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Sounds of Silence: The Supreme Court and Affirmative Action

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SOUNDS OF SILENCE: THE SUPREME COURT AND AFFIRMATIVE ACTION

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I. INTRODUCTION

Judges "speak" in a variety of fashions, from addressing litigants or jurors in open court,[1] to making statements to the general public outside of the courthouse.[2] Arguably the most fundamental form of judicial speech is that contained in judicial opinions, where judges offer public justification for their decisions and help to maintain a self-governing society by enabling "We the People" to discern, critique, and debate the reasons given for judicial acts.[3] Opportunities to speak, however, can also be opportunities to remain silent. Language is the lifeblood of the law, but language is capable of diversion in lieu of focus, obfuscation instead of revelation. Moreover, the decision of what to say inevitably sacrifices other potentially significant considerations, perspectives, and issues which remain unspoken. When judges speak, there is also often judicial silence.[4]

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1. *See* Christopher N. May, *What Do We Do Now?: Helping Juries to Apply the Instructions*, 28 LOY. L.A. L. REV. 869 (1995).

2. *See* Erwin Chemerinsky, *Is It the Siren's Call?: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831 (1995); Gregory C. O'Brien, Jr., *Speech May Be Free, and Talk Cheap, but Judges Can Pay a Heavy Price for Unguarded Expression*, 28 LOY. L.A. L. REV. 815 (1995). One way in which judges "speak" that can easily go unnoticed is by their environments, sending signifying messages of authority and objectivity through their raised benches and colorless uniforms. For an examination of what judges communicate by their stark black robes, see James B. Zagel & Adam Winkler, *The Independence of Judges*, 46 MERCER L. REV. (forthcoming 1995).

3. *See* STEPHEN MACEDO, LIBERAL VIRTUES: CITIZENSHIP, VIRTUE, AND COMMUNITY IN LIBERAL CONSTITUTIONALISM (1990) (arguing that liberal democracy depends on norms of public justification and reason-giving by judiciary in particular, and government in general).

4. [Communication] is all about the production of ideas, images, and cultural representations, but it also selectively silences even as it creates. Like all artistic expression, it is a crafting process of production and negation, in the same way that a painting may involve choices to include yellow and blue while leaving out red and green.

Patricia J. Williams, Metro Broadcasting, Inc. v. FCC: *Regrouping in Singular Times*, 104 HARV. L. REV. 525, 537 (1990).

The Supreme Court's decisions on race-based affirmative action amply illustrate this phenomenon. If in the context of affirmative action the topics of race and America's racial history seem inevitable,[5] the Court has steered the constitutional conversation away from race and towards something else. If we explore the reasoning and rhetoric of the Court in three of the most significant affirmative action cases—*Regents of the University of California v. Bakke*,[6] *City of Richmond v. J.A. Croson Co.*,[7] and the recent decision in *Shaw v. Reno*[8]—we find that instead of talking about race and its role in American society, history, and constitutionalism, the Court diverts attention by placing *institutions* at the center of the debate. The Court analyzes the constitutional dilemmas of affirmative action predominately in terms of institutions. Throughout the cases the reasoning of the Court turns on how particular issues affect, distract, or fit into existing institutional arrangements and institutional practices. Race consciousness, when allowed, is permitted because of institutional reasons—that is, that result is dictated by the Justices' ideas and beliefs about various institutions in our society. How race-conscious policies and laws can be structured and implemented is also guided by the Court's institutional concerns and understandings. As a result the contours of constitutional doctrine on affirmative action are not determined by the demands of racial justice, but by the ability of racial preferences to fit into current institutional regimes.

The Court's emphasis on institutions in its reasoning and rhetoric instead of more explicit focus on racial considerations is problematic. Not only does the Court's reliance on institutional concerns obscure

5. This Article focuses on affirmative action primarily aimed to advantage blacks. The extensive and devastating subordination of blacks is unparalleled in American history, and thus lies at the heart of the affirmative action dilemma. Although focusing on blacks risks marginalizing other minority groups, few would deny that the experience of blacks is unique and deserves focused attention. *See* Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1072-73. Moreover, progress on the racial front will likely lead to substantial advancement with regard to other subordinated minorities.

Aspects of the analysis here would resonate to a certain extent with affirmative action for women, though the Court has tended to take a more deferential view of benign or compensatory gender classifications. *See, e.g.*, Califano v. Webster, 430 U.S. 313 (1977) (upholding Social Security benefit formula that extended greater benefits to females than to males on justification that law compensated for historical discrimination in wages). *But see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (invalidating nursing school admission policy favoring women applicants).

6. 438 U.S. 265 (1978).

7. 488 U.S. 469 (1989).

8. 113 S. Ct. 2816 (1993).

the central issues of race involved and of America's racial past inherent in the affirmative action controversy, but it also rests on unquestioned and unexamined premises. The Court presumes the institutions and institutional practices it defers to are neutral, natural, and necessary, failing to recognize how those structures are themselves the product of a contingent social context. The social environment in which institutions arise impinges upon and shapes those regimes and operations. Yet the Court bases its reasoning on idealized versions of American institutions, decontextualized from the real world of American experience. Consequently, the Court does not notice how the general attitudes of prejudice and racism in society infect and infiltrate the very institutions to which the Court defers. If racism has contaminated the structure and operation of institutions, then there is considerably less reason to accord them deference, at least in their current condition.

Emphasis on institutions in place of issues of race also causes the Court's reasoning to become entangled and incoherent, shifting from one case to the next as the Court becomes lost due to its effort to avoid the central issues of race involved in affirmative action. A close examination reveals that in each case the Court actually reasons from different premises, reorders its priorities, and betrays deep inconsistencies with the earlier affirmative action precedents. While consistently themed around the subject of institutions, the opinions continually reinterpret, reshape, and reconfigure the institutional moorings upon which earlier decisions were based.

The purpose of this Article is to show how the Court's most significant affirmative action decisions are guided by institutions and notions of institutionality, and to highlight the problems engendered by this approach. The Article carefully examines the lead opinions of *Bakke*, *Croson*, and *Shaw*, revealing the institutional discourses underlying them and the inconsistencies and illogics within them. To rebut the institutional arguments put forth by the Court, an alternative discourse centered explicitly on race is offered. This alternative discourse is not intended to be complete or uncontroversial. Rather it serves as a useful foil to dissect the Court's arguments and expose the premises that go unquestioned. The goal here is decidedly critical; I do not seek to resolve the issue of affirmative action's constitutionality or answer every conceivable question that could be raised.[9] The alter-

9. It may be that the debate over the legal status of affirmative action is "outmoded" with little hope of an edifying resolution because the debaters have reached an impenetrable deadlock and the political will to create race-conscious remedies is not strong enough

native discourse effectively highlights the logical flaws and incongruities of the Court's affirmative action decisions.

The argument proceeds as follows. Part II briefly considers the theoretical framework used to understand and categorize the cases, explaining in more detail what it means to say that the Court has emphasized "institutions" and "institutional concerns" in its reasoning. Part III analyzes the three affirmative action cases, probing to uncover the Court's reliance throughout on notions and understandings about institutions. This Part also underscores the problematic nature of analyzing affirmative action in terms of institutions by identifying the tensions created by institutional discourse and offering an alternative discourse that brings racial issues directly to bear. This alternative discourse critiques the Court's decisions by giving voice to a few of the things left silent by the Court's rhetoric and reasoning of institutionality.

II. TALKING ABOUT INSTITUTIONS

Affirmative action is essentially the use of race consciousness in a preferential manner intended not to stigmatize, but to provide a modicum of equality to members of those groups that historically have been the victims of discrimination and subordination. Affirmative action can take a variety of different forms, ranging from programs to hire more minorities at workplaces to multiculturalism in education and elsewhere.[10] Each takes into account race in an effort to promote racial equality in a society beset by racial inequity. Because affirmative action laws and policies purposefully consider race, some have challenged affirmative action adopted by government by asserting that racial classifications violate their constitutional rights to equal protection of the laws.

Over the past twenty years, the Court has considered several challenges to affirmative action under the constitutional guise of the Fourteenth Amendment's equal protection guarantee,[11] crafting a

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to support widespread affirmative action. *See* Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893 (1994). If this is true, then there may be no reason to continue making positive, as compared to critical, arguments regarding affirmative action's constitutionality.

10. *See* Charles Taylor, *The Politics of Recognition*, *in* MULTI-CULTURALISM AND "THE POLITICS OF RECOGNITION" 25 (1992) (discussing bases and consequences of politics of "equal recognition" wherein previously marginalized peoples are encouraged to assert their authentic identities).

11. The equal protection component of the Fifth Amendment's Due Process Clause, which has been read to be the substantive equivalent of the Fourteenth Amendment's

doctrine in which affirmative action can pass constitutional muster, though just barely and not too often. Three cases represent the major doctrinal events in the course of the Supreme Court's constitutional affirmative action jurisprudence.[12] *Regents of the University of California v. Bakke*[13] was the Court's first full consideration of affirmative action.[14] Justice Lewis Powell's solo opinion, announcing the judgment of the Court, applied strict scrutiny to racial classifications by the state and set the stage—the scenery, the actors, and the themes—for the Court's later treatment of race consciousness intended to benefit otherwise disadvantaged minorities. The Court coalesced a majority around the strict scrutiny standard in *City of Richmond v. J.A. Croson Co.*,[15] where Justice Sandra Day O'Connor's opinion for the Court reshaped the doctrinal foundations laid in *Bakke*. *Shaw v. Reno*[16] is the most recent and perhaps most revolutionary of the affirmative action cases, throwing open issues already settled by the earlier decisions. Taken together, these three cases—and their interpretations of other affirmative action precedents—establish the basic constitutional doctrine regarding race-based affirmative action adopted by the states. But it is an inconsistently developed doctrine, each case appearing to build on the others but in fact remolding earlier decisions and their arguments, and ultimately reformulating the constitutional status of affirmative action.

These cases establish the shaky foundations of affirmative action doctrine by focusing myopically on "institutions." In other words, the Court is led to a particular result at each doctrinal turn because of a concern with, or understanding of, one or more institutions in society. Institutions, simply defined, are structural organizations of rules and

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equal protection guarantee, governs affirmative action laws adopted by the federal government. *See* Fullilove v. Klutznick, 448 U.S. 448, 455 (1980).

12. Excluded from this discussion is affirmative action adopted by private employers, the legality of which is determined by reference to federal law—Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988 & Supp. V 1993)—not the Constitution. *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193, 197 (1979) (upholding private affirmative action plans). Federal affirmative action laws are not the central focus of this Article, but the role of Congress in affirmative action is explored through analysis of *Croson*'s interpretation of *Fullilove*. *See infra* notes 98-111 and accompanying text.

13. 438 U.S. 265 (1978).

14. Several years before *Bakke*, the Court refused to consider the constitutionality of the University of Washington Law School's preferential admissions program for members of racial and ethnic minorities, ruling instead that because the law school had admitted the white plaintiff subsequent to the filing of the lawsuit, the complaint was moot. *See* DeFunis v. Odegaard, 416 U.S. 312, 319-20 (1974).

15. 488 U.S. 469 (1989).

16. 113 S. Ct. 2816 (1993).

relationships that persist over time. They can be either "formal" or "informal." That is, they may have some formal official status in society as evidenced by an identifiable body and/or charter—for example, a corporation, a bureaucracy, or a branch of government. They may also arise informally out of culture or routine social interaction, such as rules of etiquette or language. We are mainly concerned here with formal institutions because they are the ones emphasized by the Court's reasoning and rhetoric.[17]

The Court's decisions revolve around four basic institutional concepts. The first is the existence of a *mandate* that requires race consciousness; only where the Court can say that the core mission of a particular institution is furthered by adopting affirmative action measures will race consciousness be constitutionally permissible. The second institutional concept the Court relies upon is *functionality*, the ability of an institution to carry out its mission in an effective manner. If affirmative action can be said to interfere with the operation of an institution, its practices, and objectives, then race consciousness will not be allowed to stand. Third, the Court shows a forceful concern for traditional institutional *decision-making processes*. Even where the Court allows race consciousness, the institution involved cannot enable race to corrupt the traditional way in which the institution has distributed burdens or benefits. Finally, understandings about the *symbolic role* of institutions in society influence the Court's reasoning. At times the Court reasons from the premise that institutional arrangements play an important role in shaping how we look at the world, and that institutions must therefore strive to maintain legitimacy in the eyes of the people—legitimacy that derives from adherence to traditional institutional procedures and practices. One of these four concepts controls the resolution of most of the significant issues the Court deals with in the course of deciding affirmative action cases, although the Court consistently reinterprets and reforms the institutional conceptions on which it relies.

17. My definition of "institutions"—formal or informal—does not purport to be complete. I seek only to capture the essential features to make use of the term understandable. For a more nuanced view of formal institutions, see Karen Orren & Stephen Skowronek, *Beyond the Iconography of Order: Notes for a "New Institutionalism," in* THE DYNAMICS OF AMERICAN POLITICS 311 (Lawrence C. Dodd & Calvin Jillson eds., 1994). In explaining the "impinging, interactive, and contingent character" of institutions, Orren and Skowronek describe other fundamental features of particularly political institutions. Among others, these features include purposiveness—how institutions are organized with reference to specific goals—and otherdirectedness—how institutions influence and control the behavior of people outside of the institutions themselves. *See id.* at 323-29.

The Court talks about a variety of different institutions and institutional settings. For instance, Justice Powell's opinion in *Bakke* turns fundamentally on his conceptions of two institutions: the judiciary and the university.[18] In *Croson*, the Court bases its reasoning on understandings of Congress as an institution, though the Court also emphasizes the institutional role of state agencies.[19] In *Shaw*, the institutional concerns guiding the Court are the electoral institutions of the states and the state legislative bodies.[20] What links these various settings is their institutionality—the way they are understood as organized, established structures in society with certain specified roles, regulations, and operating procedures.

In one sense institutional concerns are destined to influence affirmative action law because institutions tend to be the bodies adopting affirmative action measures. It is no surprise therefore that the Court talks about the university or the state legislature as institutions when dealing with race-conscious policies of universities or legislatures. What is surprising about the Court's decisions is the extent to which institutional concerns drive, not just influence, the Court's analysis.[21] Virtually every significant doctrinal point turns on an argument about institutions. Each question the Court asks—from what level of scrutiny should apply to how precedents should be interpreted—is answered by an implicit understanding or view of some institution and its practices.

Even if the breadth of the Court's reliance on institutions was not itself problematic, there are several reasons to condemn the dominance of institutions in the Court's reasoning. The Court tends to obscure significant racial considerations, such as the depth of America's troubled racial history and current pervasive inequality. Unspoken in the Court's decisions are the endemic social, political, and economic

18. *See infra* part III.A.

19. *See infra* part III.B.

20. *See infra* part III.C.

21. It is beyond the scope of this Article to test the nature and scope of institutions-oriented analysis in the entirety of equal protection doctrine. Yet, it might be helpful to indicate an area in which, by contrast, institutions do not play as overwhelming a role as they do in race-based affirmative action. A good example would be gender discrimination cases, where institutional concerns are peripheral to the central discussions of the Court regarding the relationships between the sexes. *See, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975) (discussing outdated conceptions of female role in society); Frontiero v. Richardson, 411 U.S. 677 (1973) (discussing relationship of husband and wife, and social stereotypes of women). This is not to say that institutional concerns never play a role in gender cases—far from it. *See, e.g.*, Rostker v. Goldberg, 453 U.S. 57 (1981) (emphasizing institutional needs of military). Institutional concerns in gender discrimination cases just do not dominate the way they do in race-based affirmative action cases.

inequalities that still beset our society, dividing us into virtually "two nations"—one white, one black.[22] Moreover, the experiences and perspectives of members of historically subordinated groups are not brought to bear in the decisions.[23]

Perhaps more disconcerting still is the superficial neutrality of current institutional arrangements. Deference to institutions as they presently operate in society is not called for when the institutions themselves are tainted by racism. Such deference may be similarly inappropriate whenever an institution or its practices serves to exacerbate racial inequality or perpetuate existing racial subordination. Yet the Court assumes the neutrality and impartiality of institutions without questioning its own premises. The Court often isolates the institution it analyzes from its real world context, abstracting an institutional ideal from the social reality in which the institution must operate. Yet, our institutions are enmeshed in a larger social fabric of attitudes and actions, whose strands impinge upon, restrict, and pattern institutional arrangements. As a result of the Court's idealized versions of institutions, it fails to notice the way racism and American racial attitudes influence some of those very institutions and challenge our allegiance to the traditional practices and features of institutional regimes.

The Court's focus on institutions also leads to inconsistent and incongruent results. Not only does the Court suddenly and surprisingly switch from one institution to another in its reasoning, but its understanding of what is important with regard to any particular institution or institutional practice also shifts from case to case. For instance, the Court's reasoning at one point may turn on the Justices' understanding of some institutional concept, such as the mandate of the body adopting affirmative action. Yet, in the next case the Court is liable to consider persuasive a completely different type of institutional mandate, or perhaps even ignore the existence of similar man-

22. *See generally* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) (detailing economic, educational, and wealth chasms between blacks and whites that mark American life). On the lingering effects of America's racial history, see Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 840-58 (1983).

23. Mari J. Matsuda has popularized the phrase "looking to the bottom" to describe a process of critically interpreting social phenomena from the vantage point of those who have been excluded historically from power, such as people of color and women. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324-26 (1987). Bringing to bear these perspectives helps to reveal the forms by which power relations in society are maintained. Just as essential is how such perspectives open up dialogues and help us better test our own beliefs about "truth." *See* Matsuda, *supra.*

dates altogether. As a consequence of such inconsistencies, the doctrine the Court has established is entangled in vines of the Court's own creation.

Although troublesome, the institutional orientation of the Court and the racial silences it encourages are not wholly incomprehensible. When the subject is race, silence can often be expected from judges and, indeed, from most Americans. We live in a society where speaking forthrightly about issues of race is often unacceptable as a matter of etiquette. Talking openly and honestly about race is taboo. Even though race is at the core of many legal and political dilemmas, such as affirmative action, a code of manners has developed that attempts to get beyond race by pushing it into the background. As with any code of etiquette, the etiquette of racial discourse imposes limits on what we can say and how we can say it, and ultimately what we think about and how we prioritize. Because of etiquette, silences and gaps when we talk about race are far too common.[24] But just as they are routine, they often go unnoticed and unexamined. Etiquette is most effective when it works on the level of the subconscious, shaping behavior even when we are not cognizant of it. When we have fully internalized the rules and codes of social relations, we begin to act upon them without any cognizance of our doing so. We cease to reflect on them, following them blindly, thereby entrenching and reproducing those forms of interaction and manners of expression.

The etiquette of racial discourse and the silences it produces arise in part out of white guilt and black suspicion. White Americans often attempt to avoid discussions of race out of a sense of shame for the sins of their forefathers and a desire not to offend. Even the most conscientious white person in a public place is likely to revert to a hushed whisper just to utter the word "black" if the subject of a black person's race comes up. Meanwhile, black Americans often harbor suspicions when whites do talk about racial issues, fearing the subconscious furthering of racist ideology by even well intentioned whites. It becomes "politically incorrect" for whites to discuss racial issues.

24. A poignant illustration of how we hesitate to talk about racial topics can be found in a recent issue of *The New Republic*, which included a symposium on the 1994 book *The Bell Curve* by Charles Murray and Richard Herrnstein. *See* Symposium, *Race & I.Q.*, NEW REPUBLIC, Oct. 31, 1994, at 4. Murray and Herrnstein concluded that differences in I.Q. between blacks and whites are genetic, raising the spectre of blacks being biologically "inferior" to whites. *The Issue*, NEW REPUBLIC, Oct. 31, 1994, at 9. Although hotly debated in the mass media, the subject caused the editors of *The New Republic* to write an apology for even discussing the book, despite the fact that the issue contained numerous scathing—and persuasive—attacks on the book and its theory. *Id.*

Though blacks may feel free to deal with race explicitly, both whites and blacks contribute to an environment where we as a society cannot approach racial issues with the type of openness and honesty necessary to resolve our racial dilemmas. Silence, or simply changing the topic, will not lead us to racial justice.

But no matter how much we might try, we cannot avoid completely the issue of race in America; our shared history sees to that. The disjunction between our aspirational political ethos of equality and freedom on the one hand, and our savage history of slavery and caste on the other, remains unresolved. Our society is still beset by endemic racial inequalities in terms of wealth, education, and political power.[25] Racial identity continues to carry with it an inhibiting stigma of inferiority. And, of course, the political and legal dilemmas involving race continue to ensnare us, constantly bringing race to the fore. When combined with a silencing code of racial etiquette, the dilemmas worsen for we are made to deal with racial issues by talking around them rather than addressing them head on. This is what appears to have happened to the Court; the Justices shape and contour constitutional doctrine on race-conscious affirmative action by placing institutions and institutional concerns instead of race at the center of the debate. It just may be that the Court is mirroring general societal trends, such as the code of racial etiquette, when it focuses on institutions.

III. AFFIRMATIVE ACTION, INSTITUTIONS, AND THE COURT

This part analyzes the reasoning of the Supreme Court in the core decisions on the constitutionality of state-sponsored affirmative action. It reveals how the Court's direction is influenced by conceptions of institutions and institutionality. Each of the three cases considered—*Bakke*, *Croson*, and *Shaw*—are taken up case-by-case in their historical progression. This approach reveals the specific steps in the Court's arguments, opening them up to critique and challenge by an alternative discourse emphasizing race and America's racial history. It also highlights the false evolution of affirmative action doctrine, illuminating where seeming continuities are in fact two ideas at odds or, at least, in disharmony. We will witness how institutional threads are woven throughout the doctrine, yet each seeming to change color and pattern depending on the particular case.

25. *See* HACKER, *supra* note 22, at 93-146.

A. *In the Beginning:* Regents of the University of California v. Bakke

All conversations on the constitutional doctrine of affirmative action begin with Justice Powell's solo opinion announcing the judgment of the Court in *Regents of the University of California v. Bakke*.[26] Justice Powell laid the groundwork for the doctrine with regard to standards of review, guiding principles, and fundamental concerns. It was Justice Powell who initiated the focus on institutions and first betrayed noticeable silences to more explicitly racial issues.

In *Bakke* the Court held unconstitutional the University of California at Davis (U.C. Davis) medical school's affirmative action plan, which provided racial and ethnic minority applicants[27] with a separate admissions procedure under which the school reserved a prescribed number of places in the entering class for disadvantaged minorities.[28] Alan Bakke, a white applicant whom the school had rejected two years in a row, filed suit alleging that the university violated the equal protection guarantee by not considering him for the reserved slots solely on the basis of his race.[29]

The first significant constitutional question Justice Powell addressed was the level of scrutiny that should apply under equal protection to the medical school's admission program.[30] Justice Powell argued that the strict scrutiny standard was appropriate for all race-based classifications, regardless of who was burdened or benefited by the classification.[31] To make this argument, Justice Powell first had to overcome Justice Harlan Fiske Stone's equal protection principle as envisioned in footnote four of *United States v. Carolene Products Co*.[32] Footnote four of *Carolene Products* created the framework for the Court's equal protection jurisprudence in the modern age by establishing varying levels of judicial scrutiny to specific types of legislative classifications. Although legislatures must always classify in

26. 438 U.S. 265 (1978).

27. The admissions policy stated that it applied to all "economically and/or educationally disadvantaged" applicants, not simply to racial and ethnic minorities. *Id.* at 272 n.1. The Court noted, however, that in practice only racial or ethnic minority applicants received recommendations through the separate admission procedure. *Id.* at 276.

28. *Id.* at 275.

29. *Id.* at 277-78.

30. Prior to reaching the constitutional question, Justice Powell addressed whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988), proscribed only those racial classifications violative of the Equal Protection Clause. *See Bakke*, 438 U.S. at 281-87.

31. *Bakke*, 438 U.S. at 295-99.

32. 304 U.S. 144, 152-53 n.4 (1938).

writing laws, Justice Stone wrote that some laws may deserve more scrutiny—or less deference—by the judicial branch than others.[33] Laws dealing with economic regulation ought to be subject to less judicial oversight than those which either limit fundamental political rights, such as the right to vote, or discriminate against "discrete and insular minorities,"[34] such as blacks. Subjecting laws discriminating against blacks to exacting scrutiny is motivated by the recognition that such a discrete and insular minority is likely to lack sufficient political representation in government to safeguard its interests against majoritarian abuse.[35] Of course whites are neither discrete nor insular, tending to dominate the political process rather than be victimized by it. Consequently, under the *Carolene Products* rationale, laws discriminating against whites, such as U.C. Davis' affirmative action plan, ought not receive strict scrutiny but some level of judicial review that is more deferential to the legislature.[36]

Justice Powell avoided *Carolene Products* by giving voice to institutional concerns. Justice Powell's rejection of the *Carolene Products* rationale turned on his concern for the smooth operation of the judiciary as an institution. Justice Powell argued that if the Court upheld Justice Stone's theory, judges would not be able to perform adequately their institutional duty or function—competently adjudicating cases and controversies. "[C]oncepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments"[37] beyond the capacity of judges to classify and to distinguish. Such concepts are inherently "transitory,"[38] fluid, and subject to change as populations shift and political power is continuously reorganized. As a result, he said, judges would have to make difficult choices relying on nothing more than the "ebb and flow of political forces"[39] in order to stay within the theory of *Carolene Products*. "The kind of variable sociological and political analysis necessary" to determine who is a "minority" under Justice Stone's approach "simply does not lie within the judicial competence."[40]

Justice Powell's institutional argument is striking in its silences. If opinions took pictorial form, this one would be of a desert landscape,

33. *Id.*
34. *Id.*
35. *Id.*; *see* JOHN HART ELY, DEMOCRACY AND DISTRUST 151 (1980).
36. *See* ELY, *supra* note 35, at 170.
37. *Bakke*, 438 U.S. at 295.
38. *Id.* at 298.
39. *Id.*
40. *Id.* at 297.

in which the power and social status of the races are constantly shifting dunes of sands. Constructions of "majority" and "minority" represent the power arrangements of a brief moment in time, which will most certainly be lifted and transformed come the next, inevitable gust of wind. But this image does not conform with the historical reality of racial categories in America, where racial subordination has been characterized by an unmistakable rigidity and inflexibility. Historically blacks have been a deeply oppressed minority, with never more than a token share of social, economic, and political power. While the white Anglo-Saxon majority has certainly grown at the margins to incorporate white ethnics,[41] the dominant white majority has stubbornly resisted the full inclusion of blacks. If the sands shift in some places, in others they barely budge. The durability of American racial subordination undermines Justice Powell's fear of shifting sands.

Even if the sands did shift significantly over the long term, Justice Powell's concern for the institutional competence of judges to keep up with such "transitory" moments was at odds with a sentiment he expressed earlier in the opinion when addressing how to interpret Title VI, but to which he suddenly became silent. Just a few pages before, he stated:

> The concept of "discrimination" [under the language of Title VI], like the phrase "equal protection of the laws," is susceptible of varying interpretations, for as Mr. Justice Holmes declared, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[42]

Here, the problem of dynamic social and linguistic phenomena was embraced by Justice Powell, reflecting a nuanced view of transition, change, and the judicial function. Justice Powell conceded that part of the basic requirements of being a judge was the ability to keep up with changing interpretations and meanings of legal concepts and ideas. Justice Powell's treatment of "discrimination" or "equal protection" as distinct from the "concepts of 'majority' and 'minority' " is without justification. It makes little sense to say that judges are incapable of assessing which groups in society have suffered pervasive discrimina-

41. Some of these white ethnic groups, such as Irish and southern and eastern European immigrants who came to America around the turn of the twentieth century, faced harsh, quasi-racial discrimination when they landed on our shores. *See* RONALD TAKAKI, A DIFFERENT MIRROR 146-54, 277-310 (1993).

42. *Bakke*, 438 U.S. at 284 (quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)).

tion, yet they can effectively keep up with the even more subjective "living thought" of what equal protection means. Indeed, the Court's view of equal protection has changed radically over the past century—beginning in powerless dormancy and growing to constitutional vibrancy[43]—during which time the racial composition of the "majority" has remained mostly static.

Justice Powell's concern for institutional functionality in terms of judicial competence was also evidenced in his analysis of gender classifications. Although he stated at one point that a theoretical understanding of equal protection guided his choice of standard of review, according to which no person or "special wards [are] entitled to a degree of protection greater than that accorded others,"[44] he later strayed from this position and enhanced his institutions-based reasoning. When faced with the fact that under recent Supreme Court decisions gender classifications received special treatment in the form of "intermediate" scrutiny[45]—less than strict, but more than deferential rational basis—Justice Powell said the same are "less likely to create analytical and practical problems" for the judiciary such as those posed by the majority/minority distinction.[46] As a result gender classifications are "relatively manageable for reviewing courts."[47] The key for Justice Powell was not a theoretical adversity to "special wards," but rather the ability of the institution of the judiciary to handle the relevant classification in the performance of its tasks.

If Justice Powell defeated Justice Stone's theory of judicial review from *Carolene Products*, his victory did not in itself provide a positive

43. The Fourteenth Amendment's guarantee of equal protection was "strangled in infancy by post-civil war judicial reactionism." *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of Laws*, 37 CAL. L. REV. 341, 381 (1949). Fifty years after the ratification of the Fourteenth Amendment, Justice Oliver Wendell Holmes was able to characterize equal protection as "the usual last resort of constitutional arguments." *See* Buck v. Bell, 274 U.S. 200, 208 (1927). In the postwar era the Court breathed life into the Equal Protection Clause, and now commentators can correctly say that "the equal protection guarantee has become the single most important concept in the Constitution for the protection of individual rights." *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 568 (4th ed. 1991).

Justice Powell was obviously aware of the shifting sands of constitutional equal protection; indeed, he mentioned the various stages in equal protection's history. *See Bakke*, 438 U.S. at 291-92. Hence his reluctance to trust judges to determine who constitutes a minority or a majority is all the more surprising.

44. *Bakke*, 438 U.S. at 295.

45. Califano v. Webster, 430 U.S. 313, 317 (1977); Craig v. Boren, 429 U.S. 190, 197 (1976).

46. *Bakke*, 438 U.S. at 302-03.

47. *Id.* at 303.

justification for applying heightened scrutiny to the medical school's affirmative action program. Justice Powell proposed a positive reason for strict scrutiny, but it revolved around institutional concerns, more specifically the symbolic role of governmental institutions. He argued: "*All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. . . . [And they will] be perceived as invidious."[48] "One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies,"[49] racial classifications by the government. What Justice Powell implied was that institutions need to be seen as legitimate by the people, and if institutions appeared to favor one race over others, institutions would lose their legitimacy. Different treatment by the state works a symbolic harm onto those burdened, inciting them to anger and resentment.

No doubt Justice Powell articulated a truth about race relations in America and about the role of institutions in society. Many whites do feel "deep resentment" of affirmative action plans that distribute benefits on the basis of race or ethnicity.[50] This is due to the fact that people derive and create meaning, in part, through institutions. In other words, people shape their own identities based on the institutional regimes and practices that surround them.[51] A voter, for example, may feel that she is an empowered, respected individual with equal dignity on account of fair and democratic electoral institutions.[52] State institutions in particular may have strong symbolic content because people often judge their place in the general society by the proxy of their involvement in governmental institutions.[53] In this regard Justice Powell was correct; institutions do have important symbolic roles, particularly state institutions.

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48. *Id.* at 294 n.34 (emphasis omitted).

49. *Id.*

50. On the role of "white resentment" in shaping Justice Powell's opinion, see Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1047-48 (1979).

51. *Cf.* DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 251-65 (1990) (analyzing how institutional practices of criminal punishment convey and reinforce cultural meanings); Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 367-78 (1993) (describing way that electoral institutions "regenerate and reaffirm certain cultural meanings and concepts which are impressed upon and absorbed by [voters]").

52. *See* Winkler, *supra* note 51, at 375.

53. One of the reasons this may be is the special charisma that attaches to governmental institutions and actors. *See, e.g.*, CLIFFORD GEERTZ, *Centers, Kings, and Charisma: Reflections on the Symbolics of Power*, *in* LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 121-46 (1983); EDWARD SHILS, *Charisma, Order, and Status*, *in* CENTER AND PERIPHERY: ESSAYS IN MACROSOCIOLOGY 256-75 (1975).

Yet even so, Justice Powell's analysis was only partial and incomplete. Justice Powell was silent as to how many members of racial and ethnic minorities feel about the unfairness and symbolic illegitimacy of governmental institutions as currently constituted. Specifically, state institutions presently lack legitimacy in many minorities' eyes because institutional officeholders remain overwhelmingly white, with only token minority contingents.[54] Unless institutions become more representative of the diverse society in which they operate, they will not be considered "fair" by racial minorities. Justice Powell, by his silence to how blacks, for example, might perceive institutions, sacrificed their desire and need for legitimate institutions to calm white emotions and sentiments.[55]

Led by these institutional concerns, Justice Powell applied strict scrutiny to the U.C. Davis medical school's affirmative action plan.[56] Justice Powell's analysis of the first prong of strict scrutiny—determining whether the state has a "compelling" end to justify its program—relies on notions of institutions and institutionality. The university justified its affirmative action plan by asserting a remedial interest in "countering the effects of societal discrimination."[57] Justice Powell, however, dismissed this interest as "an amorphous concept of injury,"[58] insisting instead that to justify a remedial affirmative action plan, there must be

> *judicial, legislative, or administrative findings* of constitutional or statutory violations. After such findings[,] . . . the governmental interest in preferring [minorities] . . . is substantial . . . . In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight . . . .[59]

Justice Powell thus limited the availability of remedial affirmative action to instances where governmental institutions have made specific

54. *Cf.* HACKER, *supra* note 22, at 122 (discussing lack of legitimacy of overwhelmingly white societal institutions in eyes of many minorities); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 707 (describing lack of legitimacy of white institutions of higher education).

55. Perhaps Justice Powell was silent to the perspectives of racial minorities merely for strategic reasons, aiming to make "diversity" palatable to the dominant white majority. If so, the strategy is flawed, even if it appears to make race-consciousness more politically acceptable. *See infra* notes 217-26 and accompanying text.

56. *Bakke*, 438 U.S. at 291.

57. *Id.* at 306.

58. *Id.* at 307.

59. *Id.* at 307-08 (emphasis added) (citations omitted).

"findings," through appropriate institutional procedures, of past discrimination. In essence there is no discrimination to remedy unless and until some proper institutional body—the judiciary, legislature, or administrative agency—makes authoritative findings of discrimination. A particular state institution, such as the university, lacks the capacity to undertake remedial efforts if a general governmental body already charged with remedial powers does not order such action and define the scope of the remedial effort. "[I]solated segments of our vast governmental structures are not competent to make those decisions . . . ."[60]

Again, affirmative action was not acceptable because of the challenges it posed to institutional functionality, reflected in the notion of the "competen[ce]" of "governmental structures." Whereas earlier he expressed a concern for the institutional competence of the judiciary, the dominant concern here was the institutional competence of the state agency or body adopting affirmative action to be able to detect, gauge, and remedy the effects of racial discrimination. Even when a remedial purpose was possible without interfering with institutional functionality—for example, where there are specific findings of discrimination in violation of the law—Justice Powell insisted on "oversight" by other governmental institutions of the remedial policy's implementation, evidencing even further dependence upon institutional concerns.[61]

In rejecting the state's interest in remedying "general societal discrimination," Justice Powell was silent to the interrelatedness of widespread cultural attitudes and institutional discrimination. In American history, racist cultural ideology has worked to establish and maintain an entire system of racial inequality, excluding blacks and other ethnic minorities from many educational, economic, and political opportunities. Though slavery and Jim Crow have been eradicated, the underlying ideology and world-view that enabled these forms of subordination to arise have not simply perished.[62] Many whites continue to harbor often unrecognized cultural understandings about blacks that breed assumptions of black inferiority and perpetu-

60. *Id.* at 309.

61. *See id.* at 308.

62. HACKER, *supra* note 22, at 14, 20-21. As Justice Marshall pointed out in his opinion, the Court has often played a substantial role in perpetuating racist ideology and racial subordination. *See Bakke*, 438 U.S. at 387-94 (Marshall, J., concurring in part and dissenting in part).

ate inequitable treatment.[63] "Most blacks have to overcome, when meeting whites, a set of assumptions older than this nation about one's abilities, one's marriageability, one's sexual desires, and one's morality."[64] The ideology of black inferiority results in a range of harms, from the routine, relatively mild annoyance of taxicab drivers skipping black fares[65] and salespeople paying "special" attention to black customers,[66] to the more devastating residential segregation that results from "white flight"—the phenomenon whereby once approximately ten to twenty percent of a traditionally white neighborhood is populated by blacks, whites move out in large numbers.[67] Such unconscious racial understandings deeply affect how even the most well-meaning whites treat blacks in daily life and, of course, in particular institutional contexts, such as the workplace, the church, or the school. It is undeniably true that general societal discrimination may at times be amorphous in its manifestations. But when we see distinctive patterns of activity that correlate to racial identity—such as the endemic disparity in minority representation in the professions[68]—coupled with America's profound racist history, we know that race is playing a significant, if not dominant, role in maintaining inequality. Silent to the prevalence of negative cultural attitudes about race, Justice Powell required specific institutional "findings"[69] of violations of the law to justify any state effort to help blacks achieve an already elusive equality.

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63. *See generally* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987) (discussing relationship between unconscious racial stereotypes and racially discriminatory practices).

64. T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1066-67 (1991).

65. HACKER, *supra* note 22, at 20.

66. *See* Regina Austin, *"A Nation of Thieves": Securing Black People's Right to Shop & to Sell in White America*, 1994 UTAH L. REV. 147, 148-51.

67. HACKER, *supra* note 22, at 36-38. White flight is discussed further at *infra* note 213 and accompanying text.

68. HACKER, *supra* note 22, at 110.

> When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. A Negro male who completes four years at college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. Although Negroes represent 11.5% of the population, they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors.

Bakke, 438 U.S. at 395-96 (Marshall, J., concurring in part and dissenting in part) (footnotes omitted).

69. *Bakke*, 438 U.S. at 307.

If Justice Powell's extensive focus on institutions tends to obscure rather than expose the real life status of the races in America, his opinion should be recognized for how it provides the doctrinal foundation for affirmative action plans to pass constitutional muster. Justice Powell accomplished this by holding that some racial classifications can serve compelling governmental interests, and hence affirmative action may be able to survive the demanding test of strict scrutiny.[70] This is no small achievement in light of the fact that only once has a state law been able to withstand this exacting form of judicial review under equal protection.[71] Professor Gerald Gunther once famously remarked that the strict scrutiny standard is " 'strict' in theory and fatal in fact."[72] Yet Justice Powell found the medical school's interest in creating a diverse student body sufficiently compelling to warrant, at least theoretically, the use of race as a factor in the admissions process.[73]

Justice Powell found diversity a compelling interest because it could be tied to institutional concerns, namely the university's institutional mission or mandate. Justice Powell agreed with the medical school's argument that part of the mission of the university is to provide a student body comprised of diverse people with different backgrounds and experiences, each contributing to the robust marketplace of ideas necessary in the academic arena.[74] Quoting Justice Felix Frankfurter, Justice Powell stated, " '[I]t is *the business of a university* to provide that atmosphere which is most conducive to speculation, experiment and creation.' "[75] Echoing Justice Oliver Wendell Holmes's famous dissenting opinion in *Abrams v. United States*,[76] Justice Powell crafted an image of the university as the heart of the marketplace of ideas from which the discovery of "truth" is made possible by dialogue inclusive " ' "of a multitude of tongues," ' "[77] each with its

70. *Id.* at 320.

71. *Cf.* Korematsu v. United States, 323 U.S. 214, 216, 223-24 (1944) (holding internment of Japanese-Americans during World War II constitutionally permissible under strict scrutiny).

72. 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).

73. *Bakke*, 438 U.S. at 311-12.

74. *Id.* at 312-13.

75. *Id.* at 312 (emphasis added) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

76. 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting) (articulating marketplace of ideas metaphor to justify First Amendment guarantee of freedom of speech).

77. *Bakke*, 438 U.S. at 312 (quoting Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

own accent and insight. Justice Powell took notice of the fact that wide exposure to different ideas and people—diversity—is part of any university's inherent educative mandate.[78]

In recognizing racial identity as a proxy for diversity of experience and perspective, Justice Powell articulated a realistic view of the different life experiences of blacks and whites in America. The perspectives of the stigmatized "Other" are valuable and deserve expression in the formative arenas of education.[79] By including the views of subordinated groups in academic life, all students will benefit. According to the language of strict scrutiny, diversity is a compelling governmental interest. And in light of Justice Powell's clear conclusion that the U.C. Davis medical school had no interest in remedying discrimination, either of a general nature—"too amorphous"—or of a particular one—no findings of specific discriminatory practices—this integrational purpose passes the first prong of strict scrutiny even where there is no remedial motivation whatsoever.

If Justice Powell offered a realistic understanding of diversity, his reach was limited by the institutional notions guiding him. He found the medical school's admissions plan unconstitutionally overbroad because it reserved a specified number of seats in the entering class only for minority candidates.[80] Race consciousness would only be permissible, it seems from Justice Powell's reasoning, when it could fit comfortably into the traditional institutional procedures for decision making. According to Justice Powell, race could be used as a plus factor in screening applicants[81] in the same way a university used other traditional, nonquantifiable factors to rate candidates and insure academic diversity beyond test scores and grade point averages, such as "exceptional personal talents, unique work or service experience,"[82] "demonstrated compassion,"[83] " 'geographic origin[,] or a life spent on a farm.' "[84] Justice Powell here was deeply wrong; the daily experience of being a member of a stigmatized minority is not equivalent to a summer job or an ability to play the piano. Ignoring this error, we can still see the institutional orientation of Justice Pow-

78. *Id.* at 312-13.

79. *Id.* at 312-13 n.48 (citing Princeton University president's description of benefits derived from diverse student body).

80. *See id.* at 319-20.

81. *Id.* at 317-18.

82. *Id.* at 317.

83. *Id.*

84. *Id.* at 316 (quoting with approval Harvard College's diversity-in-admissions program).

ell's reasoning. Justice Powell reduced race to a plus factor in order to make it "fit in" with the existing decision-making procedures of the university. Race is brought down to the level of work experience because that is a level with which the institution is familiar; race consciousness is only acceptable if it can be envisioned as a normal "factor" akin to those traditionally used in the usual institutional procedures. Any more substantial consideration of race would be a deviation from historical decision-making practices and therefore unwelcome.

Justice Powell's acceptance of traditional decision-making procedures comes without his having questioned or challenged the objectivity and neutrality of such procedures in their real world operation. If Justice Powell searched beyond the surface of university admissions procedures, he would find that the decision to admit or reject an applicant often rests on "factors" or "qualifications" other than test scores and personal experiences that are not tied to academic diversity or a robust exchange of ideas. As Justice Blackmun noted in his opinion, universities have long "given conceded preferences up to a point to those possessed of athletic skills, to children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful."[85] It is thus "somewhat ironic" for Justice Powell to be "so deeply disturbed over a program where race is an element of consciousness."[86] Justice Powell failed to reflect on this real-world context, crafting and maintaining an institutional ideal—a vision of the institution of the university abstracted from the social environment in which it operates.

B. Firming Up the Institutional Foundations? City of Richmond v. J.A. Croson Co.

Justice Powell's opinion in *Bakke* first set forth the possibility that racial classifications in the context of affirmative action would be subject to strict scrutiny. But his was a solo opinion, and although he announced the judgment of the Court, the Justices were deeply divided over which equal protection standard should apply. Some disagreed with Justice Powell's view that strict scrutiny ought to apply to affirmative action and instead argued for a middle-tier approach that would be more deferential to the state governments in their efforts to

85. *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring in part and dissenting in part).
86. *Id.*

remedy discrimination against minorities.[87] It was not until *City of Richmond v. J.A. Croson Co.*[88] that a majority of Justices agreed on the strict scrutiny standard and cemented that standard into controlling constitutional doctrine.[89] *Croson*'s reasoning is also led by institutional concerns related to those first articulated by Justice Powell in *Bakke*, but the *Croson* Court revised and reshaped the content of the institutional notions invoked.

Richmond's city council adopted an affirmative action plan presumptively requiring thirty percent of all city construction contracts to be subcontracted out to Minority Business Enterprises (MBEs).[90] The law was motivated by the stark fact that despite comprising fifty percent of the city's population, blacks—via the proxy of minority-owned firms—only received 0.67% of the city's prime contracting business in prior years.[91] Finding no evidentiary showing of "constitutional or statutory violation by anyone in the Richmond construction industry,"[92] the Court, per Justice Sandra Day O'Connor, held the law unconstitutional. Without an identifiable history of discrimination against the advantaged minorities within the particular industry, the state lacked a sufficiently compelling remedial purpose to justify its plan under strict scrutiny.[93] Even if a sufficient remedial purpose had existed, the Court stated that the rigid numerical quota was unconstitutionally overbroad because it did not contain a waiver provision which would allow whites to obtain city contracts in the event that MBE bids were artificially high.[94]

Justice O'Connor's analysis of strict scrutiny begins and ends with institutional concerns. Since *Bakke*, the Court had wavered between standards in the few affirmative action controversies it faced, so that it was not clear from precedent which standard applied. Chief Justice Burger explicitly refused to characterize his adopted standard as strict

87. This was the approach suggested by Justices Brennan, White, Marshall, and Blackmun, who concurred in part and dissented in part in *Bakke*. *See id.* at 359 ("[R]acial classifications designed to further remedial purposes ' "must serve important governmental objectives and must be substantially related to achievement of those objectives." ' ") (quoting Califano v. Webster, 430 U.S. 313, 317 (1977) (quoting Craig v. Boren, 429 U.S. 190, 197 (1976))).

88. 488 U.S. 469 (1989).

89. *Id.* at 493.

90. *Id.* at 477-78.

91. *Id.* at 479-80.

92. *Id.* at 500 (emphasis omitted).

93. *Id.* at 505.

94. *Id.* at 507-08.

scrutiny in his *Fullilove v. Klutznick*[95] opinion upholding a minority set-aside law for federal contracting.[96] Then, a controlling plurality of Justices applied strict scrutiny to reject an affirmative action plan in *Wygant v. Jackson Board of Education*.[97] In each of these cases, the Justices vigorously debated which level of equal protection scrutiny should apply to affirmative action controversies.

Justice O'Connor began in a position similar to Justice Powell's in *Bakke*; she first had to defend the Court's choice of the strict scrutiny standard. But her analysis rests on different institutional concerns and in some ways turns Justice Powell's analysis on its head. If Justice Powell had to overcome Justice Stone's equal protection theory of *Carolene Products*, Justice O'Connor had to find a way around the *Fullilove* decision, where the Court affirmed the constitutionality of a federal MBE set-aside program similar to the one adopted by the Richmond city council. Justice O'Connor distinguished *Fullilove* by characterizing Chief Justice Burger's choice of standard as intermediate scrutiny, a deferential form of review applicable, according to Justice O'Connor, only to affirmative action laws adopted by Congress, and not to those adopted by the states.[98] The basis for her distinction was institutional: Congress has a different institutional mission than the state governments regarding the pursuit of racial equality.[99] " '[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress,' "[100] she stated. "Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce"[101] the promise of equal protection and pursue race-conscious affirmative action. That mandate was the enforcement power embodied in Section 5 of the Fourteenth Amendment, which gave Congress an identifiable charge to remedy America's racial injustices by establishing that Congress had a specific obligation to enforce the guarantees of equal protection and due process.[102] The constitutional amendment made the goal of achieving racial equality part of the institutional mandate of Congress; it revised Congress' charter, the Constitution itself. Lacking this remedial mandate, states that attempt to remedy racial injustice will find their race-

95. 448 U.S. 448 (1980).
96. *Id.* at 492.
97. 476 U.S. 267 (1986).
98. *Croson*, 488 U.S. at 486-91.
99. *Id.* at 490-91.
100. *Id.* at 488 (quoting *Fullilove*, 448 U.S. at 483).
101. *Id.* at 490.
102. U.S. CONST. amend. XIV, § 5.

conscious measures suspect and subject to stricter scrutiny. To Justice O'Connor, the choice of standard turned on the nature of the institutional mandate of the body enacting affirmative action laws.

By hinging the issue on the respective institutional missions of Congress and the states, Justice O'Connor let the history of racial subordination by the states pass unseen in the shadows. In the United States, state and local governments, not the federal government, perpetrated the vast majority of governmental discrimination against stigmatized minorities. Though the federal government cannot claim immunity from discrimination—witness the history of the armed forces—the governments of the several states adopted and enforced the most extensive array of subordinating measures, affecting so many millions of lives for so long. State governments adopted laws excluding blacks from jury service[103] and prohibiting interracial marriages.[104] It was local law enforcement that turned a blind eye to lynchings and hate crimes against blacks. Since the end of the Civil War, the federal government guaranteed blacks' right to vote by the Fifteenth Amendment,[105] but the states erected barriers to effective voting, such as literacy tests, poll taxes, grandfather clauses, white primaries, and racial gerrymandering.[106] Virginia is no exception to this general phenomenon, having participated actively in the perpetuation of a racial caste system even after the Court's decision in *Brown v. Board of Education*[107] outlawed the most blatant forms of governmental discrimination.[108] Justice Marshall characterized Richmond's recent history of racial discrimination as "disgraceful."[109] The federal government most likely has discriminated against far fewer people than the state and local governments, if for no other reason than the federal government was largely inactive in legislating for the general welfare until the New Deal. One reason the federal government has some responsibility in achieving racial justice is that the state governments, like Virginia, have often proven unwilling to extend the promise of equal

103. *See* Strauder v. West Virginia, 100 U.S. 303, 305 (1879) (holding unconstitutional West Virginia law banning blacks from jury service).

104. *See* Loving v. Virginia, 388 U.S. 1, 3 (1967) (holding unconstitutional Virginia law banning interracial marriage).

105. U.S. CONST. amend. XV.

106. *See* Shaw v. Reno, 113 S. Ct. 2816, 2823 (1993) (describing state-erected barriers to black electoral participation).

107. 347 U.S. 483 (1954).

108. This history was detailed by Justice Marshall in his *Croson* dissent. *See Croson*, 488 U.S. at 544-46 (Marshall, J., dissenting).

109. *Id.* at 544 (Marshall, J., dissenting).

citizenship to minorities.[110] Justice O'Connor's emphasis on the institutional mandate of Congress vis à vis the states obscures the vividness of this history.[111]

Having distinguished *Fullilove*, Justice O'Connor then defended her choice of strict scrutiny by calling it a way of " 'smok[ing] out' "[112] perceived impurities in the decision-making processes of institutions that adopt affirmative action measures. "Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by *illegitimate notions of racial inferiority* or *simple racial politics*."[113]

It is evident how a decision-making procedure would be defective if explicitly based on stereotypical notions of racial inferiority; few would argue that the blatant use of racist ideology to disadvantage and stigmatize minorities does not violate our constitutional commitment to equal protection. Justice O'Connor's second suspect motivation, "simple racial politics,"[114] was fuzzier and less obvious. Perhaps her fear was that politicians would attempt to pursue a politics of racial spoils, using the mantle of benign discrimination to take attention away from their real motive of racial self-dealing.[115] Justice O'Connor emphasized that, in the case of Richmond, five of the nine members of the city council who adopted the minority set-aside law were black.[116] Because a black majority provided an advantage to members of its own, the Court had special cause to be suspicious that the decision-

110. *See id.* at 559-61 (Marshall, J., dissenting).

111. While severely limiting the ability of states to adopt race-conscious affirmative action laws, Justice O'Connor's analysis seemed to broaden significantly Congress's role in achieving racial justice. *See* Kenneth L. Karst, *Private Discrimination and Public Responsibility:* Patterson *in Context*, 1989 SUP. CT. REV. 1, 46-47. For supporters of affirmative action, however, relying on Congress is a risky proposition, especially in light of hostile Republican control of both houses. *See* Steven V. Roberts, *Affirmative Action on the Edge*, U.S. NEWS & WORLD REP., Feb. 13, 1995, at 32, 38 (describing efforts under way in key congressional committees to limit, even ban, affirmative action).

112. *Croson*, 488 U.S. at 493.

113. *Id.* (emphasis added).

114. *Id.* at 510.

115. According to T. Alexander Aleinikoff, a majority of the Court thought that "[a]fter attaining political power . . . , blacks on the city council acted according to one of the oldest American political traditions of rewarding one's friends out of public coffers." Aleinikoff, *supra* note 64, at 1104. Aleinikoff correctly notes that the fear of racial self-dealing was hinted at by Justice O'Connor, but received more forceful articulation in the concurring opinions of Justices Anthony Kennedy and Antonin Scalia. *See id.* at 1102-04.

116. *Croson*, 488 U.S. at 495.

making process of the legislative institution was not functioning properly.[117]

The Court's special caution with regard to affirmative action programs adopted by a black majority such as Richmond's city council may reflect a far too common assumption made by whites concerning the objectivity and neutrality of blacks. Dominant majorities often assume that the way they see the world is an accurate and impartial depiction of reality.[118] Competing perspectives can be brushed aside as false, biased, or motivated by the desire to seize power.[119] As a result, blacks are at times assumed by whites to be self-interested and partial. The problem is accentuated when minorities hold positions of authority or prominence. When he was a district court judge in Pennsylvania, the Honorable A. Leon Higginbotham experienced this when a defendant—a union in a race discrimination case—moved to disqualify the judge because he was black and thus, according to the defendant, would be predisposed to favor the black plaintiff.[120] The assumption of the litigant's motion was that a black judge would be hopelessly subjective and biased while a white one could be objective and impartial even if the white judge shared racial identity with one of the litigants.[121] Similarly, white legislators might be seen as neutral deliberators of the common good, while black legislators are considered self-interested and self-dealing.

> [T]he Court [in *Croson*] implicitly questions the ability of black politicians to be "other-directed," interested in improving the condition of disadvantaged members of the community, whatever their race. Any action taken on behalf of the black community is presumed to be racial self-dealing and therefore a serious violation of antidiscrimination law.[122]

Accordingly, actions taken by blacks that benefit blacks are inherently suspect.[123]

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117. *Id.* at 495-96.

118. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 49-74 (1990).

119. *See id.* at 60-61.

120. *See* Commonwealth v. Local Union 542, International Union of Operating Engineers, 388 F. Supp. 115 (E.D. Pa. 1974); *see also* MINOW, *supra* note 118, at 61 n.43.

121. In these days of racial animus, it is not surprising that this phenomenon is occasionally reversed and white judges are asked to recuse themselves by black litigants due to perceived prejudice against blacks. I am indebted to the Honorable James Zagel for sharing his experiences in this regard with me.

122. Aleinikoff, *supra* note 64, at 1105.

123. This is the view Justice Marshall ascribed to the majority. *See Croson*, 488 U.S. at 555 (Marshall, J., dissenting).

Surely, Justice O'Connor did not intend to buttress the notion that blacks are inevitably partial and biased while whites can be neutral and objective. Rather, it seems she intended to rest her fear of impure politics on a broader vision of the political process and of the Court's role in regulating it. To make this clear, however, Justice O'Connor invoked Justice Stone's theory from footnote four of *Carolene Products*, claiming that "one aspect of the judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference."[124] Strict scrutiny should apply to this case, she stated, because of the fact that the law was passed by one Richmond racial majority—blacks—and arguably harms a Richmond racial minority—whites.[125] This invocation of *Carolene Products* contrasts sharply with Justice Powell's argument in *Bakke* that the Court was not in any way bound by the *Carolene Products* theory of protecting "discrete and insular minorities"[126] because the majority/minority distinction was beyond the pale of judicial competence.[127] By the reasoning of Justice O'Connor, judges are not only competent to determine who constitutes a "majority" and who a "minority" in Richmond, but it is part of their judicial function to do so. Making such judgments is part of the basic institutional tasks or duties of judges. Justice O'Connor's acceptance of *Carolene Products* turned on her view of institutions; like Justice Powell, she was informed by an understanding of the judiciary and of its institutional role. But the similar themes cannot mask the stark inconsistencies of their reasoning. Justice O'Connor accepted *Carolene Products*' rationale for the precise proposition that Justice Powell rejected in *Bakke*.

Croson's analysis of the significance of Richmond's interests under the first prong of strict scrutiny continues the institutional argument. The Court rejected Richmond's asserted compelling interest in remedying general societal discrimination against blacks and other minorities.[128] Suddenly echoing Justice Powell in *Bakke*, Justice O'Connor called this too amorphous a justification for race-conscious affirmative action.[129] The Court held that the body adopting affirmative action must have a " 'strong basis in evidence' " to conclude that

124. *Id.* at 495 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938)).
125. *Id.* at 495-96.
126. *Carolene Prods.*, 304 U.S. at 152-53 n.4.
127. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 295-98 (1978).
128. *Croson*, 488 U.S. at 505.
129. *Id.* at 499.

there has been identifiable involvement by that institution with discriminatory practices in the relevant industry.[130] In other words the body must have what we might call a *particularized remedial purpose*, one geared towards remedying discrimination against minorities in the relevant industry perpetuated or supported by the particular institution now resorting to race consciousness.[131]

It is not clear exactly how much fault on the part of the institution is necessary under *Croson*'s analysis. Justice O'Connor did not state that the institution itself must have had racially discriminatory practices, such as refusing to hire blacks. But the institution must have some minimal degree of fault; Justice O'Connor said the institution must itself have been at least a "passive participant" in discrimination within the industry.[132] In the case of Richmond, the Court held that the record showed no evidence of even this level of fault,[133] although Justice Marshall's dissent argued that sufficient evidence was present in the form of uncontroverted testimony by longtime members of the Virginia construction industry.[134]

Justice O'Connor's analysis illuminates the variety of different institutional missions the Court wavers between in affirmative action cases. Once again, institutional mandates come to the fore, but this time they are of a different strain. In *Bakke*, Justice Powell described what we might call "inherent" institutional mandates; the medical school, as an educative institution, had to provide a diverse student body in order to fulfill its inherent and essential educational purpose.[135] The use of race consciousness was therefore allowable, in theory, because the school's inherent educational mission meant insuring diversity, including racial diversity. According to the *Croson* Court's interpretation of *Fullilove*, Congress was able to be race conscious because of its "formal" mission embodied in the enforcement provision of the Fourteenth Amendment.[136] Congress can use race because its charter, the Constitution, was officially amended through appropriate procedures.[137] This is not an inherent mandate, but a for-

130. *Id.* at 500, 510 (quoting *Wygant*, 476 U.S. at 277).
131. *See id.* at 509.
132. *Id.* at 492. "Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system." *Id.*
133. *Id.* at 510.
134. *Id.* at 540-46 (Marshall, J., dissenting).
135. *See supra* notes 74-78 and accompanying text.
136. *See supra* notes 98-102 and accompanying text.
137. *Bakke*, 438 U.S. at 487.

mally adopted one. Then *Croson* offers another possibility: a mandate imposed on the institution due to its own tortious conduct of participating in discrimination against minorities. If there is an identifiable history of discriminatory practices in which the institution was at least a "passive participant," then the institution can now advantage minorities to compensate for the injury.[138] This "tortious" mandate attaches to an institution because of its own fault in participating in or supporting minority subordination..

The Court's requirement of one of these types of institutional mandates to create a sufficiently weighty governmental interest in affirmative action is prompted in part by the Court's sentiment that racial classification in pursuit of broader social goals, such as remedying general discrimination in an entire industry, is a slippery slope. "[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.' "[139] But to insist that a governmental interest have a clear, logical stopping point before it can be considered compelling does not resonate with constitutional history. The Court has regularly and frequently characterized numerous interests or objectives of government as compelling without requiring precise boundaries. For example, the Court has not hesitated to argue that state governments have the utmost weighty interest in such diverse and diffuse ends as maintaining an intelligent electorate[140] and responsibly educating its citizens.[141] These governmenal ends have few logical stopping points. Their limits are defined by the rights of those affected by laws enacted in their pursuit. Yet the Court in *Croson* skipped this question to focus instead on the adopting institution and its proper role in addressing racial inequity. Even if we assume that the Court in other cases was correct in calling the maintenance of an intelligent electorate or the responsible education of the citizenry compelling,[142] it is hard to see why remedying the racial subordination that has marked Ameri-

138. *Croson*, 488 U.S. at 492.

139. *Id.* at 498 (quoting *Wygant*, 476 U.S. at 275).

140. *See* Dunn v. Blumstein, 405 U.S. 330, 354-58 (1972).

141. *See* Wisconsin v. Yoder, 406 U.S. 205, 213, 221 (1972).

142. Elsewhere, I have examined the Court's legitimation of a state's interest in pursuing an intelligent electorate and have concluded that this governmental end is misplaced in the American context. *See* Winkler, *supra* note 51, at 346-50, 358-63. That critique supports the argument that maintaining an intelligent electorate is not a compelling interest. I agree with the Court that a state has a weighty interest in educating its citizenry, even though state-enforced socialization always poses certain risks. *Cf.* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding unconstitutional mandatory flag salute

can history and destroyed tens of millions of lives is not equally weighty.

The particularized remedy theory developed by *Croson*'s institutional analysis rests on faulty and inconsistent beams of support. By requiring a tie between the specific institution's participation in an industry's discriminatory practices and the availability of affirmative action, the Court indicated that only those institutions that can be said to have contributed, at least minimally, to discrimination against minorities owe damages to compensate for the harm. One reason for terming this a tortious mandate is that it is influenced by basic notions of fault and causation at the core of the private law of torts. Redress and remedy are intimately tied to attributions of fault and causation. But these tort law notions do not fit neatly within the fabric of affirmative action, as is apparent if we move beyond the realm of institutions and into that of the people affected by affirmative action. First, the real party burdened with paying the "damages" are whites who lose the opportunity to work on a Richmond contract. These people are, in the Court's words, "innocent."[143] Yet the Court will allow them to

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law for public schoolchildren because coerced expressions of patriotism would likely undermine, rather than encourage, respect for American liberties).

143. If the language of white innocence is found throughout the affirmative action cases, the Court has offered little insight into the substantive content of this idea. *See, e.g.*, *Bakke*, 438 U.S. at 298, 307, 310. Before joining the Court, Justice Antonin Scalia expressed his strong resistance to affirmative action on precisely this ground—that many whites are innocent. *See* Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147. According to then-Professor Scalia, most white Americans, as members of immigrant ethnic minorities, were not culpable for slavery and racial subordination because they "took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups." *Id.* at 152.

Even if we could say that most whites never themselves discriminated against minorities, Professor Scalia's claim that white immigrant groups did not benefit from a system of racial caste is considerably less clear. On one level, whites, especially the immigrant groups cited by Professor Scalia, did in fact benefit from discrimination in employment opportunities by not having to compete with blacks, who were often excluded from labor pools in many industries both north and south of the Mason-Dixon Line. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 166 (1989) (stating that "some of the main beneficiaries of racial discrimination in employment have been white ethnics"); Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 94 (1986) (stating that "whites have reaped windfalls from racism: they would not be where they are but for the prior exclusion of blacks from competition with them"). On another level, whites are advantaged by not having a stigmatized racial identity that they must confront daily in a hostile world. *See* KARST, *supra*, at 167. On social and racial stigmas more generally, see ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963). On still another level, because of vast differences in historical legal rights and in present economic, political, and social clout, one may say that there is a "property right" in "whiteness." *See* Derrick

be burdened when there has been a particular history of institutional discrimination in the relevant industry. But the innocence, or lack of fault, of these individuals remains constant, whether or not the institution has discriminated.[144]

Second, and more significant, is the fact that the tort-bearer is not the compensated party. The recipients of remedial affirmative action are minorities living today, regardless of whether they or their relatives were the direct victims of an industry's, or an institution's, discriminatory practices. The only thing that unites the real tort-bearers—victims of discrimination by the industry—with today's beneficiaries of remedial affirmative action is racial identity; they are black. If they share the same race as those who were discriminated against in the past, they stand to gain from particularized remedial affirmative action programs as envisioned by *Croson*. Hence, the Court's approach ultimately turned on accepting racial identity as the characteristic that entitled one to damages, not endurance of identifiable acts of victimization by the particular institution or industry. Racial identity serves here as a proxy for status in a stigmatized group—a characteristic that indicates whether one belongs to a group that has been victimized *generally* by racism and discrimination in society.[145] Yet, the Court stated earlier that remedying general societal discrimination was too vague a goal. *Croson*'s theory thus turns on itself. Although the Court attempted to avoid legitimizing affirmative action intended to remedy general societal discrimination, a look beyond in-

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Bell, *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1602-11 (1989); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

Of course, this discussion emphasizes groups, not individual persons, and hence may be criticized for failing to prevent harm to real individuals, like Alan Bakke, who would be made to carry some of the weight of our society's racial problems. In response, one might question whether the burden a white individual like Bakke would be made to bear by affirmative action is even comparable to the burden imposed on black individuals today, and historically, by the racism of the wider society. *See* David P. Bryden, *On Race and Diversity*, 6 CONST. COMMENTARY 383, 419 (1989) ("I don't regard it as a fatal objection that affirmative action entails sacrificing some innocent white people. It's a high cost, but not necessarily too high. Not as high as all the suffering blacks had to endure while we forced them to wait for the opportune times to abolish slavery and segregation."); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1342 (1988).

144. *See* Sullivan, *supra* note 143, at 94.

145. The Court held that the Richmond law was overinclusive because it extended preferential treatment to groups other than blacks, such as Spanish-speakers, Native Americans, Asians, Eskimos, and Aleuts. *Croson*, 448 U.S. at 506. While it may be correct that members of those groups have never been victimized by discrimination in the Richmond construction industry, this only called for narrowing the statute, not striking it down altogether.

stitutions reveals that remedying general societal discrimination is inevitable under the court's particularized remedy theory of affirmative action, so long as racial identity is that which entitles one to participate.[146]

Justice O'Connor's positioning of the institution in this particularized remedy theory may be similarly inappropriate because she conceives of affirmative action as punishment for improper past behavior by the institution. But this tort-law-inspired notion fails to account for the fact that many institutions that adopt affirmative action do so willingly and voluntarily; indeed, they are often benefited by adopting such policies. Affirmative action generally means bringing more diverse people into the institution's practices and integrating its workforce; "diversity is good business,"[147] not severe punishment. Any institution may want to eliminate the costly inefficiencies of racism, prejudice, and intolerance which create barriers to the recognition of quality, talent, and opportunity and hinder economic growth. Some commentators have taken this possibility to mean that we can eliminate civil rights laws and rely on the open market, in its never ending quest for efficiency, to bring about racial equality.[148] Yet, race often infects our rational decision making at the subconscious level, influencing how we see the world and determine value. By subtly affecting how we calculate costs and benefits, racism hinders the effectiveness and efficiency of the market. Acculturated notions of the worth and capability of members of stigmatized racial groups impact many of our daily judgments from whether we think a job applicant "fits in," to whether we believe a candidate for elected office has the right "character."[149] Such unspoken cultural assumptions and value

146. Affirmative action could be retooled by emphasizing class instead of race, benefitting those who are economically disadvantaged no matter what their skin color. Such an approach would respond to the popular criticism of today's affirmative action that it is unfair to give preferential treatment to, say the children of black doctors in Beverly Hills while denying it to the children of the white rural poor. But this criticism and the response to it are misguided. They misstate the purpose of affirmative action, confusing economic equalization with compensation for the direct and indirect victims of racial discrimination. Affirmative action does not benefit blacks as a group simply because they are poor; it aides them because as a group they have been subordinated due to their racial identity. Furthermore, poor white people do not face life with a stigmatized identity, as even the black child of a Beverly Hills doctor must.

147. *See* Roberts, *supra* note 111, at 37 (quoting James Wall, National Director of Human Resources for management consulting firm of Deloitte & Touche LLP: "If you don't use the best of all talent, you don't make money.").

148. *See, e.g.*, RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 9 (1992).

149. *See* Lawrence, *supra* note 63, at 343.

judgments promise to be diluted, if at all, by full integration of the stigmatized into the community's economic, social, and political life.[150]

Finally, the *Croson* Court's reasoning struck a dissonant chord due to the opinion's earlier favoring of formal institutional mandates over institutional fault in distinguishing state from federal affirmative action laws. There, Justice O'Connor deferred more readily to Congress in remedying discrimination, despite the arguably greater fault of the states in perpetuating the system of racial caste. Here, however, she made degrees of fault the basis for distinguishing among institutions, holding that only those with some minimal culpability can enact affirmative action. This unreasoned shift in focus helps to undermine Justice O'Connor's institutional analysis, bearing witness to its illogics and inconsistencies.

C. Shaw v. Reno: *A Culmination of Sorts*

The Supreme Court recently revisited the problem of race consciousness in *Shaw v. Reno*.[151] At issue in *Shaw* was North Carolina's oddly-shaped twelfth congressional district, drawn by the state to create a "majority-minority" district—that is, one in which blacks constituted a majority of the voters.[152] In the aftermath of the 1990 census,[153] the Assistant Attorney General for the Civil Rights Division required the North Carolina legislature to draw this majority-minority district, having previously rejected, pursuant to section five of the Voting Rights Act (VRA),[154] North Carolina's first redistricting plan because the plan provided for only a single majority-minority district.[155] A second majority-minority district was necessary under the VRA " 'to give effect to black and Native American voting strength.' "[156] The forceful position of the Assistant Attorney General was sparked by North Carolina's awful record of discrimination in politics and elections; blacks constituted twenty percent of the popula-

150. *See, e.g.*, Karst, *supra* note 111, at 9-11 (arguing that promise of equal citizenship depends upon racial integration at all levels of society, but particularly at workplace, so that acculturated notions of racial stigma can be diminished).

151. 113 S. Ct. 2816 (1993).

152. *Id.* at 2819-21.

153. *Id.* at 2819.

154. *Id.* at 2820.

155. *Id.*

156. *Id.* (quoting Attorney General's report appended to Brief for Federal Appellees at 10a-11a).

tion,[157] yet not a single black representative had been elected to Congress this century.[158] Creating the first majority-minority district was not difficult, but the second district was troublesome because, outside of the first black district, blacks were not sufficiently concentrated in any one discrete geographical area.[159] To comply with the federal order, North Carolina drew a long, serpent-like district that was in places no wider than an interstate highway it followed in order to connect dispersed pockets of urban black voters.[160] North Carolina's redistricting resulted in the election of the state's first two black congressional representatives since Reconstruction, one from each of the two majority-minority districts.[161]

The Court in *Shaw* held that white voters could pursue a cause of action challenging race-conscious districting as violative of their rights to equal protection.[162] In so doing, the Court remanded the case to the district court for further proceedings to determine if white voters in North Carolina did in fact suffer infringements of their constitutional rights.[163] The Court held that the district court, on remand, was to apply strict scrutiny,[164] and although not required by the procedural posture of the case, the Court offered a lengthy discussion of how strict scrutiny should work in the context of electoral redistricting.[165] The opinion gave every indication that North Carolina's twelfth congressional district would not survive this standard's rigorous demands.[166]

At its core *Shaw* is an affirmative action case. The state created the majority-minority district to give blacks a measure of political equality that a discriminatory electoral system had long denied them. North Carolina had been race conscious in drawing district lines and had sought specifically to advantage blacks—not unfairly, but rather to meet the demands of political fairness required by the VRA and,

157. *Id.*

158. *Id.* at 2834 (White, J., dissenting).

159. *See* T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After* Shaw v. Reno, 92 MICH. L. REV. 588, 590-91 (1993).

160. *Shaw*, 113 S. Ct. at 2820-21.

161. *Id.* at 2834 (White, J., dissenting).

162. *Id.* at 2832.

163. *See id.*

164. *See id.* at 2830, 2832.

165. *See id.* at 2824-26.

166. On remand the district court held that North Carolina's electoral districting scheme *was* constitutional, even under strict scrutiny. *See* Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994). It is hard to imagine that the district court's decision will be upheld on appeal in light of the strong language of the Supreme Court in *Shaw*.

more directly, the Assistant Attorney General. Concerns similar to those guiding the Court in *Bakke* and *Croson* influenced the Court in *Shaw*, though we also find inconsistencies and reconfigurings of the institutional principles and conceptions used by the Court. Again we see the overwhelming emphasis on institutions and again we find disturbing silences to race and the real world context in which American institutions operate.

Justice O'Connor's opinion for the Court in *Shaw* began with more promise than the earlier affirmative action opinions, as she recounted a devastating tale of America's history of racial subordination.[167] She recounted how even after the Fifteenth Amendment formally extended the right to vote to blacks, state efforts to maintain blacks in a subordinate position systematically disenfranchised them.[168] Justice O'Connor reminded us that the states perpetuated racial discrimination in politics through a host of instruments " 'both subtle and blunt,' "[169] such as literacy tests, good character requirements, and unfair political gerrymandering.[170] Drawing on examples from Mississippi to Alabama, Justice O'Connor recognized the sorry history of white electoral exclusion of blacks.

Justice O'Connor's version of history was, however, primarily an institutional one. It was not a history of people or experiences or events, but one of institutional practices—what institutional measures diluted blacks' right to vote. Perhaps we should not be surprised to find history that focuses on institutions, but what remains most disconcerting is that Justice O'Connor did not draw connections between past and present. She told the story as if it were only history, using exclusively the past tense. She corralled racism into the realm of history. One finds no mention of the continuing racial inequities in today's political arena resulting from two hundred years of black political exclusion. Blacks are still woefully underrepresented in gov-

167. *See Shaw*, 113 S. Ct. at 2822-23. This is a story which has only rarely found its way into the opinions of the Court. Even the Court's landmark decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954), lacked any real discussion of our history of race relations, focusing instead on a clinical discussion of the psychological and economic effects of school segregation on minorities.

168. *Shaw*, 113 S. Ct. at 2822-23.

169. *Id.* at 2822 (quoting James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 637 (1983)).

170. *Id.* at 2823.

ernment, particularly the federal government.[171] North Carolina's black population is no exception. Yet for Justice O'Connor, the patterns of racial discrimination in the electoral arena were not present realities but merely past practices.

The plaintiffs in *Shaw* claimed to have a "constitutional right to participate in a 'color-blind' electoral process."[172] Their invocation of the principle of colorblindness—complete governmental ignorance of race—echoes a chord that from time to time has been struck in constitutional decisions.[173] But Justice O'Connor quickly explained that the Court has never imposed a constitutional requirement of colorblindness on government action;[174] certainly neither *Bakke* nor *Croson* articulated such a principle, though they did purport to limit the instances in which government can be race conscious. Justice O'Connor straightforwardly admitted that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors."[175]

The principle that the *Shaw* Court adopted in lieu of colorblindness has a distinctly institutional orientation. Justice O'Connor crafted what we might call a "nonexclusivity principle" for institutional decision making.[176] Rather than enforcing pure ignorance of race, the opinion allows states to be race conscious in electorial districting so long as race is not the exclusive factor on which district lines are drawn. Justice O'Connor stated that the problem with North Carolina's twelfth congressional district was that "it rationally can be

171. For an analysis of black representation in Congress, see CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS (1993). Swain includes a history of black electoral success—or, more accurately, electoral frustration. *See id.* at 20-44.

172. *Shaw*, 113 S. Ct. at 2824.

173. The most famous claim for a "color-blind constitution" was that of the first Justice John Marshall Harlan in his eloquent dissent in Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). For an analysis of the birth of this constitutional concept, see ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

174. *Shaw*, 113 S. Ct. at 2824. "Despite their invocation of the ideal of a 'color-blind' Constitution, appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise: This Court never has held that race-conscious state decision making is impermissible in *all* circumstances." *Id.* (citations omitted); *see also* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99 (arguing that race-consciousness, not colorblindness, animates antidiscrimination law).

175. *Shaw*, 113 S. Ct. at 2826.

176. Richard Pildes and Richard Niemi have noticed this principle in *Shaw*, referring to it as a principle of "value pluralism." *See* Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 499-506 (1993).

viewed only as an effort to segregate the races for purposes of voting, *without regard for traditional districting principles*."[177] Distinguishing cases in which the Court approved of race-conscious districting, Justice O'Connor argued that in those earlier instances, the state had " 'employ[ed] sound districting principles such as compactness and population equality' " and the minorities had " 'residential patterns [which] afford[ed] the opportunity of creating districts in which they [would] be in the majority.' "[178] According to *Shaw*, race consciousness is acceptable so long as the traditional factors on which institutional decision making has been based are not ignored. While Justice O'Connor admitted that some use of race consciousness may be inherent in districting,[179] she insisted that districting which ignores traditionally relevant criteria such as compactness and contiguity[180] in favor of race raised a constitutional controversy.[181]

Shaw's principle of nonexclusivity rests firmly on a concern for institutional decision-making processes. The principle was designed to insure that such processes are not interfered with by an overwhelming reliance on race as a factor in allocating institutional resources. As such, it was linked to a concern for institutional functionality. Justice O'Connor appeared to fear that exclusive reliance on race in districting would undermine the effective and proper functioning of representative democratic institutions.[182] Justice O'Connor did not base her argument, however, on the obvious proxy for gauging the functional effectiveness of representative institutions in voting rights cases: vote dilution. Vote dilution occurs when electoral districts are drawn to reduce the relative voting power of identifiable groups of voters below their approximate percentage of the relevant population.[183] As Justice White argued in his *Shaw* dissent, accepted voting rights concepts of injury did not support the white plaintiffs' cause of action because the plaintiffs could not show that North Carolina's districting

177. *Shaw*, 113 S. Ct. at 2824 (emphasis added).

178. *Id.* at 2829 (quoting United Jewish Org. v. Carey, 430 U.S. 144, 168 (1977)) (emphasis omitted).

179. *Id.* at 2826.

180. *See* Pildes & Niemi, *supra* note 176, at 500-01. Traditional districting principles might also include "ensur[ing] effective representation for communities of interest, . . . reflect[ing] the political boundaries of existing jurisdictions, and . . . provid[ing] a district whose geography facilitates efficient campaigning and tolerably close connections between officeholders and citizens." *Id.* at 500.

181. *See Shaw*, 113 S. Ct. at 2824-25.

182. *Id.* at 2827.

183. *See* Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 24-27 (Bernard Grofman & Chandler Davidson eds., 1992).

scheme unfairly diluted the voting power of whites. "Whites constitute roughly 76 percent of the total population and 79 percent of the voting age population . . . . Yet, under [North Carolina's] plan, they still constitute a voting majority in 10 (or 83 percent) of the 12 congressional districts."[184] Their votes not having been unfairly diluted, the white plaintiffs could not show that the proper functioning of the electoral institutions was interfered with under accepted principles of voting rights.

The Court rejected Justice White's position, emphasizing a novel version of institutional functionality in the context of voting. "[R]eapportionment legislation that cannot be understood as anything other than an effort to classify and separate voters by race . . . threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[185] Due to this signaling effect, "elected officials are more likely to believe that their primary obligation is to represent only the members of that group."[186] Justice O'Connor thus articulated a belief that racial gerrymandering infects the connection between representative and represented, hindering the proper functioning of electoral institutions.

Justice O'Connor's notion of a corrupt electoral connection recalled the fear of racial self-dealing she hinted at in *Croson*. Blacks in elected office who represent a racially gerrymandered district would only represent black interests, unconcerned with the general welfare of their constituency. Once again, blacks seem to be viewed as incapable of being other-directed, hopelessly bound to self-interested power politics. Beyond this unfortunate notion, Justice O'Connor's view of electoral institutions was problematic because it reflected an idealized version of electoral politics that failed to correspond with American experience. The reality is that elected representatives always respond more to some constituencies among their voting populations than to others. Representatives from districts in which the predominant industry is farming obviously pay more attention to the demands of that portion of their constituency, even if other constituents favor opposing policies. No doubt legislators in districts heavy with military defense contracting firms will guide their votes and policies by the demands of that constituency, despite the fact that some residents of the same jurisdiction might strongly oppose such positions. Though we often as-

184. *Shaw*, 113 S. Ct. at 2838 (White, J., dissenting).
185. *Id.* at 2828.
186. *Id.* at 2827.

pire for legislators devoted to the common good, elected officials also should be "representatives" of their jurisdictions, fighting for the interests of their dominant constituencies. This is an inherent feature of American representative democracy, yet Justice O'Connor mistook it for a corrupting influence on the operation of the institutions of government.

Justice O'Connor might respond that when it comes to race, the same rules do not apply. While any political jurisdiction will have competing constituencies among its populace regarding policy positions, it is inappropriate to posit that racial minorities, *qua* racial minorities, will take identifiably consistent political positions and have distinct political interests. Justice O'Connor indicated something like this when she condemned racial gerrymandering because

> [i]t reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which the [sic] live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.[187]

If drawing a connection between racial identity and political interests is an "impermissible racial stereotype," Justice O'Connor was herself guilty of this sin. Why would it be, as she recognized earlier, that a legislature "always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors"?[188] Legislators pay attention to demographic factors such as race and economic status precisely because those factors correspond with political attitudes and preferred policy positions. This is not a sign of racial bigotry, but reflects instead a realistic portrait of political life. Indeed, members of racial minority groups, particularly blacks, often share a high uniformity of interests and assume similar policy positions—even despite economic or other demographic variance.[189]

A further incoherence marked Justice O'Connor's reasoning with regard to the electoral connection, for her theory logically depended

187. *Id.*

188. *Id.* at 2826 (emphasis omitted).

189. *See* MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN AFRICAN-AMERICAN POLITICS (1994) (arguing that, despite more economic diversity, blacks remain politically cohesive, likely due to their perceptions of "linked fates" as members of subordinated caste); *cf.* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1112-13 (1991) (collecting sources showing racial bloc voting).

on a link between racial identity and political beliefs. To say that black legislators in racially gerrymandered districts would respond only to black constituents assumes that black constituents are an identifiable political group sufficiently coherent so that they can be responded to by officials. If blacks do not have interests distinct from those of whites, then a legislator will have trouble attempting to represent blacks as a discrete group at the expense of other constituents. Emphasizing an idealized vision of electoral institutions, Justice O'Connor's argument was ensnared by the racial reality it attempted to ignore.

The real world political environment inhabited by black officeholders also mitigates against O'Connor's view of the political divisiveness of race-based districting.

> Even in cities where blacks attain electoral success, they are still unlikely to possess major economic power . . . . Black officials, therefore, must constantly be aware of how their behavior affects dominant white economic and political forces, who may well view affirmative action [and other policy choices uniquely benefiting blacks] as being against their interests.[190]

Due to sheer numbers, black representatives will be able to accomplish little for any portion of their constituency unless they form and maintain coalitions with white representatives—something white representatives do not have to do with blacks. Consequently, black representatives have to be attuned to the needs and demands of whites, in both their districts and elsewhere, if they are to attain any substantive goals.[191] The effects of racially gerrymandered districts will not likely be those assumed by Justice O'Connor.

While repeating some of the institutional concerns of *Bakke* and *Croson*, the *Shaw* Court quietly slipped over one of the central principles of those earlier decisions' institutional analyses. According to the earlier decisions, race consciousness was possible if it could be shown that a race-conscious policy was part of the institution's mandate. Though the Court wavered on the type of mandate necessary, variously accepting inherent, formal, or tortious missions, the idea of an

190. Aleinikoff, *supra* note 64, at 1105.

191. Black electoral "gains are almost always the gratuitous dividends of policies favored by a controlling white interest or group. When no such fortuitous arrangements are possible, blacks have found political participation quite difficult and unrewarding." DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 96 (1987); *see also* Guinier, *supra* note 189, at 1116-25 (describing inability of black elected officials to assert political power without forming coalitions with whites).

institutional mandate was key.[192] The *Shaw* Court however virtually ignored the notion of institutional mandate established in the earlier cases. If the Court had been attentive to its own requirement of institutional mandate, it surely would have found that North Carolina had a compelling governmental interest supporting its electoral race consciousness. One might say that a state government has an inherent responsibility to provide electoral mechanisms that accord all its citizens the equal opportunity to elect representatives of their choice; otherwise, it is difficult to say those mechanisms provide for autonomous self-government. In addition, North Carolina has a formal mandate embodied in the VRA, federal law enacted under the constitutional authority of the enforcement power of the Fourteenth Amendment—the very same provision that *Croson* read to require deferential judicial review of race consciousness.[193] There is little doubt that North Carolina had a tortious institutional mandate stemming from its own identifiable culpability in racial discrimination. A variety of North Carolina's electoral mechanisms, such as literacy tests[194] and electoral districting,[195] historically have deprived blacks of fair representation, making North Carolina an active participant in an identifiable history of discrimination. And there could be no evidentiary problems; there have been unambiguous legislative and judicial findings of specific statutory and constitutional violations in North Carolina's electoral system.[196] Indeed, the only reason North Carolina was involved in drawing majority-minority districts in the first place was because the state had a history of electoral discrimination which subjected it to the provisions of the VRA.[197] Yet the *Shaw*

192. *See supra* notes 134-38 and accompanying text.

193. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (1988 & Supp. V 1993).

194. It was North Carolina's literacy test that was challenged in Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959) (upholding constitutionality of literacy tests). Recognizing discrimination where the Court would not, Congress subsequently outlawed literacy tests in the Voting Rights Act. *See* 42 U.S.C. § 1973aa.

195. *See* Thornburg v. Gingles, 478 U.S. 30 (1986) (holding North Carolina's 1982 districting scheme violative of Voting Rights Act because it diluted black voting strength). In *Gingles*, the district court specifically found a long history of official racial discrimination in North Carolina's electoral system. *See id.* at 38-39.

196. *See, e.g., id.* Forty of North Carolina's 100 counties were covered under the original Voting Rights Act of 1965. *Shaw*, 113 S. Ct. at 2820; *see* Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (1965)).

197. *Gingles*, 478 U.S. at 38-39. When it did consider North Carolina's legal duty under the Voting Rights Act to enhance black representation, the *Shaw* Court insisted that "a reapportionment plan that satisfies § 5 [of the Act] still may be enjoined as unconstitutional." *See Shaw*, 113 S. Ct. at 2831. True, but under Justice O'Connor's own interpretation of *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the question of constitutionality when the federal government enforces a race-conscious remedy is supposed to be governed not

Court was incoherently silent to the institutional mandates that proved so persuasive in earlier cases.

The Court was distracted from many of these difficulties perhaps by nothing more than the appearance of the congressional district. Certainly, Justice O'Connor described how the strange shape of the twelfth district was "bizarre"[198] and "dramatically irregular."[199] "[R]eapportionment," she stated, "is one area in which appearances do matter."[200] But the concern for appearances was itself motivated by a perception that the oddly shaped district disrupted traditional institutional arrangements. Justice O'Connor clearly expressed the Court's dissatisfaction over the district's lines which were drawn with little regard for existing geographical boundaries or political subdivisions.[201] Justice O'Connor explained that the district

> is approximately 160 miles long and, for much of its length, no wider than the I-85 [highway] corridor. It winds in snake-like fashion through tobacco country, financial centers, and manufacturing areas "until it gobbles in enough enclaves of black neighborhoods." . . . Of the 10 counties through which District 12 passes, five are cut into three different districts; even towns are divided.[202]

According to the Court, existing jurisdictional boundaries ought to be maintained and preserved in the drawing of congressional districts. The rhetorical flourish that "even towns are divided"[203] only highlights the absurdity of the "snake-like" district.[204]

If Justice O'Connor was attuned to existing geographical and demographic configurations, she remained silent to how racism, prejudice, and discrimination have contributed to, and continue to influ-

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by strict scrutiny, but by the more deferential intermediate scrutiny standard. In *Shaw*, the federal government forced North Carolina to adopt the race-conscious districting to remedy a history of electoral inequality. *Shaw*, 113 S. Ct. at 2820. Specifically, it was the Assistant Attorney General for Civil Rights acting under the express authority of the congressionally enacted Voting Rights Act, the epitome of a law adopted to "enforce" the guarantee of equal protection. The Assistant Attorney General had previously rejected North Carolina's earlier electoral districting plan because it contained only one black majority-minority district and hence provided for inadequate black representation. *Id.*

198. *Shaw*, 113 S. Ct. at 2825-26 (repeating then agreeing with plaintiffs' characterization of district's shape).

199. *Id.* at 2820.

200. *Id.* at 2827.

201. *Id.* at 2821, 2827.

202. *Id.* at 2820-21 (quoting Shaw v. Barr, 808 F. Supp. 461, 476-77 (E.D.N.C. 1992) (Voorhees, C.J., concurring in part and dissenting in part)) (citations omitted).

203. *Id.* at 2821.

204. *Id.*

ence, the composition of populations in regions, counties, cities, and, yes, towns. Throughout American history racial considerations and exclusionary efforts against blacks have affected the drawing of municipal and county borders.[205] Moreover, if the twelfth district "snake[s]" through existing jurisdictional boundaries to "gobble up" enclaves of blacks, it is due to the severe residential segregation of blacks which relegates most to isolated urban areas with high concentrations of black residents. As sociologists Douglas S. Massey and Nancy A. Denton argue in their influential study *American Aparthied: Segregation and the Making of the Underclass*:[206]

> No group in the history of the United States has ever experienced the sustained high level of residential segregation that has been imposed on blacks in large American cities for the past fifty years. This extreme racial isolation did not just happen; it was manufactured by whites through a series of self-conscious actions and purposeful institutional arrangements that continue today.[207]

While other ethnic groups have been able to integrate white neighborhoods with relative success, over the past century blacks have found themselves increasingly separated into segregated residential enclaves.[208] This pattern does not result from natural socioeconomic factors, nor from black preferences; it stems from white prejudice. This prejudice has operated on numerous levels to create residential segregation. In the first half of this century, a variety of zoning laws,[209] restrictive covenants,[210] and outright measures of physical violence prevented blacks from moving into white neighborhoods.[211] Though the Supreme Court has since taken a strong constitutional stand against these forms of discrimination,[212] the lingering effects of

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205. *Cf.* Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 188 (1994) ("No one who has lived through a political annexation fight in the South believes that those decisions are made free of race- and class-based interests.").

206. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993). Massey and Denton thoroughly detail the concentration and isolation of blacks in American cities, showing that deliberate segregation has contributed to persistent poverty among blacks.

207. *Id.* at 2.

208. *Id.* at 21, 48, 71 (comparing black-white residential isolation and segregation indices).

209. *Id.* at 35-36.

210. *Id.* at 36-37.

211. *Id.* at 34-35.

212. For instance, the Court struck down racially restrictive covenants in 1948. *See* Shelly v. Kraemer, 334 U.S. 1 (1948).

this discrimination still contribute to racial isolation because residential patterns tend to shift very gradually. Moreover, racial isolation is exacerbated by continuing white prejudice in new and subtler forms, such as "white flight," whereby whites tend to move out of residential areas in high numbers once approximately ten to twenty percent of their neighbors are black.[213] And this phenomenon is not limited to any economic or social class; wealthy blacks find themselves just as isolated as poor ones.[214] Studies show that black home seekers also face widespread discrimination by realtors, mortgage lenders, and sellers,[215] despite the prohibitions of the Fair Housing Act.[216]

Of course, no one would demand that the Court solve all these problems in an electoral districting case. Yet, neither should the Court bow to traditional boundary lines; we should be well aware that they too are shaped by racism. But the Court never turns a critical eye to the prevailing institutional arrangements, accepting them instead as neutral, objective, natural boundaries deserving of respect.

Ultimately, recognition of this racial reality provides the best justification for a discourse that moves beyond institutions. Our institutional structures are built on the foundation of existing social orderings and relationships. They are not ideal types, perfectly created from our imaginings and aspirations; they are historical creatures that emerge not so much from creative genius, but from prevalent patterns of human social behavior. If the attitudes of the society in which an institution develops include racial subordination and racial group exclusion, it should be little surprise that racism will influence the institutional arrangements formed. But as the Court reasons from institutions, presupposing that they are ideal types or operate in a neutral manner, it forgets to look at the way social life affects institutional regimes and mechanisms. Consequently, the regimes take on the appearance of the "norm"—both in terms of our expectation and in terms of our assessments of value. Hence, the Court does not feel it necessary to justify deference to institutions. But a closer, more critical look indicates that American institutions are often infected by the racism of our past and, more troubling still, our present.

213. *See* HACKER, *supra* note 22, at 37-38. For an analysis of "white flight," see William H. Frey, *Black In-Migration, White Flight, and the Changing Economic Base of the Central City*, 85 AM. J. SOC. 1396 (1980). For a description of the racial attitudes of whites that give rise to "white flight," see MASSEY & DENTON, *supra* note 206, at 88-96.

214. HACKER, *supra* note 22, at 37-38.

215. MASSEY & DENTON, *supra* note 206, at 96-109.

216. 42 U.S.C. § 3604 (1988).

III. CONCLUSION

Amidst all the silences engendered by the Court's focus on institutions in affirmative action cases, there is one pervasive silence that the Court has promoted throughout, one which stops institutional actors from openly admitting the use of race consciousness in their decisions to distribute governmental benefits and burdens. Under the Court's affirmative action doctrine, some affirmative action plans can pass the demanding constitutional test of strict scrutiny, and hence can use race consciousness constitutionally. Even here, however, the Court encourages institutions to keep the use of race quiet, to hide the role of race in institutional decision making. The Court's opinions suggest that institutions ought to strive to make it seem like something else is going on.

This situation began in *Bakke*, where Justice Powell argued that in lieu of an explicit separate admissions procedure, the medical school should use a policy like Harvard College's, where race is used as a subjective, unquantifiable plus factor. "The applicant who loses out . . . to another candidate receiving a 'plus' on the basis of ethnic background . . . would have no basis to complain of unequal treatment . . . ."[217] A plus factor is "nonobjective"[218] and therefore hard to detect. If race was used in this way—silently, undetectably—it posed less of a constitutional dilemma. In *Croson*, the Court's requirement of waiver provisions in minority set-asides also promised to keep the public discussion hushed.[219] Race consciousness, when allowed, must take an imprecise and ambiguous form—making it difficult to perceive the motivations for any single institutional decision. In *Shaw*, the effort to keep racial considerations under wraps culminated in the Court's refusal to condemn race-conscious districting so long as it complied with traditional districting notions, such as compactness, contiguity, and existing political subdivisions.[220] If the state can hide the recourse to race by drawing a "normal"-looking district, the constitutional problem of race consciousness would be averted.

In each of these cases, the Court invited institutions to remain silent with regard to how they use race. Perhaps this silence is strategic, an effort to allow race consciousness while mitigating white re-

217. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

218. *Id.*

219. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507-08 (1989).

220. Shaw v. Reno, 113 S. Ct. 2816, 2826-30 (1993).

sentment.[221] The political strength of affirmative action has always been precarious and the explicit use of race threatens to spark a political backlash. But if this strategy has motivated the Court, it is fair to say, in light of current events, that the strategy has not succeeded. We can hide race, but we cannot stop its discovery. The law school at Georgetown learned this lesson the hard way, after years of admitting minority students under the *Bakke*-approved "plus factor" approach. The school was embarrassed when a law student, who worked part time in the administrative offices and had access to the files, publicized the average LSAT scores and grade point averages of recently admitted minority students, which were lower than the required averages for whites to gain admission.[222] When discovered, the fact that race had been used quietly to help minorities get into the law school only made the affirmative action more controversial. Secrets are rarely kept for long and, once revealed, cause more disruption for the fact of their having been hidden.

Sweeping race consciousness under the rug has also failed to make affirmative action more palatable in broader political arenas. Due to the political revolution of 1994, when Republicans were swept into national office en masse, finally gaining a majority in the House after almost five decades of Democratic dominance,[223] affirmative action faces a strong backlash.[224] While Congress considers banning race-conscious affirmative action altogether,[225] conservative activists in California are launching a drive to put an initiative on the 1996 general ballot which would outlaw state-sanctioned racial preferences.[226] The assault on affirmative action is still just gathering steam; if the strategy was to save race consciousness by hiding it, then the strategy has backfired.

Not only do the affirmative action cases endorse this brand of racial silence, but they also provide us with ample illustration of how we should not deal with racial issues. Following the Court's lead, we can choose to talk about something like institutions, making their sins,

221. Without endorsement, Kenneth Karst has posited the possibility of this strategic motivation in the Court's affirmative action cases. *See* Karst, *supra* note 111, at 45-46.

222. *See* Michel Marriott, *White Accuses Georgetown Law School of Bias in Admitting Blacks*, N.Y. TIMES, Apr. 15, 1991, at A13.

223. *See* Adam Clymer, *The 1994 Elections: Congress the Overview; G.O.P. Celebrates its Sweep to Power*, N.Y. TIMES, Nov. 10, 1994, at A1; Joe Klein, *The New New Deal*, NEWSWEEK, Jan. 2, 1995, at 18.

224. *See* Roberts, *supra* note 111, at 38.

225. *See id.*

226. *See id.* at 32, 37.

and not our own, the subject of controversy. Perhaps reasoning from institutions is not inevitably illogical and incoherent. But if *Bakke*, *Croson*, and *Shaw* are any indication, we should make a different choice, for more direct, forthright, and open speech. For it seems unlikely that we will ever get far in the pursuit of racial equality if we ignore the dilemmas posed by our nation's troubled history and imperfect cultural and social norms. Racial justice is one area in which we need less silence and more speech—by judges and, indeed, by the rest of us as well.