces in one group's views, a situation that appears to be present in both *Richmond* and *Metro*. See *infra* notes 249-69 and accompanying text.

<sup>227</sup> *Id.* at 817-21. In this section, Judge Easterbrook explains that notwithstanding all of the positive aspects of stare decisis, *id.* at 817, see also *supra* note 163 and accompanying text, it does not work where there are more than two credible legal theories that may apply, *id.* at 817-19. Because different groups of Justices will find different controlling principles in the precedents as well as in the cases before them, decisions can be consistent and inconsistent with precedent at the same time. Easterbrook's idea applies equally as well to the affirmative action area. See *infra* Part III.C.

<sup>228</sup> Easterbrook, *supra* note 215, at 819. One of Easterbrook's examples is *Apodaca v. Oregon*, 406 U.S. 404 (1972). Easterbrook, *supra* note 215, at 819 n.41. As shown below, *Apodaca* provides a striking example of the sort of "nonlaw" law that emerges from the affirmative action cases. See *infra* notes 237-41 and accompanying text.

<sup>229</sup> Easterbrook, *supra* note 215, at 821-22.



is that results are manipulated in an erratic fashion.<sup>230</sup>

Legal training and culture are at odds with the notion that courts act through a majoritarian voting mechanism, but that is the reality of our appellate system. Judges are not isolated scholars who announce "law" when the group, as a whole, is convinced of the soundness of a particular constitutional theory.<sup>231</sup> Instead, courts decide those cases that come to them and announce decisions whenever a majority—five on the Supreme Court—agree on a judgment. With that announcement, the views of the Justices on the results and reasoning are effectively frozen, perhaps to be revisited in another future case presenting the same or similar issues. If all of the Justices agree, the issue is probably resolved for a lengthy period and the myth of group deliberation is maintained. If a majority clearly agrees in all key respects, the issue is probably resolved for a period of moderate length and the myth of "the law" is tarnished only to the extent that it must acknowledge the existence of differing views.<sup>232</sup> If no majority agrees, however, the issue is likely to be considered still open, and criticism of the Court as incompetent and incoherent is likely to increase. Easterbrook's argument, at bottom, is that such criticism is unfair. It is fairly easy for the Court to render a coherent decision, consistent with past cases, when there is only one issue with two possible conclusions. When there are multiple issues, the likelihood of agreement by a critical mass of Justices diminishes rapidly. This may be one reason for the increase in plurality or otherwise unclear decisions by the Court since 1970.<sup>233</sup> Whether due to an increase in cases with three or more possible conclusions or simply to changes

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<sup>230</sup> Easterbrook points out that both *stare decisis* and compromise to achieve a majority opinion, the two approaches most often urged to prevent judicial gridlock, are themselves forms of strategic voting. *Id.* at 821–22. He then makes a series of points that reveal the impossibility of developing a coherent principle for reaching principled decisions in this area. *Id.* at 822. In short, no principled rules are discoverable even at this abstract level, and *stare decisis* provides no escape, as its role in strategic voting equals its role in path dependence. Accordingly, Easterbrook argues for weakening *stare decisis* when more than two decision paths are credible, and suggests that the Court has done this as a practical matter. *Id.* at 820–21 & n.43.

<sup>231</sup> That is the theory of the continental model. *See supra* note 156 and accompanying text. It is no more than a myth about our system.

<sup>232</sup> If such differing views were to disappear immediately upon the issuance of the decision, majority opinions would tend to take on the firmness of unanimous opinions. It seems likely, however, that persistent dissents, *see supra* notes 211–12 and accompanying text, and changes on the Court mean that split courts only resolve the matter temporarily. While this is apparently more true of controversial matters, such as the nearly annual abortion case or affirmative action, the point remains that even five is not a solid majority on the modern Supreme Court.

<sup>233</sup> *See supra* notes 164, 182 and accompanying text.

in Court membership that rendered agreement on a single resolution less likely, Easterbrook's theory explains much of the problem.

Constitutional criminal procedure provides one example of Easterbrook's theory at work. Many of the cases considered by the Court in the several decades before 1970 presented fairly stark questions concerning the incorporation doctrine, the application of the Bill of Rights to the states.<sup>234</sup> For example, in 1967 the Court decided *Duncan v. Louisiana*,<sup>235</sup> in which it held that the Sixth Amendment's right to a jury trial applies to the states. The fact that the jury is fundamental to our nation's criminal justice system permitted a clear majority.<sup>236</sup>

By 1970 most of the relatively straightforward incorporation questions had been answered and the cases then coming before the Court presented more subtle questions. Following *Duncan*, the Court had to determine whether the jury trial right applies in petty cases, whether a jury necessarily requires twelve members, and if not, how many members are required, whether a jury must return a unanimous verdict (and if not, what sort of margin is required), and whether a smaller than twelve person jury may return a nonunanimous verdict, and so on.<sup>237</sup> One of these cases presented a classic application of Arrow's Theorem at work. In 1972, the Court considered the constitutionality of Oregon's use of nonunanimous juries in criminal cases.<sup>238</sup> Four Justices voted

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<sup>234</sup> See generally WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 44-73 (2d ed. 1992) (describing incorporation theories and their application from the 1940s through the 1960s).

<sup>235</sup> 391 U.S. 145 (1968).

<sup>236</sup> *Id.* at 148-54. *Duncan* reveals the complexity of the problems in this area. On one level, the case is simple, as it presents one issue—whether the Jury Trial Clause of the Sixth Amendment applies to state criminal trials—and seven Justices concluded that it does apply. However, two different theories support incorporation: “total incorporation,” which was explained in a concurring opinion for Justices Black and Douglas, *id.* at 162-71, and the majority’s “selective incorporation,” which had the support of Chief Justice Warren and Justices Brennan, White, Fortas, and Marshall, *id.* at 148-49 & n.14. Even *this* majority was to some extent illusory. Justice Fortas accepted selective incorporation in theory but challenged the notion that all aspects of the federal and state jury trial rights are necessarily identical. *Id.* at 211-15 (concurring in *Bloom v. Illinois*, 391 U.S. 194 (1968) and *Duncan*). Justice Fortas’s one Justice theory that was not necessary to the decision in *Duncan* became a dispositive one Justice theory several years later. See *infra* notes 238-41 and accompanying text.

<sup>237</sup> *E.g.*, *Ballew v. Georgia*, 435 U.S. 223 (1978) (whether five jurors are too few); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (composition of the jury pool); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (whether unanimous juries are required); *Williams v. Florida*, 399 U.S. 78 (1970) (whether twelve jurors are necessary); *Baldwin v. New York*, 399 U.S. 66 (1969) (which cases are criminal for purposes of the Sixth Amendment).

<sup>238</sup> *Apodaca v. Oregon*, 406 U.S. 404 (1972); see also *Johnson v. Louisiana*, 406 U.S.

to uphold the system, concluding that there is no Sixth Amendment requirement that juries be unanimous. Four other Justices voted to overturn the system, reasoning that the Sixth Amendment requires criminal juries to return unanimous verdicts.<sup>239</sup> Each theory finds support in the history of the amendment and its underlying policies, and each theory is consistent with the notion that the Sixth Amendment grants the same rights to federal and state defendants, as required by the incorporation theories followed in *Duncan*.<sup>240</sup> Justice Powell refused to accept the latter notion, however. He concluded that the Sixth Amendment should be interpreted to require unanimous juries in federal cases, but that the Fourteenth Amendment's Due Process Clause—the vehicle for the incorporation doctrine—is more flexible and permits non-unanimous state juries, as long as they are consistent with fundamental fairness.<sup>241</sup>

What is the law in this area? It depends on how one asks the question, and

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356 (1972).

<sup>239</sup> The lineup in *Apodaca* was as follows: Justice White issued a plurality opinion for himself, Chief Justice Burger, and Justices Blackmun and Rehnquist, which denied that the Sixth Amendment imposed any requirement of unanimity. *Apodaca*, 406 U.S. at 405-14. Justices Douglas, Brennan, Marshall, and Stewart dissented in a series of short opinions in both *Johnson* and *Apodaca*. *Johnson*, 406 U.S. at 380 (Douglas, J., with Brennan, J., and Marshall, J., dissenting), 395 (Brennan, J., with Marshall, J., dissenting), 397 (Stewart, J., with Brennan, J., and Marshall, J., dissenting), 399 (Marshall, J., with Brennan J., and Marshall, J., dissenting) (also incorporating by reference the dissents of Douglas, J., Brennan, J., and Marshall, J., in *Johnson*). Justice Powell constituted the fifth vote to uphold the Oregon system, but did so under his own theory. *Johnson*, 406 U.S. at 366 (concurring); *Apodaca*, 406 U.S. at 414 (concurring); see *infra* note 241 and accompanying text.

<sup>240</sup> See *supra* notes 235-36 and accompanying text.

<sup>241</sup> *Johnson*, 406 U.S. at 369-77. Thus, Justice Powell's vote to uphold *Apodaca*'s conviction rendered Justice White's four Justice opinion a plurality opinion and the various opinions opposing non-unanimous juries mere dissents. To the extent that the question was whether *Apodaca* was denied a constitutional right to a unanimous jury verdict, this result seems correct, given the views of five Justices. But if the question were instead whether the Sixth Amendment requires unanimous juries, Justice Powell presumably would have joined his dissenting colleagues. There is no reason that the question could not have been so formulated, given the fact that the incorporation doctrine was settled by 1972, and only occasional opinions, such as Justice Fortas's concurrence in *Duncan*, see *supra* note 236, challenged the notion that incorporation requires identical guarantees in the federal and state criminal Justice systems. In short, eight Justices accepted the full application of the Sixth Amendment to *Apodaca*'s criminal prosecution, but they split evenly on its meaning. Thus, Justice Powell's adherence to a legal position thought to have been discarded had the effect of creating an anomalous result and a paradoxical view of constitutional law.

the answer is logically and inescapably inconsistent. Eight Justices believed that the Sixth Amendment applies equally in state and federal cases; five Justices believed that the Sixth Amendment requires federal juries to be unanimous; and five Justices believed that the Sixth Amendment does not require state juries to be unanimous. Each Justice agreed with two of these propositions and disagreed with a third. In keeping with Easterbrook's interpretation of Arrow's Theorem, the three propositions cannot all be correct as a matter of logic. Yet each proposition is correct as a matter of Supreme Court doctrine, which makes each proposition "law" to such important segments of society as state and federal judges, legal publishers, and bar examiners.

Easterbrook's theories of the inevitability of this kind of doctrinal chaos are not beyond dispute. Kornhauser and Sager's study of appellate decisionmaking suggests that a court of conscientious judges can avoid incoherence by deciding cases one at a time, thus avoiding the ranking of preferences, and by acting with a shared sense of the requirements of coherence.<sup>242</sup> This critique may be theoretically sound, but it is at odds with the reality that led to the problem in the first place. How can a judge avoid ranking preferences when that is an integral part of the process of weighing alternatives?<sup>243</sup> A common understanding of and commitment to coherence might minimize the problem, but it seems unlikely that such an understanding could exist in the face of the sorts of fundamental disagreements that result in paradoxical decisions.

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<sup>242</sup> Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 107 n.37 & 112-116 (1986); see also Rogers, *supra* note 208, at 467-68 (noting both views and suggesting that Kornhauser and Sager conclude that the Court can be consistent but not sensible).

<sup>243</sup> At bottom, this criticism seems to be that Easterbrook erroneously assumes that Justices vote separately on each issue. Kornhauser & Sager, *supra* note 242, at 115. It may be that Justices act in a more holistic fashion, as the authors suggest, and that they are sufficiently aware of the need for coherency to limit their freebooting. But on a closely split Court it takes only one free thinker to destroy coherency, as Justices Powell, Stevens, and Scalia have repeatedly proved. Perhaps more importantly, it would only cover up the tension. It may take no unusual degree of self-control for a Justice to rein in his or her individual views when they will make no difference in the outcome of the case before the Court. But it would be remarkable for Justices to do so in cases in which such voting would result in what they believe to be an erroneous judgment. This was Rogers's point—Justices almost always vote to affirm or reverse on their own analysis of a case, regardless of the views of a majority. Rogers, *supra* note 208, at 440. If Justices are going to reveal their own views in cases in which they make a difference, the only result of suppressing those views in other cases would be to fool the rest of the world about the likely outcome of Supreme Court litigation.

### C. *Theory and Reality in Affirmative Action*

The real relevance of public choice reflections on the judicial process is not in demonstrating the inevitability of Arrow's Theorem or any other form of jurisprudential deadlock. It is that the benefits of our appellate system—neither wholly British nor continental, based on precedent but not strictly bound by it, and sometimes dependent on the accuracy of inferences drawn from several different opinions—do not come without costs. Some of those costs relate to the difficulty of deriving a uniform vision of law. Affirmative action is one area in which these particular costs have been relatively high.

Equal protection cases generally, and affirmative action cases particularly, are likely to continue to present incoherency problems. Equal protection cases in general will do so because the Court must interpret and then apply the phrase "equal protection of the laws," which is certainly susceptible of more than two principled meanings, and probably more than nine. Affirmative action cases in particular will do so for two additional reasons. First, affirmative action is exceptionally controversial to the Justices, as it is to the general public. In this already sensitive area, the numerous issues that arise in affirmative action cases provide many opportunities for disagreement. Even if the Justices agree about many features of a program, they are likely to disagree sharply over others. For example, the Justices could agree that a remedial objective is worth pursuing, yet disagree about appropriate methods of achieving it. The Court is hampered in resolving such questions by the fact that the Justices seem to be unable to avoid the influence of their own policy views about affirmative action.<sup>244</sup> Whether it is *possible* to avoid such influence is a fair question, but it seems likely that the Justices have given in to the temptation more than is necessary or wise. Reliance on extra-legal values may not be troublesome when the values are shared both within the Court and between the Court and a clear majority of the public.<sup>245</sup> This appears to be the

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<sup>244</sup> This point is central to one criticism of the Court's general decisionmaking practices. Note, *Plurality Decisions*, *supra* note 154, at 1128. The author suggests that a key cause of the increasing number of plurality decisions is the Court's "value-laden 'substantive reasoning.'" *Id.* at 1128. Of course, whether this is good, bad, or inevitable is problematic. If all of the Justices could put their own policy views out of their minds *and* agree on the appropriate factors to consider in reviewing affirmative action cases, it is likely that clearer decisions would result. But in the absence of agreement on the relevant factors, agreement on the irrelevance of policy beliefs would probably do little to achieve coherence.

<sup>245</sup> The Note discussed in the preceding footnote suggests that such an agreement over values was evident in *Lochner v. New York*, 198 U.S. 45 (1905), and the era and doctrine that arose from it. Note, *Plurality Decisions*, *supra* note 154, at 1141. This seems incorrect. What made the doctrine so remarkable, and what accounts for its reputation in legal circles today, is the fact that the Court forced *its* substantive values on an unwilling society. See

case, for example, with respect to invidious racial discrimination.<sup>246</sup> Yet when agreement is impossible, and especially when the disagreements are as strong as they are on the subject of affirmative action, the tension within the Court is more likely to lead to digging opposing trenches than to building a common foundation.

Second, the Court appears to be committed to examining affirmative action plans under the tiers of review, a framework designed to respond to invidious discrimination. It may be that the use of tiers of review provides some protection from the corrosive effects of open disagreement over affirmative action as a matter of policy, but the artificial nature of the standards of review hinders rather than aids analysis when subtle and necessarily fact-laden issues are important. Whatever good results from the emotional distance provided by the tiers of review<sup>247</sup> is more than outweighed by the disadvantages of their

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David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910*, 52 U. CHI. L. REV. 324, 381 (1985) (accepting a role as “censor of the reasonableness of all laws”); Thomas Reed Powell, *The Judiciality of Minimum-Wage Legislation*, 37 HARV. L. REV. 545, 547–52 (1924) (setting out Supreme Court history to show that decisions denying regulatory authority were imposed by the personal beliefs of the Justices). That reputation may be overdrawn. Professor Tribe makes the usual criticisms of *Lochner* but notes that at the time the Justices’ views “were far from aberrant or peculiarly retrogressive.” TRIBE, *supra* note 9, at 568; *see also* Currie, *supra*, at 378–82 (arguing that *Lochner* imposed rigid scrutiny of economic legislation but that the Court did uphold much legislation). Attempts to draw a contemporary analogue are obstructed by the very substantive reasoning that the author identifies as the culprit. Aggressive judicial review of affirmative action can be criticized as *Lochnerizing* for its willingness to overturn decisions by politically elected officials. It can also be defended as distinct from *Lochnerizing* and instead premised on decades of careful judicial scrutiny of all race-based governmental action.

<sup>246</sup> There can be little doubt about *this* aspect of equal protection law, at least. Opponents of affirmative action often make a point of stressing opposition to invidious racial discrimination. *E.g.*, BORK, *supra* note 19, at 77 (“The end of state-mandated segregation was the greatest moral triumph constitutional law had ever produced.”); Devins, *supra* note 10, at 28–29 (“no one disagrees” that discrimination harmful to racial minorities is prohibited); Lee, *supra* note 34, at 275 (“there was simply no room for legitimate disagreement” on official racial discrimination); Reynolds, *supra* note 22, at 1007 (strong statement in opposition to racial inequality). Accordingly, there is no noticeable criticism of the Court when the Justices assume that invidious discrimination is reprehensible and allow this view to affect their opinions.

<sup>247</sup> Whether *any* good really results from the tiers is debatable. In an abstract sense, the tiers allow Justices to put their arguments into “process” form, thereby transforming merits arguments into “sufficiency of showing” arguments that allow the author of an opinion to imply that a different judgment might have resulted if the government had made a stronger (or, from the other side, weaker) defense of the law. Nevertheless, cases such as

wooden and inept design. The traditional tiers of equal protection review simply do not provide an appropriate methodology for examining intentional race-conscious governmental action that is benign rather than malign.<sup>248</sup>

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*Richmond* undermine the implication. It is hard to believe that most of the Justices voting to overturn the ordinance would have been persuaded to uphold it by greater evidence. *See supra* notes 77-79 and accompanying text. Of course, it would not take "most of the Justices" to reach a different result, as *Metro* proves, *see supra* notes 102-03 and accompanying text, and the majority in that case is equally suspect of using the standard of review to obscure the range of views within the Court. *See infra* notes 261-69 and accompanying text.

<sup>248</sup> This seems in part to result from the cross-signals that at least some forms of race-conscious action send. All racial classifications are potentially troublesome, if only because in the past invidious discrimination was occasionally justified by claims that it was protective or otherwise benign. For example, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court upheld Louisiana's requirement that railroad accommodations be segregated, noting that the state acted to preserve the peace and good relations between the races and not out of a belief in white supremacy. *Id.* at 544-552; *see also* *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("Traditionally, . . . [sex] discrimination was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal but in a cage.") (plurality decision); *cf.* *University of Cal. Regents v. Bakke*, 438 U.S. 265, 298 (1978) (protective barriers reinforce racial stereotypes); *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) ("A segregated admission process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions."). Moreover, racial Justice is necessarily rough. Whether or not overinclusion in affirmative action is really a serious problem, underinclusion plainly is, and some observers believe such programs impose a double hardship on those erroneously excluded. *See, e.g.,* Scalia, *supra* note 3, at 152-54 (many groups other than African Americans have suffered from discrimination). Actions to remedy past wrongs of racial discrimination nevertheless have highly appropriate purposes under ends/means analysis, and actions to benefit minority or other disadvantaged groups are not "suspicious" in the sense that courts must scrutinize governmental action to protect against prejudice or abuse by the political majority.

The two primary tiers of review, rational basis and strict scrutiny, are ill-equipped to deal with this ambiguous nature of affirmative action. The tiers were designed to respond to the far less ambiguous archetypes of routine legislative enactments and other actions apparently premised on improper motivations. Intermediate scrutiny therefore seems to be a logical alternative, as the *Metro* majority asserted. *But see supra* note 109 and accompanying text (suggesting that the majority's scrutiny was in fact less than intermediate scrutiny). Intermediate scrutiny, however, is less a tier of review than a conclusion that a case-by-case examination of the various factors for and against the governmental action is necessary. This seems to be Justice Stevens's approach, which may explain his willingness to support the intermediate scrutiny opinion in *Metro*. To the extent intermediate scrutiny is in fact a tier, it is appropriate in such cases. *See infra* notes 271-72, 283-84 and accompanying text.

The various opinions in *Richmond* and *Metro* exemplify two of the Supreme Court's methods of dealing with its inability to derive a coherent theory of constitutional interpretation. Each method uses a form of smokescreen. The first method is the false majority, in which a majority of the Court simply pretends that there is agreement that does not in fact exist. Here the Court in effect allows each decision to stand on its own, regardless of whether any doctrine emerges from the line of decisions. The second method is the overgeneralized conclusion, in which the Court talks at a level of abstraction that a majority does support, but which hides deep disagreements about the application of the general conclusion.

The first method is illustrated by the peculiar federal/state dichotomy that emerges from *Richmond* and *Metro*. Only one Justice seemed to believe that the Constitution distinguishes between state and federal authority in this area. Yet a plurality in *Richmond* and a majority largely made up of different Justices in *Metro* relied on that distinction to wrangle out from under inconvenient precedents.<sup>249</sup> The result was apparently overwhelming support that is non-existent in fact. The true plurality<sup>250</sup> of *Richmond* only seemed to become settled in *Metro*. As revealed by the dissents in that case, Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy recognized only the most narrow of distinctions, one that plainly would apply strict scrutiny to most federal affirmative action programs.<sup>251</sup> To these Justices, the distinction they accepted in *Richmond* was simply a device to justify deviating from *Fullilove*'s more accommodating approach. *Metro* provided another opportunity to limit *Fullilove* to its facts, but circumstances conspired to force this group of Justices to do so in dissent. The *Metro* majority, however, was not any more committed to the federal/state distinction. Justices Brennan, Marshall, and Blackmun have consistently urged the application of intermediate scrutiny to both state and federal programs.<sup>252</sup> In *Richmond* their dissent nowhere acquiesced in the majority's distinction, and in fact argued that the Richmond plan's similarity to the program upheld in *Fullilove* virtually proved the validity of the City's

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<sup>249</sup> See *Metro*, 497 U.S. 547, 563-66 (1990); *Richmond*, 488 U.S. 469, 486-93 (1989) (plurality opinion); *id.* at 521-24 (Scalia, J., concurring); *supra* notes 66-68, 104 and accompanying text.

<sup>250</sup> See *supra* note 192 and accompanying text.

<sup>251</sup> *Metro*, 497 U.S. 457, 602-10 (1990). Justice O'Connor's theme permitted no exceptions: "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications." *Id.* at 604.

<sup>252</sup> See, e.g., *Metro*, 497 U.S. at 564-65; *Richmond*, 488 U.S. at 535; *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 301-02 (1986); *Fullilove v. Klutznick*, 448 U.S. 448, 517-19 (1981); *University of Cal. Regents v. Bakke*, 438 U.S. 265, 359 (1978) (all three Justices, and occasionally Justice White, supporting use of intermediate scrutiny).



plan.<sup>253</sup> They would probably have preferred to overrule *Richmond*, but reliance on the distinction in *Metro* apparently allowed them to attract Justice White, whose vote was necessary to uphold the FCC's programs.<sup>254</sup>

In all likelihood only Justice White believed in the federal/state line.<sup>255</sup> The result is the same as in *Apodaca*, the unanimous jury trial case:

- (1) Eight Justices believed that the Equal Protection Clause applies equally to the federal and state governments;
- (2) five Justices believed that intermediate scrutiny applies to federal affirmative action programs;<sup>256</sup>
- (3) five Justices believed that strict scrutiny applies to state affirmative action programs.

As in *Apodaca*, each Justice agreed with two of these propositions but disagreed with a third, even though the three propositions cannot all be correct as a matter of logic. The federal/state line that arises from the second and third propositions is "the law." It prevails over the first proposition essentially because cases involve either federal or state programs, and therefore do not provide a vehicle for the Court to issue a holding on the first proposition.<sup>257</sup>

The Supreme Court's second method of obscuring inconsistency is to use

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<sup>253</sup> *Richmond*, 488 U.S. at 530-36. *Fullilove* is cited at various points in the dissenting opinion, often in direct response to the majority's questions about the ends/means fit of the racial set-aside. See, e.g., *id.* at 536 (noting that *Fullilove* found the interest to be sufficient); *id.* at 539 (noting the extent of the governmental justification required by *Fullilove*); *id.* at 543 (noting that *Fullilove* upheld Congress's conclusion that past discrimination caused racial imbalance in contracting).

<sup>254</sup> See *supra* notes 130-32 and accompanying text.

<sup>255</sup> Only Justice White joined opinions accepting the distinction in both cases. Justice White was also one of only two Justices not to issue an opinion in at least one of the cases (Chief Justice Rehnquist was the other). White's silence may weaken our confidence in his commitment to all of the words in the opinions he joined, but the absence of other evidence leaves us with no alternatives.

<sup>256</sup> Justice Stevens is placed in this second group. This distorts to some extent his unique "reasonableness" approach to all equal protection cases. See *Metro*, 497 U.S. at 601-02 & n.3; *Richmond*, 488 U.S. at 514-15 & nn.5-6; see also *supra* note 136 and accompanying text. Still, his analysis seems to be in effect the sort of case-by-case approach intermediate scrutiny requires, see *supra* note 48, and he did explicitly join the majority opinion in *Metro* that espoused intermediate scrutiny for federal programs. *Metro*, 497 U.S. at 602.

<sup>257</sup> Drawing the line between federal and state action in this regard is not always easy. *Fullilove*, after all, involved federal funding of construction by state and local governments. See *Fullilove*, 448 U.S. at 453-54. Cases after *Richmond* and *Metro* have upheld similar state set-asides under federal authorization. See, e.g., *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991); *Michigan Road Builders Ass'n v. Blanchard*, 761 F. Supp. 1303, 1313-15 (W.D. Mich. 1991).

abstractions to paper over the differences among the Justices. If the first method generates confusion because the Court has in effect reached a decision without majority support for a particular rationale, this second method generates confusion because the Court asserts a legal conclusion that is too general to be of much use in deciding cases.

In *Richmond*, for example, the Court concluded that the city's ordinance was invalid because it was not sufficiently tailored to a compelling governmental interest to withstand strict scrutiny.<sup>258</sup> It is likely that different Justices were concerned with different failings of the ordinance. For example, some Justices may have considered the city's failure to consider alternatives to be more troublesome than the harm to "innocent" third parties or the inclusion of groups not subject to past discrimination.<sup>259</sup> It may be that any one of these failings would have been enough to convince a majority to strike down the program, but it also may be that some or all were significant only in context with the others. The important point, however, is that one cannot tell from studying the decision because the majority used a totality of the circumstances approach to reach an abstract conclusion concerning the ends/means fit. The opinion employed nebulous terminology and then remarked on a number of aspects of the Richmond ordinance that one or more members of the majority found objectionable. Once each of five Justices found something to be objectionable enough to invalidate the program, a majority could conclude that the program was not necessary (or narrowly tailored) to a compelling government purpose, even if no two Justices found any single aspect to be objectionable. The majority support for the conclusion concerning narrow tailoring may, therefore, hide the fact that no majority agreed on the

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<sup>258</sup> *Richmond*, 488 U.S. at 498–511. Again, of course, only four Justices formally supported the last portion of this discussion. *See id.* at 470–73. But Justice Scalia's strong support of rigorous strict scrutiny, *see id.* at 520–21, 524–25, indicates that although Justice O'Connor's opinion speaks for only four Justices, its use of strict scrutiny makes it a false plurality. *See supra* notes 83–87 and accompanying text (Justice Scalia's views) and *supra* text accompanying note 190 (explanation of false plurality).

<sup>259</sup> Different Justices seem to be concerned about different aspects of affirmative action programs. *See, e.g.,* *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 489, 497–98, 499–500 (1986) (Justices White and O'Connor separately dissent, finding the affirmative action plan too rigid); *id.* at 500 (Chief Justice Burger and Justice Rehnquist dissent, emphasizing the fact that the program benefited individuals not themselves proven to be victims of the employer's discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281–83 (1986) (emphasizing the relevance of the burden imposed on "innocent" persons); *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1981) (Stevens, J., dissenting) (expressing concern about legislative attempts to remedy past discrimination). The various points the Justices identify as central largely track the various issues raised in such cases. *See supra* Part I.B.

significance of any particular aspect of the program. The lawyers reading *Richmond* do not know, and more importantly, those state and local officials charged with drafting affirmative action plans do not know, which aspects of the Richmond plan were most in need of correction, or if some aspects may be included in new plans that avoid other problems. In this sense, *Richmond* presents a constructive plurality, a majority opinion that in reality has the effect of a plurality opinion.<sup>260</sup>

This form of over abstraction is also present in *Metro*, with the same result. The Court's holding with respect to the standard of review<sup>261</sup> seems over confident given Justice Stevens's doubts on the use of any general standard of review.<sup>262</sup> A more accurate description of the views of the critical mass of five Justices would be: four Justices believed intermediate scrutiny applies to congressionally mandated benign race-conscious measures, and one more believed that the unusual nature of the FCC's diversity policies brings them "within the extremely narrow category of governmental decisions for which racial or ethnic heritage may provide a rational basis for differential treatment."<sup>263</sup> The general assertion that federal plans are subject to intermediate scrutiny also seems to misread Justice Stevens's attitude toward affirmative action. His dissent in *Fullilove* and explicit endorsement of forward-looking over backward-looking plans in both *Richmond* and *Metro* indicate that he would be reluctant to be so deferential to federal remedial plans.<sup>264</sup>

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<sup>260</sup> See *supra* note 193 and accompanying text.

<sup>261</sup> *Metro*, 497 U.S. 547, 564-65 (1990); see *supra* text accompanying note 102.

<sup>262</sup> See *supra* notes 136, 256 and accompanying text. Thus, Justice Stevens made it a constructive plurality. If he had declined to sign the majority opinion, which would seem to be an action more consistent with his views, that opinion would have been a plurality opinion. It would be an illegitimate plurality, see *supra* note 191 and accompanying text, as it would reflect Stevens's unwillingness to bend to *Fullilove* or to the use of the tiers of review in such cases. As it is, however, he was both a critical fifth member of a majority with which he disagreed in part, and the author of a doctrinal concurrence. His concurrence in *Richmond* was also doctrinal. Justice Scalia's concurrence in that case was both expansive and emphatic, and Justice Kennedy's concurrence was a limiting concurrence. See generally *supra* notes 200-04 and accompanying text.

<sup>263</sup> *Metro*, 497 U.S. at 601 (footnote omitted).

<sup>264</sup> See *Metro*, 497 U.S. at 601 (Stevens, J., concurring) ("I endorse this focus on the future benefit, rather than the remedial justification, of such decisions.") (footnote omitted); *Richmond*, 488 U.S. 469, 511-14 & nn.1-3 (1989) (Stevens, J., concurring) (noting difficulty of prescribing legislative remedies and variety of other appropriate justifications for race-based decisionmaking); *Fullilove v. Klutznick*, 448 U.S. 448, 540-41, 548-54 (1981) (Stevens, J., dissenting) (indicating an extremely skeptical attitude toward legislative remedies based on race); see *supra* notes 81, 115, 131 and accompanying text. One curious aspect of Justice Stevens's preference for forward-looking programs is that forward-looking

Finally, there are reasons to question the extent of the majority's agreement in applying the intermediate scrutiny standard. Much as the *Richmond* majority opinion set out the standard and then critically described aspects of the set-aside, much of the *Metro* majority opinion simply described aspects of the FCC policies that support the Court's general conclusion.<sup>265</sup> The extended analyses of the Commission's special responsibilities in governing use of broadcast frequencies, the constitutional difficulties of directly regulating broadcast content, the FCC's history of attempting to achieve diversity through other methods, the fact that the policies are flexible rather than rigid quotas, and the conclusion that few persons can be characterized as burdened, all add up to another totality of the circumstances test.<sup>266</sup> As in *Richmond*, it is virtually impossible to determine which, if any, of these factors was critical to the Court's conclusion. Given some of Justice White's prior decisions, it is likely that the extent of FCC authority over broadcasting and the minimal hardship were both important,<sup>267</sup> and taking Justice Stevens at his word, the utility of

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federal programs would seem to have the support of a majority of the 1990 Court, while remedial federal programs would not, even though it appears that all eight of the other Justices favored remedial justifications.

<sup>265</sup> See *Metro*, 497 U.S. at 566, 568-71, 574, 577-82, 586-96. Not surprisingly, both sides relied on law office legislative and administrative history; cf. *id.* at 610-12, 615, 618-19, 622-29 (O'Connor, J., dissenting). Each of these opinions wrongly implies that all of the factors pertinent to the Court's decision point in one direction. The sides disagreed about that direction, of course, and only in this fashion did the Court acknowledge that the need for and effectiveness of such programs are questions on which the Congress, the FCC, and the public are all closely split.

<sup>266</sup> These were the majority's conclusions. As suggested in the previous footnote, the dissenters sorted different facts and reached different conclusions. Two examples reveal the extent of the differences. First, the majority noted Congress's continuing supervision and the availability of review to ensure that the policies would be applied correctly and not maintained longer than necessary. *Metro*, 497 U.S. at 594-96. The dissenters argued that the FCC had never seriously reviewed its policies and that Congress had prevented its only attempt to do so. *Id.* at 625-28. Second, the majority found the burdens imposed by the policies to be minor and rarely imposed. *Id.* at 596-600. The dissenters found the burdens to be significant, noting that the distress sale program is closed to nonminorities and that race is dispositive in many comparative hearings. *Id.* at 630-31.

Open use of a totality of the circumstances test would not necessarily result in unanimous or even clear majority opinions, as such differences would remain. It would, however, make it easier for the Justices to describe what they were doing and for readers to understand the nature of the Court's response to affirmative action.

<sup>267</sup> Justice White generally acknowledges broad regulatory authority in the broadcasting area. See, e.g., *FCC v. League of Women Voters*, 468 U.S. 364, 402-08 (1984) (joining dissents supporting broad view of regulatory authority); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979) (authoring majority opinion generally supportive of

these policies and the absence of a stigma attaching to those disadvantaged were probably significant.<sup>268</sup> Justice White had the good sense to remain mute, and Justice Stevens's opinion overlapped very little with the majority opinion he signed.

But even if we knew the importance of the cited factors to these two Justices, we still would not know their importance to the other majority Justices. We do not know, for example, the importance to Justices Brennan, Marshall, and Blackmun of the FCC's attempts to reach its objectives through other means. Accordingly, we cannot gauge the Court's response to a federal program that met all of the factors except for consideration of other means. The same is true for each of the other factors. We know only two things: together, all these factors satisfied a majority of the Court, and the loss of support from any one of the Justices would mean that the law will be struck down, absent an uncharacteristic decision by one of the dissenters to adhere to *Metro*.<sup>269</sup>

#### IV. CONCLUSION

There are no solutions to the problem of inconsistency. If Judge Easterbrook is correct, incoherence is inevitable, but even if he is wrong, the fact that incoherence is so prevalent in certain settings but not in others suggests that it is not solely the result of thick-headed judges intent on imposing their world views on the nation. Nevertheless, some observations can be made about attempts to lessen doctrinal incoherence.

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broad authority despite denying power in the particular case); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (authoring unanimous opinion upholding fairness doctrine and prescribing broad authority over broadcasters).

Justice White also appears to be more troubled than most of his colleagues by affirmative action programs that impose hardships on innocent non-minorities. *See, e.g.*, *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 499-500 (1986) (dissenting in statutory case because the burden on innocent workers would be unfair); *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 531 (1986) (dissenting in statutory case because of hardship to white employees); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 294-95 (1986) (writing separately to note that racially conscious layoffs of innocent white teachers are unconstitutional).

<sup>268</sup> *See Metro*, 497 U.S. at 601 (Stevens, J., concurring); *Richmond*, 488 U.S. 469, 512, 516-17 (1989).

<sup>269</sup> The several changes on the Court since 1990 only exacerbate the problem of making predictions. With three members of the *Metro* majority now gone, it is unrealistic to assume that the Court will scrupulously honor its holding, let alone the implications of its analysis. Of course, one point of this article is that it would be just about as unrealistic even without any changes on the Court.

When in doubt, lawyers propose balancing tests.<sup>270</sup> Use of a balancing test to review equal protection challenges to affirmative action plans would provide some advantages. If carefully drafted, such a test could avoid equating invidious and benign discrimination, and it could also provide a more appropriate vehicle for evaluating the numerous pertinent factors that do not fit comfortably into means-ends analysis.<sup>271</sup> In the affirmative action area, for example, balancing would allow the Court to recognize and weigh the benign intentions underlying an affirmative action program without being compelled to sacrifice careful analysis of the specific facts giving rise to the program, which seems to be the case using the tiers of review. Balancing also makes it possible for courts to address factors that seem to have been overlooked or dismissed in most recent cases, such as the present disadvantages that result from past racism and the actual effects of using race-conscious classifications as opposed to race-neutral classifications. Balancing would also more accurately reflect what a majority of Justices now seem to be doing. Accordingly, it would allow

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<sup>270</sup> A number of recent articles address balancing as a tool of constitutional adjudication. *See, e.g.*, T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Frank Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. REV. 16 (1988); Robert F. Nagel, *Liberals and Balancing*, 63 U. COLO. L. REV. 319 (1992); Steven Schiffman, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293 (1992).

The easy criticism of balancing is that its lack of form permits judges (and scholars) to use balancing to justify any preferred outcome. *See infra* note 272 and accompanying text. Despite this evident danger, balancing provides an attractive model for constitutional analysis. In this complex area, in which so many factors seem to be pertinent to the judicial task, there may be no other way—let alone an effective way—to formulate the role of such factors than to place them into categories and describe the way the categories relate. This is more or less what most modern balancing approaches attempt to do.

<sup>271</sup> One example would be the purpose for implementing an affirmative action program. As it stands after *Richmond* and *Metro*,<sup>1</sup> the factors considered do not seem to reflect the shadings and particularities that exist in real life and governmental decisionmaking. In *Richmond* the working majority defined a very limited role for affirmative action, finding that societal discrimination could not provide a basis for such action and held the city to a high standard of proving past discrimination in the particular industry. *Richmond*, 488 U.S. at 493–506. The failure to meet that standard meant, in effect, that the city could not act in a race-conscious way, no matter how limited. Some form of balancing would allow the extent of societal discrimination and other, forward-looking, justifications to set the parameters of race-conscious action. Perhaps a rigid quota would not be appropriate absent the more specific findings demanded by the majority, but the Court's effective denial of any power to provide additional help to minority businesses in a state that refused to educate most of its African Americans old enough to manage a business is itself unduly rigid.

lower courts and litigants to describe the applicable decision process more correctly.

Unfortunately, the benefits of candor may be outweighed by the fact that balancing may be a large part of what has got the Court in its present fix. Balancing is likely to result in the same sort of unclear totality of the circumstances analysis that bedevils attempts to understand cases such as *Richmond* and *Metro*. Easterbrook dismisses balancing as useless: "[I]t is possible to prove anything you want with a kit of 'interest balancing' tools . . . ." <sup>272</sup> Balancing may still be appropriate in this or other areas, but it will not end incoherence.

What might minimize incoherence is what Henry Monaghan describes as a "transformative or longstanding precedent."<sup>273</sup> Such decisions take on the mantle of constitutional bedrock, nearly on the level of constitutional text and superior to other interpretative tools. *Brown v. Board of Education*<sup>274</sup> is the most noteworthy in the equal protection area.<sup>275</sup> Transformative decisions help to avoid incoherence for two reasons. First, they provide more specific content to the open-ended clauses of the Constitution. Second, they have legitimacy based on a nearly universal acceptance of their tenets.

Although a transformative precedent would greatly help affirmative action analysis, there is no way to manufacture one. Instead, such precedents arise through a series of events: all or most of the Justices agree on a decision (and its reasoning); they then issue an opinion that transcends the specific facts of

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<sup>272</sup> Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 781 (1990). Easterbrook describes balancing tests as both a mechanism to increase judicial authority relative to that of the legislatures, *id.* at 780, and "an increasingly common move that liberates the court from all semblance of rules," *id.* at 781. *See also* Zoelsch v. Arthur Anderson & Co., 824 F.2d 27, 32 n.2 (D.C. Cir. 1987) (describing balancing tests as "difficult to apply and . . . inherently unpredictable").

<sup>273</sup> Monaghan, *supra* note 163, at 724.

<sup>274</sup> 347 U.S. 483 (1954).

<sup>275</sup> It is noteworthy that although the decision is disputable in history and constitutional theory, *see, e.g.*, Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56-59 (1955) (the Equal Protection Clause was not intended to prohibit segregation); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 32-34 (1959) (the decision can be defended only on freedom of association grounds), it is strongly endorsed even by those generally hostile to broad readings of constitutional rights, *see, e.g.*, BORK, *supra* note 19, at 74-84 (generally approving the result). *But see id.* at 75 (a "great and correct" decision but a "very weak opinion"). Perhaps the most noteworthy transformative precedent is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *Marbury* is constantly questioned on historical and theoretical grounds, *see* TRIBE, *supra* note 9, at 25-26 & n.9, but no one takes seriously the notion that it should be overruled.

that case to elucidate a broader area; the Justices, lower courts, and attorneys<sup>276</sup> find that it works—that it allows them to derive and apply constitutional principles in a predictable and satisfactory manner. While it would be an overstatement to insist that such cases “just happen,” there seems to be no way to force one. The closest thing to a transformative opinion in the affirmative action area is Justice Powell’s opinion in *University of California Regents v. Bakke*,<sup>277</sup> which recognized a middle ground between a strict constitutional prohibition of race-conscious governmental action and an uncritical approval of rigid racial quotas.<sup>278</sup> The Powell opinion remains a major source of authority for opinions on all sides of the affirmative action debate because of Justice Powell’s sensitive analysis of the issues.<sup>279</sup> But an opinion signed by only one member of the Court cannot truly be a transformative precedent, especially when its reasoning can be applied in a number of different ways.

If the Supreme Court does develop a transformative precedent in the affirmative action area, it will probably be due to the deeply conservative nature of the present Court. From 1969 to 1991, each new member of the Court was more conservative than the Justice he or she replaced,<sup>280</sup> and the newer Justices tend to be the most opposed to affirmative action. Justices Brennan, Marshall, and White, three of the five Justices who voted to uphold the FCC’s programs, are now gone from the Court, and President Clinton’s appointees are not likely to change the direction on this issue for at least a few

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<sup>276</sup> The public also seems to play a role here. *Brown* became a transformative precedent in part because the majority of the public recognized the inequality of segregation and more and more came to see the need to transform society in this respect.

<sup>277</sup> 438 U.S. 265 (1978).

<sup>278</sup> *Id.*

<sup>279</sup> Justice Powell’s analysis recognized the various values potentially served by increasing the number of minority students, but also the substantial burdens caused by a rigid quota, including potential intangible harms that could unintentionally result. *Id.* at 305–15. Justice O’Connor’s majority/plurality opinion in *Richmond* relies on the Powell opinion in *Bakke* at several points, see *Richmond*, 488 U.S. at 493–94 (standard of review), 496–97 (permissible objectives), 505–06 (nature of equality guarantee), as does her dissent in *Metro*, see 497 U.S. at 619 (correlation of race and behavior). The Powell opinion is also central to the majority’s analysis in *Metro*, which cites Justice Powell’s recognition of the first amendment values served by diversity, 497 U.S. at 568, and the importance of limits on the program, *id.* at 596, 597.

<sup>280</sup> See generally Smith, *supra* note 158, at 318 and *passim*. All Supreme Court appointments from 1969 through 1991 were by Republican presidents. Even those Justices often characterized as liberal replaced more liberal Justices: Justice Blackmun replaced Justice Fortas, and Justice Stevens replaced Justice Douglas.



more years.<sup>281</sup>

Thus, *Metro* may become a historical anomaly, either overturned or narrowed to the limits of its unusual facts. Consistent decisions by the Court against affirmative action programs would not mean, however, that the decisions or the body of law that emerges would be coherent. That would occur only if the new anti-affirmative action majority were able to coalesce around a theory that would resolve future cases and avoid the development of law by shifting majorities—the law that results from the intersection of fundamentally inconsistent cases. To draw on Professor Kelman's metaphor, the Court can achieve this only if its soloists agree to perform in quintets.<sup>282</sup> They also must avoid the mush-majority of "totality of the circumstances" tests unless, (1) that is what a majority clearly believes is appropriate and, (2) the opinions are written so as to clarify the individual and contextual significance of each factor. The opposing majorities in *Richmond* and *Metro* could not or would not do so; as a result, their opinions said less with each word.

The biggest reason that even a monolithic Supreme Court will not put the affirmative action question to rest is that the Court has only the power to decide cases, not the power to end controversies. The Court might become internally consistent, issuing decisions based on understandable and coherent reasoning. But society does not have a coherent attitude toward affirmative action, and the Court can go only so far in helping it to achieve one. Thus, another way for the Court to look at the problem is to recognize the reality of profound societal disagreement and accept its own inability to come to a cosmic solution. Instead of basing decisions on a single theoretical premise, the Court should throw away its smokescreens, acknowledge its inability to be consistent on affirmative action, and try to decide each case that comes along as best it can.<sup>283</sup> This may be what some of the Justices have been trying to do,<sup>284</sup> but their attempts to fit

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<sup>281</sup> President Clinton's appointment of Justice Ruth Bader Ginsburg to replace Justice White is not likely to change matters, other than to change the number of Justices supporting the federal/state dichotomy from one to zero. Given the ages of the remaining Justices, it is likely that a conservative majority will prevail on the Court for another ten to fifteen years even if no more conservative Justices are appointed.

<sup>282</sup> Kelman, *supra* note 156, at 263.

<sup>283</sup> This would require using all available evidence and paying attention to every factor that is deemed by any reasonable observer to be relevant to the task. As Professor Farber suggests, "constitutional law needs no grand theoretical foundation," and is best interpreted with the help of "every tool that comes to hand." Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332 (1988).

<sup>284</sup> It certainly seems to be what Justice Powell was trying to do from *University of California Regents v. Bakke*, 438 U.S. 265, 319–20 (1978), through *Wygant v. Jackson Board of Education*, 476 U.S. 267, 269 (1986). It also seems to be the thread of Justice Stevens's opinions in the affirmative action cases. Justice O'Connor's fact-intense and

pragmatism into existing equal protection theory has both obscured the reality of the process and hindered the accomplishment of its goals. This is especially true when the Court uses strict scrutiny, for that test mandates substantial judicial intervention. Instead, the Court should rely on common sense and recognize that its inability to reach clear and consistent decisions suggests that it should be more deferential to other parts of government. This would probably result in more affirmative action programs surviving equal protection analysis, a fact that may be unacceptable to a majority of the present Court. But the Court's decisions to date evidence the complete failure of the logical application of grand theory, while the more experience-based actions of the other organs of government have not yet been proven to fail.

The message sent by the Supreme Court in the affirmative action area is uncertainty, with a resulting need for continual reappraisal. This is probably the most accurate message the Court could send,<sup>285</sup> even if it is not the one any of us individually would choose. The doctrinal disarray is frustrating but inevitable, given the arguments on the many issues that underlie the controversy. The incoherence of the Court's opinions may exacerbate doctrinal confusion, but on balance it may be good for our system of government. Incoherence creates more options for future cases, provides additional opportunities for courts to find "fair" solutions in individual cases, and engenders caution, at least by those Justices that recognize the futility of finding the one, true principle that decides every case. But most of all, the incoherence should not make us *or* the Court feel despondent. It is in the end better that the Court send multiple and confusing cross-messages in its cases than that it send a single, wrong message. And when lower court judges, professors, and lawyers criticize the Court for its ramblings, and when we berate ourselves for failing to understand the Court's attempts to reconcile its decisions, we can and should remember that most of the Justices agree with us.

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factor-rich analysis in *Richmond* is evidence of her support for such an approach, although the form into which it is applied, strict scrutiny, is at odds with this notion. Similarly, it seems to be consistent with the pro-affirmative action Justices, if only because they rely on intermediate scrutiny, which at bottom is a vehicle for case by case analysis.

<sup>285</sup> Cf. Novak, *supra* note 154, at 781 (plurality decisions indicate uncertainty and seek additional argument); Ray, *supra* note 153, at 813 (when no consensus exists, further study is better than an unsatisfactory compromise).