Color-Blind Theories and Color-Conscious Remedies

J. Skelly Wright†

Color-blind theory has proven to be the main tribute inequality pays to the principle of equality in our national life. At the nation's founding, the assertion that "all men are created equal" was used to justify establishment of a regime in which enslavement of the black population was given constitutional sanction.¹ In 1857 the Supreme Court managed to harmonize the principle of equality of all citizens with the continued existence of slavery by simply declaring that black persons are not citizens.² In 1896 the Supreme Court placed its imprimatur on a ghastly system of apartheid, but in doing so, felt it necessary to declare the policy "separate but equal."³ It is a tribute to the American ideal of equality that the High Court was driven to *lie* rather than to admit what it was doing.⁴

Today, many decry affirmative attempts to remedy the continued social and economic deprivation of blacks and other minority group members. Once again, people tip their hats in tribute to the principle of equality and insist that their sole object is to ensure that everyone is treated equally without regard to race. I suggest

† Chief Judge, United States Court of Appeals for the District of Columbia Circuit.

¹ Slavery was not merely permitted under the original Constitution; it was protected. See, e.g., U.S. CONST. art. IV, § 2, cl. 3 (fugitive-slave clause).

² *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

³ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

⁴ Lest there be any doubt that "separate but equal" was a wholly inaccurate description of the post-*Plessy* practice, see *Cumming v. Richmond County Bd. of Educ.*, 175 U.S. 528 (1899) (Board of Education allowed to close black high school for economic reasons, even though black students not admitted to white high school).

that this version of equality, which permits the continuation, indeed the exacerbation, of grave disparities in the opportunities and advantages available to persons of different races, ignores the context in which the problem of inequality has persisted in this country, and ultimately endangers our democratic institutions.

I do not suggest that everyone who opposes affirmative action on behalf of persons of disadvantaged background⁵ is motivated by racism or ill will. Quite the contrary: many are sincere and idealistic. Moreover, it is easy to understand the distaste many feel for programs that allocate burdens or benefits on the basis of race. Nevertheless, I believe that such persons focus too narrowly on the importance of formally neutral rules, and thereby inhibit achievement of the equality necessary to our political system. No one can deny that race is, and has always been, the most serious, the most divisive, and the most persistent problem in the United States. To paraphrase—and I believe to correct—Professor Alexander Bickel's famous statement: the lesson of race relations in this country has been the same since the Founding; inequality between the races is "illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society."⁶ If we come to understand why this is so, then it may become more clear what we must do about it.

I

Equality and egalitarian justice have animated political movements in countries around the globe through much of recent history. Yet nowhere is the principle of equality so central to the proper functioning of the political system as it is in the United States. This is partly the product of historical and geographical circumstance: the United States—more than most nations—comprises a profusion of races and ethnic groups. It is not surprising that racial equality is a vital issue to so heterogeneous a

⁵ For purposes of this essay, I will write primarily about black Americans. To a large extent, however, the black race is a paradigm for other disadvantaged groups. This analysis should be understood as applying to those other groups as well, except where the context indicates otherwise.

⁶ Professor Bickel's actual words were: "The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." A. BICKEL, *THE MORALITY OF CONSENT* 133 (1975). This statement has recently provided the inspiration for a sharp attack on affirmative action programs. Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

people. But in saying that racial equality is central to our political institutions, I am referring not to historical happenstance, but rather to political theory and practice.

People often assert that equality is antithetical to liberty, and that promotion of equality is antidemocratic. Properly understood, these concepts are in harmony. This understanding is best captured by the ideal of self-rule, by which I mean a system of government in which a large measure of control is vested in each citizen over his own life, and in which social control is exercised with the consent of, and through the representatives of, the citizens. Equality, far from being antithetical to this understanding of liberty, is indispensable to it. The essential equality of the citizens is a fundamental precondition to the operation of the liberal democratic regime as established in this country.

The genius of the American system has been to mold out of the conflicting private interests of its individual citizens a common interest of the community. The system requires a particular type of citizen, and it emphasizes a particular type of interest. The citizen must have a stake in his country: he must feel that his country's prosperity is his prosperity, that his country's woe is his woe. Unless he feels this bond of community, he will—no matter what his legal status—consider himself an alien in his own land. Moreover, the individual citizens must pursue interests that are flexible and open to compromise, lest they be unable to reach mutually advantageous agreements with citizens who have conflicting interests. Thus, our politics must be based upon the shifting alliances of economic and social interest, rather than the immutable and uncompromising lines of race, clan, or religion. With respect to each of these requirements, racial inequality destroys the operation of the political system.

How can we expect blacks and other members of disadvantaged minority groups to feel they have a stake in the present system? They are denied the fruits of the nation's bounty. They are crowded together in the nation's slums; they suffer widespread unemployment; they receive the worst of most social services; they bear the brunt of the nation's brutalities. As they survey our white legislatures and congresses, our white courtrooms and bureaucracies, must they not feel that their citizenship is second-rate—that, no matter what the Constitution may say about their equality as citizens, they are unequal and ruled from above? And if this *objective* inequality undermines the bonds of community felt by black Americans, the fact that it was the *deliberate* product of oppression

by the white majority should make white Americans marvel at the continued patience and patriotism of their black countrymen. Plainly, the disadvantaged position of blacks and members of other minority groups is a structural flaw in our political system, and an abomination.

Moreover, so long as the disadvantaged groups of the United States remain outside of the mainstream of our social and economic life, they will be driven to the very race-based politics feared by many opponents of affirmative action.⁷ A poor black man will often vote for black candidates espousing black causes, just as any other citizen may sometimes vote on the basis of racial or ethnic identity. But unlike his more prosperous fellow citizens, whose ethnic identity is diluted and usually overwhelmed by interests grounded in economic or other concerns, the poor black man often has no faction to support other than one based on race. Because he plays no other role in the economy or society, he has no conflicting allegiance. Hence, affirmative action may be the only way to dismantle racial politics in the long run. Only when the divisions of race and ethnicity cease to correspond, and begin to conflict, with divisions along economic, social, and other shifting lines will racial politics be subordinated. When there are large numbers of black doctors, shopkeepers, corporate executives, developers, engineers, shareholders, and so on, the problem will be solved. This must be the goal of the United States, if the clash of private interests is to continue to serve as our means of approaching the common good.

II

America's tragedy has been her failure to guarantee the equality among the races so manifestly required by the structure and theory of her government. The country has paid a price. It took a bloody civil war to extirpate slavery, and an acrimonious Reconstruction to attempt, unsuccessfully, to eradicate the gross inequality that remained. More recently there has been disorder in our cities and elsewhere, which has subsided into squabbling among races and ethnic groups for larger shares of an economic pie now perceived by many to be shrinking. Obviously, the problem of inequality has not been solved, and we can expect further racial troubles in the future until its solution. A nation preconditioned on

⁷ See, e.g., Van Alstyne, *supra* note 6, at 778.

equality among its major groups cannot function with such a contradiction in its midst.

Unfortunately, inequality among the races is extraordinarily difficult to eradicate. Many persons expected that, once formal discrimination had been curbed, members of deprived minorities would have little difficulty in entering into the mainstream of American economic and social life. It has not been so—even assuming optimistically that most formal discrimination has now ceased. We should have known that inequality would continue until we took active steps to end it. As de Tocqueville predicted long before slavery was abolished, “[a] natural prejudice leads a man to scorn anybody who has been his inferior, long after he has become his equal; the real inequality . . . is always followed by an imagined inequality rooted in mores.”⁸ This “imagined inequality rooted in mores” plagues our civic life with a vengeance, and will continue to do so until experience proves that blacks can serve competently in all levels of society.

Inequality and disadvantage do not end simply because we pass laws against them. For a member of a deprived minority group to succeed, he must develop the discipline, drive, and skills demanded by the marketplace. Unfortunately, schools and job training programs cannot effectively impart such attributes, or our task would be relatively easy. Rather, the most basic education needed by a person entering the economic and social mainstream of this country must usually be provided in the home. And although many disadvantaged parents try very hard to train their children for productive lives, they succeed too rarely. A black mother and father, deprived by past discrimination of an adequate education, and inured because of past experience to second-class status, may often be unable to help their children to develop their academic skills and self-confidence. Their despair, compounded by the cruelties of the welfare system as it is administered, may indeed cause a breakdown in the family structure altogether—to the severe detriment of their children’s chances to take advantage of opportunities now open by law to them. Discrimination, having once taken its toll, can in this manner perpetuate its effects long after the society has adopted formal equality in its racial practices.⁹

⁸ A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 341 (J. Mayer ed. G. Lawrence trans. 1969).

⁹ National economic statistics prove beyond doubt that inequality continues unabated, and even indicate that it may be increasing. The ratio of the unemployment rate of black

Moreover, poverty and race, acting in conjunction, tend to produce prejudice. So long as most blacks are poor, they will continue to exhibit the work habits and other characteristics of the poor that often impede success in the employment and society of middle-class America. And so long as white persons associate being black with being poor, they will tend to discriminate against blacks, no matter how open-minded they may imagine themselves to be. This places the poor black in a situation far more desperate than that of his poor white counterpart. Both must overcome severe educational handicaps, but the black must in addition overcome the obstacles of racial prejudice.¹⁰

It has become increasingly evident that this cycle of discrimination, deprivation, inadequate education, and renewed discrimination must be broken if a genuine equality is to emerge. Doing nothing—or doing nothing but prohibiting the more obvious forms of racial discrimination—will avail little against the momentum of poverty and discrimination that we have allowed to build. To break this cycle requires, as a matter of common sense, special treatment for the victims of past discrimination. Such special treatment may appear unnatural—even unfair in the short run—but the only alternative is to allow the effects of our history of discrimination to plague our civic life in perpetuity.

Oddly, affirmative efforts designed to remedy the effects of past racial or ethnic discrimination have aroused far more heated opposition, both in the public and in the Supreme Court, than have efforts to remedy other forms of discrimination. Even though it is now well established, as a matter of either constitutional or statutory law, that discrimination *against* older persons, handicapped persons, and women is illegal, we find that private and governmental efforts *on their behalf* are largely considered unobjectionable. Who doubts that Social Security for the aged and special programs for the handicapped are legal and constitutional? Affirmative action on behalf of women is more controversial, at least in

males to that of white males was 2.2 in 1977 and 2.7 in 1979. The ratio of the unemployment rate of Hispanic males to that of white males was 1.7 in 1977 and 1.6 in 1979. U.S. COMM'N ON CIVIL RIGHTS, *THE STATE OF CIVIL RIGHTS: 1979*, at 21 n.2 (1980). In business, progress has been almost as scant. In 1972, minority-owned businesses generated 0.7% of all American business receipts. In 1977 this figure had increased to only 2.1%. *Id.* at 26 (citing U.S. DEP'T OF COMMERCE, *A NEW STRATEGY FOR MINORITY BUSINESS ENTERPRISE DEVELOPMENT* (1979)).

¹⁰ The persistence of racial prejudice is well documented. *See, e.g., id.* at 1-2 (housing discrimination).

some settings,¹¹ but the Supreme Court—with the acquiescence of some opponents of racial affirmative action¹²—has sustained special benefits to women on the ground that such benefits are needed to remedy the relative economic deprivation of women caused by economic discrimination.¹³ Readers of Justice Rehnquist's dissent in *Weber*¹⁴ must surely be surprised to read his dissent in *Califano v. Goldfarb*,¹⁵ in which he urged the Court to uphold a provision of the Old Age, Survivors, and Disability Insurance Benefits program that favored widows over widowers.¹⁶ Justice Rehnquist called this difference in treatment "scarcely an invidious discrimination,"¹⁷ and explained: "The differentiation in no way perpetuates the economic discrimination which has been the basis for heightened scrutiny of gender-based classifications, and is, in fact, explainable as a measure to ameliorate the characteristically depressed condition of aged widows."¹⁸ Of course, this logic is equally applicable to race-based affirmative action, which in no way perpetuates the economic or other discrimination that was the basis for strict scrutiny, and which in fact serves to ameliorate the depressed condition of blacks and other deprived minority group members. Since the "depressed condition" of minority persons in the United States is more intractable, and arguably more severe and politically divisive, than that of women, what supports the proposition that it is legitimate to help the latter, but not the former, to overcome past discrimination?

¹¹ One major concern is that programs ostensibly for the benefit of women may actually be predicated on outmoded stereotypes about the role of women in society, and thus may serve to impede the efforts of women to obtain genuine equality. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

¹² Compare *Kahn v. Shevin*, 416 U.S. 351 (1974) (Douglas, J.) and *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (Stewart, J.) with *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408 (1978) (Stevens, J., joined by, *inter alia*, Stewart, J., concurring in the judgment in part and dissenting in part) and *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974) (per curiam) (Douglas, J., dissenting from finding of mootness).

¹³ *Califano v. Webster*, 430 U.S. 313 (1977) (per curiam); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

¹⁴ *United Steelworkers v. Weber*, 443 U.S. 193, 219 (1979) (Rehnquist, J., dissenting).

¹⁵ 430 U.S. 199, 224 (1977) (Rehnquist, J., dissenting).

¹⁶ Strictly speaking, Justice Rehnquist's dissents in *Goldfarb* and *Weber* are not contradictory, since the former concerned a constitutional and the latter a statutory issue. Nevertheless, the Justice's recognition of the noninvidious nature of the discrimination in *Goldfarb* stands in sharp contrast to his description of affirmative action in *Weber* as "a creator of castes, a two-edged sword that must demean one in order to prefer another." 443 U.S. at 254.

¹⁷ 430 U.S. at 242 (Rehnquist, J., dissenting).

¹⁸ *Id.*

III

Rarely do opponents of affirmative action on behalf of racial or ethnic minorities squarely confront the undeniable need of those minorities for special assistance, or the grave consequences of continuing to deny such assistance. Rather, they immediately retreat to the abstract ground of high principle. They assert the necessity of strict neutrality between the races, and urge the courts to adopt what they invariably describe as a "color-blind" theory of the Constitution and laws. They argue that such neutrality is required by the equal protection clause, thereby giving a new twist to Justice Holmes's disparaging characterization of equal protection claims as "the usual last resort of constitutional arguments."¹⁹ In fact, strict "color-blindness" of a sort was frequently urged by opponents of the Civil Rights Act of 1964. This strict neutrality would require that the government not interfere with the decisions made by its citizens, whatever their basis. Just as the government has no business telling its citizens that they should treat ballet the same way that they treat roller derby, so also should it permit its citizens to prefer whites to blacks, blacks to whites, or whatever. In this way, the government could remain aloof from the matter of color; it would treat all citizens exactly alike.²⁰

Whether or not we fully realize it, this nation has irrevocably rejected the strict "color-blind" theory of government. Now it is agreed and solemnly enacted into law that racism—both governmental and private—is wrong, and that the government should employ its power to eradicate it. The purpose of this legislation cannot be denied: to help blacks and members of other minority groups overcome the prejudice that oppresses them. Its effect is to give special advantage to those minority groups. To call such legislation

¹⁹ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

²⁰ Even this limited position of strict neutrality of the government toward matters of racial preference would be preferable to the mandatory apartheid approved in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The challenged state statute in *Plessy* required railway companies to segregate their passengers by race, depriving members of the public of the right to choose an integrated setting for their travels. That this type of legislation impeded good-spirited voluntary efforts to promote racial harmony and equality is clear from *Berea College v. Kentucky*, 211 U.S. 45 (1908). Berea College was and is a private religious college in the Appalachian region of Kentucky dedicated to the education of white and black students without segregation or discrimination. This commendable practice was outlawed by passage of a criminal statute in Kentucky, which was sustained by the Supreme Court, *id.* at 58, over an eloquent dissent by Justice Harlan, *id.* Presumably, under the strict color-blind theory of the Constitution, such odious legislation would be struck down.

"color-blind" is a meaningless abstraction. Legislation against invidious discrimination helps one race and not the other because one race and not the other needs such help. Blacks and members of other minority groups receive special protection against the irrational or malevolent decisions of states, schools, or employers, because they need it. *Equal* protection for them is not the *same* protection accorded others.

Two Supreme Court cases nicely illustrate this point. In *Reitman v. Mulkey*,²¹ the voters of California approved by referendum a new provision in the state constitution guaranteeing to residential property owners the right to refuse to sell their property to any person, on any ground, including race. In *Hunter v. Erickson*,²² the voters of Akron, Ohio approved a city charter amendment that prevented the passage of any open housing ordinances without approval by referendum. The Supreme Court did not deny that the challenged provisions were neutral on their face, and did not deny that cities and states have the right to decline to enact fair housing laws. The Court nevertheless struck down both provisions because they made it more difficult for minority groups that suffer discrimination to obtain political redress. In short, minority groups have been given special consideration for their interests, and special protections against the majoritarian political process, because of the reality that otherwise they will continue to be oppressed by an unsympathetic and often hostile majority. They require *greater assistance* to receive *equal protection*. As Justice Blackmun has said, "[i]n order to get beyond racism, we must first take account of race And in order to treat persons equally, we must treat them differently. We cannot—we dare not—let the equal protection clause perpetrate racial supremacy."²³

This paradox has not discouraged some persons from insisting that it is possible to protect minority groups against discrimination—and indeed to remedy past instances of discrimination—without racial preference. It should be evident by now that no such course is available; the "color-blind" theorists are either deluding themselves, or are insincere in their commitment to equality. Instead of debating the abstract merit of the proposition that the government may not "regulate or allocate by race,"²⁴ we

²¹ 387 U.S. 369 (1967).

²² 393 U.S. 385 (1969).

²³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J.).

²⁴ Van Alstyne, *supra* note 6, at 777.

must ask two simple, practical questions. First, how can we detect the effects of racial or ethnic discrimination? Second, how can we remedy them? If we neither detect nor remedy invidious discrimination, then obviously we have no antidiscrimination policy. But if we do, we will discover that we have begun to "regulate or allocate by race."

A

Professor Philip Kurland has recently written to decry the "new egalitarianism,"²⁵ which he describes as a perversion of the equal protection clause so as "not to require equality under law for select minorities, but to afford them preferences."²⁶ To Professor Kurland, the "new egalitarianism" is no venial constitutional aberration:

My principal personal complaint about the new egalitarianism is that its goal seems to be homogenization of the human race, nay, that it already assumes homogeneity as the fact. My creed is different. With Judge Learned Hand, I have a "faith in the indefectible significance of each one of us." I think that the question posed by the egalitarianism of today is "whether the ultimate value shall be this wistful cloudly, errant You or I, or that Great Beast, Leviathan." And for me the choice is easy.²⁷

It is not too late to turn back from the new egalitarianism to the old equality. It is not too late to turn back from Leviathan. But it soon may be.²⁸

While Professor Kurland's attention is riveted on the apocalypse, he loses interest in the practical problem of solving racial discrimination. Federal judges cannot be so lofty; they must detect and remedy specific instances of discrimination. Professor Kurland offers this comment:

It is one thing to say that if A has been excluded from a job or a place in school because he is black, . . . [he] should be and is now entitled by law to the place that should have been his were it not for his race . . . , and to monetary compensation

²⁵ Kurland, *Ruminations on the Quality of Equality*, 1979 B.Y.U.L. Rev. 1, 18.

²⁶ *Id.*

²⁷ *Id.* at 20 (quoting L. HAND, *THE SPIRIT OF LIBERTY* 173, 82 (Phoenix ed. 1977)) (footnotes omitted).

²⁸ *Id.* at 23.

for the period of deprivation It is another thing, however, to say that one becomes entitled to a place not because he has been discriminated against, but simply because he is black²⁹

But is it so clearly "another thing"?

If all racial discrimination were blatant, it might be possible to apply Professor Kurland's simple rule of justice. But we have come to recognize that discriminators do not always announce themselves clearly: more often they employ ostensibly neutral criteria to accomplish their desired end. Unfortunately, direct proof of discriminatory motivation is usually difficult, often impossible, to obtain.³⁰ Thus, experience has proven what common sense would otherwise suggest: to establish evidence of illegal racial discrimination, the courts must employ reasonable presumptions about causes and results. If a member of a minority group is qualified for a job opening, but is denied the job, then—in the absence of a legitimate, nondiscriminatory explanation—racial discrimination may be presumed.³¹ This is hardly a radical way of evaluating a charge of discrimination: given the pervasive, subtle, and persistent history of racial discrimination in this nation's workplaces, it is not unreasonable to presume that a black applicant rejected for no apparent legitimate reason is a victim of discrimination. But by this mode of analysis, have we not given the black applicant preferential treatment—"simply because he is black"? In effect, the qualified black applicant is given an entitlement to employment, denied to similarly qualified white applicants. The qualified white applicant, denied a job on the basis of some irrational or bigoted decision of the employer, is relegated to his luck. Given the subjective nature of the employment decision, the law must prefer the black applicant

²⁹ *Id.* at 18.

³⁰ See B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 16 (1976).

³¹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The prima facie case to be borne by the Title VII plaintiff alleging unlawful failure to hire consists of four parts:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. This showing shifts the burden of proof to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* The plaintiff then has a final opportunity to prove that the asserted reason for rejection was a "pretext" for discrimination. *Id.* at 804. Statistics showing underemployment of the plaintiff's racial group are relevant to that inquiry. *Id.* at 805.

because he is black in order to ensure that employers do not discriminate against him because he is black.

Moreover, in the absence of direct evidence of discriminatory intent, it seems reasonable to presume that an actor intends the natural consequence of his deeds. As Justice Stevens has pointed out, this implies that "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."³² In the employment area, we should evaluate personnel policies and practices not solely on the basis of their purposes, but also on the basis of their consequences.³³ If an employer's practices consistently cause the disproportionate hiring of members of the majority race, and if the employer can show no legitimate business purpose for those practices, then—again given the pervasive, subtle, and persistent history of racial discrimination—we can presume that the challenged practices are discriminatory. Nine years after the decision in *Griggs v. Duke Power Co.*,³⁴ few persons would dispute this. But the same proposition, restated, is: absent legitimate business reasons, employers must adopt employment practices that result in the hiring of minority workers roughly in proportion to their availability in the pool of qualified laborers.

To some, this looks like "reverse discrimination." Before they condemn it, however, they should provide some credible explanation of why allegedly neutral employment practices³⁵ should produce rankly unneutral results. Can anyone believe that low hiring

³² *Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring).

³³ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) ("Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.") (emphasis in original).

³⁴ *Id.* The Court held: "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

³⁵ Not all employment practices that cause the disproportionate hiring of white employees are illegitimate, of course. Only practices that erect "artificial, arbitrary, and unnecessary barriers to employment" are proscribed by Title VII. *Id.* at 431. "Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications." *Id.* at 430. I believe that much of the opposition to affirmative action among employers is the product of a misunderstanding on this point. To allay such misunderstanding—and also to enforce Title VII faithfully—the courts and the EEOC should be careful to respect the legitimate business needs of employers, even where those needs cannot be precisely documented or quantified. But they must be vigilant as well to ensure that discriminatory practices do not intrude into the nation's workplaces in the guise of legitimate business practices. See generally Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979); Note, *Business Necessity Under Title VII of the Civil Rights Act of 1964: A No-Alternative Approach*, 84 YALE L.J. 98 (1974).

rates for blacks are the product of chance?³⁶ Unless there is a legitimate explanation for the disparities, a fair-minded person should not be reluctant to conclude that something is amiss. In short, a serious commitment to removing race barriers from the nation's workplaces requires steps to remove racial disparities in hiring. If this be "reverse discrimination," make the most of it: I know of no other way to enforce the antidiscrimination laws.

B

Racial discrimination must not only be detected, but it must also be remedied. In practice, this requires that the courts and other institutions engaged in remedying past discrimination begin to prefer minority groups to the majority. Even if they adopt a "color-blind" theory, they will find that preferential methods are the only effective means of executing it.

This much seems to be admitted by most critics of affirmative action. Professor William Van Alstyne, for example, recently argued that "regulation and allocation by race are wrong," no matter what the purpose of the regulation or allocation may be.³⁷ Nevertheless, he was willing to agree with Supreme Court decisions that "paired racially identifiable schools, redrafted attendance lines, or mandated busing"³⁸ strictly on the basis of race. His justification is suggestive: "In each instance, the fulcrum of judicial leverage was an *existing governmental* race line, which the particular judicial order sought to remove. The object was thus to disestablish particular, existing uses of race, not to establish new ones."³⁹ Apparently, therefore, Professor Van Alstyne makes an exception to his otherwise categorical condemnation of "regulation and allocation by race" and would permit such regulation and allocation if it is useful to "disestablish particular, existing uses of race."

Professor Van Alstyne's principle is subject to a wider construction than he may expect. He seems to be thinking of a situa-

³⁶ Cf. *Alexander v. Louisiana*, 405 U.S. 625, 629-31 (1972) (inference of discrimination from disproportionate selection of white grand jurors).

³⁷ Van Alstyne, *supra* note 6, at 792. In fact, Professor Van Alstyne stated that the message of the Supreme Court civil rights decisions is "commendably even stronger." *Id.* He said that "[l]aws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. And laws attempting to advance either policy even in disguise will likewise be struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers."

³⁸ *Id.* at 784.

³⁹ *Id.* (emphasis in original) (footnote omitted).

tion in which race lines were established by the very instrumentality of government now attempting to disestablish them. An example might be a school board that once operated a dual system, and that now is required to integrate pupils and teachers so as to eradicate the vestiges of the dual system. But may an instrumentality of government seek to remedy the effects of a race line drawn not by it but by a separate agency? For example, may a housing agency employ color-conscious criteria in selecting new housing sites in order to compensate for the residential segregation caused in the past by zoning regulations or other practices of governmental agencies? The answer must surely be "yes," since the various governmental agencies are merely instrumentalities of a single responsible actor.⁴⁰ And why should not a governmental agency be permitted to take steps to disestablish the race lines wrongfully erected by its citizens?⁴¹ In a sense, all civil rights law is an attempt by government to correct the injustices created by privately imposed slavery. Government is little more than the organized arm of society. If concerted action by the citizenry is needed to correct past abuses committed by the citizens as individuals, there is no apparent reason why it cannot democratically choose to take that action through its organized arm. If race lines are wrong, then they are wrong no matter who was responsible for their establishment. It makes little sense to hamstring those in a position to fashion remedies in the way Professor Van Alstyne seems to suggest.

The principle of disestablishing race lines may also be extended to the private sector. There is no reason to confine its operation to "*governmental*" race lines. If a corporation or other private

⁴⁰ The Court in *Milliken v. Bradley*, 418 U.S. 717 (1974), may have held that one state governmental entity cannot be required to remedy the effects of another's discriminatory decisions. It reversed a lower court order requiring 53 school districts in suburban Detroit to participate in cross-district busing, stating that cross-district remedies for the segregation of a single district could not be required unless *interdistrict* segregative effects had been proved. *But cf.* *Hills v. Gautreaux*, 425 U.S. 284 (1976) (upholding a plan requiring the U.S. Department of Housing and Urban Development to build public housing in Chicago suburbs even though the plan would involve separate local governments apparently innocent of past discrimination). Even so, nothing in *Milliken* detracts from the power of separate governmental entities to participate voluntarily in cross-jurisdictional affirmative action if they so choose.

⁴¹ *Cf.* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("School authorities . . . might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole.").

association is motivated to eradicate race lines in its organization, it should be encouraged to do so—and permitted to do so without making admissions about past illegal action that would precipitate costly lawsuits against it.⁴² Surely Professor Van Alstyne, who nearly twenty years ago pointed out the fallacies in the application of the “state action” requirement,⁴³ would not now decree a “state action” limitation on affirmative remedies.

Thus, the principle of disestablishing race lines, stripped of its artificial restrictions, would justify a large range of affirmative action programs: race-conscious public housing construction, in order to erase the race line of segregated housing; race-conscious special admissions programs in professional schools, to erase the race line of segregated professions and student bodies; race-conscious hiring or training programs, to erase the race lines in employment. Indeed, it is difficult to think of a reasonable affirmative action program that could not be justified on the basis of the need to “disestablish particular, existing uses of race.”

Other practical concerns make some form of racial regulation useful. Without it, the courts would be unable to monitor compliance with their decrees effectively.⁴⁴ Congress would be unable to determine whether federal contracts are being granted to firms in compliance with its desire to eradicate racial disparities in contracting, minority group members would be reluctant to waste their time applying for jobs withheld from them in the past without some clear indication of change, employers or admissions officers would be unable to correct the pernicious effects of culturally biased testing,⁴⁵ businesses would be left uncertain about their obli-

⁴² See *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

⁴³ Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

⁴⁴ Professor Alan Freeman has propounded a telling example of this:

Suppose a municipality has gerrymandered its districts so that the entire black population is in one district, and every other district is white, and you have evidence of purposeful discrimination. If you go to court and get the practice declared illegal, what's the remedy? Suppose the court simply issues an order to the municipality that says “stop doing that.” And then a redistricting follows, with most of the black population still in the one district, and a handful of people shifted elsewhere. Assume there is no further evidence of “purposeful” discrimination. How do you know if the new scheme is a violation or not?

A. Freeman, *School Desegregation Law: Promise, Contradiction, Rationalization* (Oct. 25, 1978) (to be published in a collection of essays edited by Professor Derrick Bell tentatively entitled *ALTERNATIVE VISIONS: REVISIONIST ESSAYS ON SCHOOL DESEGREGATION* (Teachers' College Press 1980)).

⁴⁵ See Sexton, *Minority-Admissions Programs after Bakke*, 49 HARV. EDUC. REV. 313, 324-27, 333-34 (1979).

gations under the law, society would be unable to address those subtle forms of discrimination not yet detected or proved, and civil rights, religious, and other public-spirited groups would be unable to discover the proper objects for application of moral pressure. Without objective evidence of result based on a rough element of racial proportionality, discriminators would be able to mask the motives for their decisions behind their unchallengeable discretion. In short, only clear, easily monitored goals and timetables are likely to make a real difference.

IV

Few parties in litigation now question the broad discretion of courts to remedy proven past discrimination, even using preferential goals and quotas, however controversial the practice may still be in academia or among the public. Although the Supreme Court has never authoritatively approved racial hiring or promotion quotas imposed by court decree, the lower federal courts have uniformly done so.⁴⁶ But controversy still rages over the seemingly subsidiary issue of *who* may determine when race-conscious remedies are needed. Some argue that such remedies are appropriate *only* when particular acts of past discrimination have been proven in some authoritative public forum: by court decree if possible, or maybe by administrative or congressional determination.

On the surface, this purported limitation on the freedom of institutions to remedy the effects of past misdeeds seems curious. It seems to suggest that affirmative action is forbidden unless it is required: an unusual proposition under our jurisprudence. Moreover, in an age when moderates and conservatives are usually heard to praise the virtues of voluntarism and to decry coercion, it is surprising that on this issue they should forbid uncoerced acts to remedy injustice. In an age when moderates and conservatives are quick to point out the inefficiencies and perversities of decision making by bureaucrats, politicians, and judges, it is peculiar to hear them say that *only* such officials have the ability accurately to discern racial discrimination. In an age when moderates and conservatives frequently express concern that businesses are unfairly throttled by unclear and inconsistent governmental pronouncements, it is odd that they should be willing to impose an-

⁴⁶ See B. SCHLEI & P. GROSSMAN, *supra* note 30, at 1199-1200. The decision in *Weber* presumably lays this question to rest, at least by implication.

tidiscrimination laws on employers and unions, but deny them the only clear and manageable way of ensuring compliance with the law.

The decision in *Weber* settled the most important aspect of this dispute: "that Title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans."⁴⁷ At least in the case of private employers, therefore, reasonable affirmative action plans are permissible despite the absence of any judicial, administrative, or congressional finding of discrimination.

Were it not for Justice Powell's opinion in *Regents of the University of California v. Bakke*,⁴⁸ I would have thought the matter settled in other statutory⁴⁹ or constitutional areas as well. In *Bakke*, however, Justice Powell said that a racially based classification cannot be upheld on the ground that it "aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."⁵⁰

Does Justice Powell really mean to limit constructive efforts to remedy the effects of past discrimination to those aimed at specific discriminatory acts identified by a governmental tribunal? In the face of the past treatment of this nation's black citizens by the white majority, it takes no special expertise to see that the present disadvantaged position of blacks can be traced directly to that unfair treatment. Why is a governmental tribunal needed to tell us what we already know? The only effect such a requirement could have would be to slow the process by preventing persons of goodwill from helping to remedy this pressing inequality. If we must wait for governmental tribunals, we may wait forever.

The appeal to the expertise of a governmental tribunal seems especially strained in the context of *Bakke*. Justice Powell stated that the University of California at Davis was "not competent"⁵¹ to

⁴⁷ 443 U.S. at 208.

⁴⁸ 438 U.S. 265 (1978). There was no opinion of the Court in *Bakke*, but most scholars and lawyers treat Justice Powell's opinion, *id.* at 269, as if it were controlling, even though his constitutional holding in favor of Bakke was joined by no other Justice.

⁴⁹ In *Weber*, Justice Brennan indicated that Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-2000e (1976), "cannot be read *in pari materia*." 443 U.S. at 206 n.6. Thus Title VI, at issue in *Bakke*, may not allow for voluntary affirmative action efforts at least to the same extent as does Title VII.

⁵⁰ 438 U.S. at 307.

⁵¹ *Id.* at 309.

make findings concerning past discrimination. The "broad mission" of the University, the Justice said, "is education, and not the formulation of any legislative policy or the adjudication of particular claims of illegality."⁵² Were it not for this pronouncement, most persons probably would think that education professionals are the most "competent" to judge the effects of various causes on the educational attainments of students—certainly in a better position than judges or bureaucrats. One would also think that education professionals are the most "competent" to decide what sort of remedial program would be most effective in counteracting past discrimination. Moreover, as an agency receiving federal funds, the University was explicitly authorized by HEW regulations to "take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."⁵³ Apparently HEW did not think any special "competence" necessary to perceive that blacks and members of other minorities have suffered discrimination in the past; the Regents of the University of California obviously were not disabled on that score.⁵⁴ So long as the remedial purpose of the program was clear, what difference did it make that the need for it was perceived by the University and not by the courts? Allan Bakke is equally disadvantaged either way, and there is no reason to suppose that one way of making the necessary determinations is more or less accurate than the other. The primary effect of imposing the hurdle of "judicial, legislative, or administrative findings" is to make affirmative action programs rarer by making them procedurally more complicated to obtain.

In short, vigilance in the detection and remedy of racial discrimination requires race-consciousness, and such race-consciousness can be legitimate in a variety of circumstances, on the part of a variety of institutions. In the last few years the Supreme Court, albeit haltingly, has approved the use of race-conscious remedies by both public and private institutions on the basis of a number of

⁵² *Id.*

⁵³ 45 C.F.R. § 80.3(b)(6)(ii) (1979). Justice Powell disregarded this explicit delegation of authority to the University of California by the federal department most closely associated with enforcement of equal educational opportunity.

⁵⁴ The only disagreement Justice Powell expressed with the University's substantive conclusions about the need for remedial assistance was that Asians were included in the program, in spite of the large numbers of Asians admitted through the regular admissions process. 438 U.S. at 309 n.45.

rationales.⁵⁵ In my view, this means that a significant victory against discrimination has been won, a victory that "color-blind" theory could never have achieved.

V

Difficult questions remain. Just as it is clear that courts should not overturn affirmative action programs simply because they are "discriminatory," so also is it clear that the courts must be vigilant to ensure that new forms of invidious discrimination are not approved in the guise of remedial affirmative action. In this the critics of affirmative action are correct: by rejecting a clear line against remedial racial preferences, the courts have taken on an oversight task of great subtlety and difficulty. So far, the courts have been faced with cases challenging the *principle* of affirmative action, not with cases difficult to decide on their *facts*. *Weber*⁵⁶ was essentially an easy case on its facts because the affirmative hiring program was plainly temporary, and because no workers were deprived of a right to advancement that they previously had considered theirs. *Bakke*⁵⁷ was easy because the program employed fixed, undisguised numerical quotas. *United Jewish Organizations*⁵⁸ might have been hard had the Court focused on the discrimination against Hasidic Jews—clearly a discrete and insular minority—rather than treating the disadvantaged voters as "white." Under the Court's approach, however, the case was easy because "whites" are well represented in the New York legislature, and because the redistricting was overseen by the Attorney General under the explicit mandate of the Voting Rights Act. The *principles* of these cases were of course difficult and controversial; but once the principle had been decided upon, the cases themselves presented few problems.

Not so cases in the future. As Professor Van Alstyne has pointed out, the courts must inevitably face "numerous" and "rank"⁵⁹ decisions about: "*which* races; *how much* to each race; *by*

⁵⁵ *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Franks v. Bowman Constr. Co.*, 424 U.S. 747 (1976); *Lau v. Nichols*, 414 U.S. 563 (1974). See also *Califano v. Webster*, 430 U.S. 313 (1977).

⁵⁶ *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

⁵⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁵⁸ *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977).

⁵⁹ Van Alstyne, *supra* note 6, at 808.

what test is each of us to be assigned 'our' race?"⁶⁰ He is, I think, overly pessimistic when he suggests that the courts will be without constitutional bases for the decisions and will be "overwhelmed" by the task, or will instead abdicate oversight to executive or administrative bodies.⁶¹ Such pessimism may be the result of an overly punctilious standard for evaluating affirmative action programs: many apparent problems are less serious when affirmative action is evaluated in a more flexible and generous spirit. Nevertheless, Professor Van Alstyne is quite correct that there are difficult problems of adjudication ahead, and there is little in our jurisprudence to date that will guide us in the project.⁶²

The common-law method of case-by-case adjudication may well serve us better in this area than any overarching theories or principles. As the courts sift through affirmative action programs, upholding some, striking down others, the proper grounds for distinction will in time appear. This apparently is the approach decided upon by the Supreme Court. In *Bakke*, the Court struck down one plan and, in dictum, praised another. In actuality, the lower courts are left with broad discretion to judge such plans in the future.⁶³ The much-lamented confusion of the *Bakke* opinion may thus be its jurisprudential strength: by deciding little, and providing less than clear reasons, *Bakke* keeps the future open for us. *Weber* was more explicit on this score: "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans."⁶⁴ This gives little guidance to the lower courts in the short run; in the long run, however, it

⁶⁰ *Id.* at 804 (emphasis in original). But see *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 359 n.35 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part) (citations omitted):

But, were we asked to decide whether any given rival group . . . must constitutionally be accorded preferential treatment, we do have a "principled basis" . . . for deciding this question, one that is well established in our cases . . . [T]he only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. . . . Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

⁶¹ Van Alstyne, *supra* note 6, at 808. See also *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 303 (1978) (Powell, J.).

⁶² I doubt that the question "by what test is each of us to be assigned 'our' race?" will realistically be in dispute in most cases. I am content to leave most racial identification to the persons involved, except in cases of outright fraud.

⁶³ See generally Edwards, *Preferential Remedies and Affirmative Action in Employment in the Wake of Bakke*, 1979 WASH. U.L.Q. 113; Sexton, *supra* note 45.

⁶⁴ 443 U.S. at 208.

makes less likely the adoption of rigid and inapt distinctions that might prove difficult to correct.

It is therefore with some trepidation that I put forth several considerations that I believe may help to distinguish permissible from impermissible affirmative action plans. No one consideration should be dispositive; rather the court should decide, based on all relevant considerations, whether the challenged discrimination is invidious. Some of these proposed considerations may prove unworkable or wrongheaded; surely the list will be proven incomplete. Nevertheless, now that the principle of affirmative action has been essentially upheld, I think it is time to begin to think about the next step.⁶⁵ The following are in no particular order:

What is the relation between the decisionmaker and the burdened and preferred groups? One of the hallmarks of invidious discrimination has been that the decisionmaker—whether government, school, business, union, or whatever—acts out of ignorance or dislike of a racial or ethnic group he does not belong to. Because he is unfamiliar with members of a different and isolated group, he may predicate his decisions on stereotypes and bigoted misconceptions. The fundamental purpose of the equal protection clause is to ensure that governmental decisionmakers treat other groups the same way they treat their own, so as to prevent them from harming—either wittingly or unwittingly—an unrepresented minority. Thus, discrimination by the white majority against discrete, insular, and powerless minorities is considered “invidious” and subjected to “strict scrutiny” because we are suspicious that the ends sought by the majority may be illegitimate or the means irrational.⁶⁶ Even where there may be a legitimate basis for treating groups differently, a discriminatory law must be struck down under

⁶⁵ This is not, of course, the first attempt to marshal the considerations necessary for deciding affirmative action cases in the future. See, e.g., *United Jewish Organizations v. Carey*, 430 U.S. 144, 171-78 (1977) (Brennan, J., concurring in part); EEOC, *Affirmative Action Appropriate Under Title VII of the Civil Rights Act of 1964*, 29 C.F.R. § 1608 (1979).

⁶⁶ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (dictum) (“prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”). Cf. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (“the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process”).

the equal protection clause if it is based on outmoded perceptions that certain groups are weak or inferior.

But when a decisionmaker chooses to disadvantage members of *his own* racial or ethnic group, it may hardly be supposed that he is acting out of prejudice, ignorance, or hostility.⁶⁷ Such decisions should not be considered "suspect" in the usual sense. As Professor John Hart Ely put it:

When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others, or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks.⁶⁸

Many affirmative action programs will be of this sort, and should, in general, be upheld by the courts. *Weber*⁶⁹ is a good example. The decision to prefer blacks to whites for the training program at Kaiser Aluminum was negotiated by the company and the union. Since the union membership is made up primarily of persons like Brian Weber, the decision was not likely to be "invidious"—that is, not likely to be predicated on prejudice or hostility toward the disadvantaged group.⁷⁰ When the majority group acts to disadvantage

⁶⁷ *Castaneda v. Partida*, 430 U.S. 482 (1977), may be an exception to this general rule. In *Castaneda*, the Court found that the grand jury selection system of Hidalgo County, Texas, was invidiously discriminatory against Mexican Americans, even though the judge, the majority of the jury commissioners, and the majority of the elected officials of the county were Mexican Americans. Justice Marshall, concurring, stated that:

Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

Id. at 503 (Marshall, J., concurring) (footnote omitted). One might add that members of the majority group sometimes adopt the minority's negative attitude toward the majority, but surely such reactions are comparatively rare in both situations.

⁶⁸ Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974).

⁶⁹ *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

⁷⁰ In two respects, however, *Weber* might be considered slightly more troublesome.

itself for the benefit of the minority, there should be a strong presumption of legality.⁷¹

As Professor Ely points out, however, not all affirmative action plans are genuinely benign in this sense.⁷² Sometimes, the non-"suspect" facade of white-black decisions will obscure a subtler, and less innocuous, form of discrimination. In particular, a group of whites in power may establish a remedial program for the benefit of blacks, to the detriment of a discrete and powerless subgroup of whites. Indeed, it may be "the natural consequence of our governing processes that the most 'discrete and insular' of whites often will be called to bear the immediate, direct costs of benign discrimination."⁷³ One troubling instance of this may have been the *United Jewish Organizations*⁷⁴ decision. In that case, legislative district lines in New York City were redrawn under the pressure of the Voting Rights Act so as to increase the representation of nonwhite voters. To do so, a compact district of predominantly Hasidic Jewish voters, which had traditionally sent a representative to Albany, was split in two. The Hasidim lost their legislative seat. The Supreme Court upheld the districting plan, because it treated the Hasidim as merely "white" voters. As the concurring opinion indicates, however, the increase in nonwhite representation could have been accomplished in other ways. The state officials chose to split the Hasidic community in half rather than to redistribute a "more varied and diffuse range" of white voters into predominantly non-

First, the union officials who negotiated the contract with Kaiser Aluminum might not be representative of their members: they might constitute a type of white ruling class willing to sacrifice the interests of the workers. Second, the union might have a conflict of interest with its members. Because the union might face lawsuits alleging racial discrimination, it might have chosen to adopt the affirmative action program to protect the union's coffers, with little concern for the consequences on its membership. In general, however, we can safely presume that an elected leadership will adequately defend the interests of its constituency—or at least that it will harbor no prejudice against, or hostility toward, them.

⁷¹ Special deference may be due a congressional determination that certain forms of affirmative action are necessary to effectuate the substantive provisions of the fourteenth amendment: "§ 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966).

⁷² Ely, *supra* note 68, at 736-39.

⁷³ *United Jewish Organizations v. Carey*, 430 U.S. 144, 174 (1977) (Brennan, J., concurring in part). It is possible that many upper-class whites, professionals, and academics derive personal satisfaction and approbation from others by appearing to be "liberal" and "progressive." To sacrifice the interests of less advantaged whites for this reason may be less "benign" than affirmative action may generally be presumed to be.

⁷⁴ 430 U.S. 144 (1977).

white districts.⁷⁵ I am not saying that, given the state of the record, the plan necessarily should have been struck down; perhaps, however, the Court should have remanded the case for a consideration of the issue.⁷⁶

One consequence of this approach to affirmative action programs is that the courts must scrutinize somewhat more carefully those programs instituted by decisionmakers of the minority race. When black decisionmakers, for example, choose to disadvantage white persons, there is no *a priori* reason to assume that they are not acting out of prejudice or hostility. This does not mean, however, that all minority-instituted affirmative action programs must be struck down: such programs should merely be denied the presumptive validity granted programs instituted by the groups disadvantaged by them. We may no more assume that minority preference programs are "invidious" when members of a minority are in control than we may assume that policies *disadvantaging* members of minorities are necessarily benign on account of such control.⁷⁷ Still, the courts may in some circumstances need to protect powerless white persons from invidious discrimination at the hands of black majorities.

Will the classification tend to stigmatize members of a group? Ever since the Court in *Brown v. Board of Education*⁷⁸ declared school segregation unconstitutional on the ground that it "generates a feeling of inferiority as to [black children's] status in the

⁷⁵ *Id.* at 174-75 (Brennan, J., concurring in part). Some evidence suggests that if an alternative districting plan had been adopted, leaving the Hasidic district intact, the desired nonwhite majority in the adjoining district would have fallen from 65'6 to 63.4'6. State officials apparently perceived that the Attorney General required no less than a 65'6 nonwhite majority. *Id.* at 181-82 (Burger, C.J., dissenting).

⁷⁶ The district court ruled that the petitioners had no constitutionally protected rights as Hasidic Jews, *id.* at 153, and petitioners apparently did not pursue this claim, *id.* at 178 (Brennan, J., concurring in part). This partially explains why the majority blandly discussed the issues of the case as if the Hasidim were indistinguishable from the other whites of New York.

A second problem in the case that received no attention from the majority was the claim by Puerto Rican voters that they were disadvantaged by the redistricting plan. *Id.* at 173 (Brennan, J., concurring in part). The Puerto Ricans were classified with the blacks as "non-whites," *id.* at 150 n.5 (White, J.), and thus were treated as if they benefited from the plan. This exemplifies a potential problem of affirmative action programs: they may tend to benefit primarily the most vocal and politically powerful of the minority groups. If the courts are not sensitive to this problem, no one will be.

⁷⁷ See *Castaneda v. Partida*, 430 U.S. 482 (1977) (leaders from minority groups may act out of prejudice towards their own group).

⁷⁸ 347 U.S. 483 (1954).

community that may affect their hearts and minds in a way unlikely ever to be undone,"⁷⁹ the courts have recognized that a key aspect of invidious discrimination is its tendency to stigmatize persons of particular groups. This stigma may take the form of stamping the group as inferior, venal, weak, or whatever, depending on the popular prejudice and the nature of the discrimination. Any evaluation of the legality of an affirmative action plan must include a serious search for a stigmatizing purpose or effect, for "[s]tate programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."⁸⁰ Any affirmative action program that would label a class of persons as innately inferior should therefore be struck down.

That the Supreme Court has been misled on the subject of stigma can be seen in the gender-based discrimination cases such as *Kahn v. Shevin*.⁸¹ In *Kahn*, the Court upheld a statute granting widows, but not widowers, a \$500 property tax exemption, stating that it was "reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden."⁸² Under the circumstances, however, that ostensibly benign purpose was likely predicated on the stereotype of the helpless and dependent widow. As Justice White stated in dissent, "[t]he presumption is that all widows are financially more needy and less trained or less ready for the job market than men."⁸³ Such demeaning presumptions should not be the basis for public policy. More hopeful was the later case of *Craig v. Boren*,⁸⁴ in which the Court struck down a law permitting the sale of 3.2% beer to females, but not males, between the ages of 18 and 21. The Court recognized that the law was predicated on the "social stereotype" that young men are more likely to be "reckless."⁸⁵ Even when there may be some statistical evidence

⁷⁹ *Id.* at 494.

⁸⁰ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

⁸¹ 416 U.S. 351 (1974).

⁸² *Id.* at 355.

⁸³ *Id.* at 360-61.

⁸⁴ 429 U.S. 190 (1976). See also *Stanton v. Stanton*, 421 U.S. 7 (1975).

⁸⁵ 429 U.S. at 202 n.14.

tending to support such stereotypes, it is not permissible for the state to reinforce them so as to perpetuate the stereotype.⁸⁶

I do not expect that many racial affirmative action programs would be struck down on a theory of "stigma." Members of the majority group are rarely if ever stigmatized by the existence of a minority preference program: did anyone conclude on the basis of Allan Bakke's rejection from medical school that whites are not very intelligent? The more serious danger is that the minority, which is apparently being helped by the program, may suffer because of an appearance that its members are unable to "make it" on their own. Such challenges should be rejected, so long as the programs are grounded in the need by minority group members for special treatment to redress the effect of past discrimination. It is not "stigmatizing" to need help for such a reason. And in the long run, as blacks and members of other minority groups assume responsible positions in the economy and government, and display their ample abilities to function effectively, the stigma of minority status will tend to decline. The absence—not the presence—of affirmative action produces the true stigma, for it would perpetuate the disadvantage of minority persons and the stereotypes that accompany it. Moreover, the courts should cast a skeptical eye on the claims of white plaintiffs who seek to strike down a program because of an alleged stigmatizing effect on minority persons. Even if they have standing in a technical sense to mount such a challenge, their assertions on that score carry little weight. For an Allan Bakke to win a place in medical school by purporting to defend the interest of an uncomplaining and unidentified "stigmatized" minority person would be ironic. "What's Hecuba to him or he to Hecuba, [t]hat he should weep for her?"⁸⁷

Does the program take away vested rights? In evaluating a program that benefits certain persons at the expense of others, the courts must inquire whether the vested rights of members of the latter group are disturbed. Programs that take away the vested rights of innocent persons—as opposed to those that affect only the possibility of future benefits—may require a more substantial justification. I think this may explain the tension between such deci-

⁸⁶ "[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204 (footnote omitted).

⁸⁷ W. SHAKESPEARE, *HAMLET*, II, 2, 562-63.

sions as *Weber*⁸⁸ and *International Brotherhood of Teamsters v. United States*.⁸⁹ In *Teamsters*, the Supreme Court held illegal under Title VII a remedy granting retroactive seniority rights to black workers who had been discriminated against prior to enactment of Title VII. In *Weber*, the Court approved a plan admitting less senior blacks into a job training program ahead of more senior whites, thereby diluting the value of the whites' seniority rights. In *Teamsters*, the retroactive seniority would have denied the white workers the benefits of seniority that they already had, and thus would have disrupted their settled expectations.⁹⁰ In *Weber*, on the other hand, the white workers never had any right or expectation to be admitted into the job training programs, because prior to the adoption of the affirmative action plan, all of Kaiser's skilled craftsmen were hired from outside the plant. Thus, Brian Weber himself was better off after adoption of the challenged plan than he was before: now he has at least some chance of receiving the training, whereas before he had none.⁹¹

Often, employers and other persons in authority attempt to reallocate the vested rights of innocent persons in order to cover their own misdeeds. The courts should insist where possible that affirmative remedies be at the expense of the wrongdoer, rather than at the expense of innocent bystanders. Back-pay remedies, special training, damages, and the like place the onus for correcting past injustice on the employer-perpetrator rather than on the innocent employee, and should therefore be preferred. Of course, where the employees had participated in the past instances of discrimination, it matters little whether their settled expectations are defeated; we should apply the traditional rule of justice that a person should not

⁸⁸ *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

⁸⁹ 431 U.S. 324 (1977).

⁹⁰ *But cf. Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976) (holding that an award of retroactive seniority is an appropriate remedy for racial discrimination occurring after passage of Title VII). *Franks* serves as a reminder that even the established seniority rights of innocent persons may sometimes be disturbed if the public interest is sufficiently compelling. As the Court noted, denying retroactive seniority to victims of discriminatory hiring would completely "frustrate the central 'make whole' objective of Title VII." *Id.* at 774. And "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest." *Id.* at 778 (footnote omitted).

⁹¹ Both the majority and the concurring opinions in *Weber* stress this point. See 443 U.S. at 208 (Brennan, J.) ("At the same time, the plan does not unnecessarily trammel the interests of the white employees."); *id.* at 215 (Blackmun, J., concurring) ("Here, seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights.").

profit from his own misdeeds. Yet, when essentially innocent persons are asked to bear the brunt of remedying injury inflicted by someone else, or by society as a whole, the courts should attempt to protect their interest, so far as it is consistent with justice.⁹²

Most affirmative action plans do not disturb vested rights, and thus do not require this special degree of justification. Affirmative hiring goals, preferential admissions processes, minority contracting provisions, and the like only affect the opportunities for future benefits. Important as these opportunities may be, their adjustment for the purpose of promoting racial equality is ultimately not as serious as the reallocation of vested rights.

Is the program reasonably designed to achieve a remedial purpose articulated by the decisionmaker? Perhaps the most important mode of analysis the courts may employ to determine whether a race-conscious remedial program is legal or constitutional is to insist that the purpose of the program be articulated, and that the program be reasonably designed to accomplish that purpose. The Brennan group in *Bakke* said that to justify a racial classification established for ostensibly benign reasons, "an important and articulated purpose for its use must be shown."⁹³ We need not indulge in the largely meaningless quest for a verbal formulation that expresses the appropriate level of "scrutiny" to be applied in such cases: both the Brennan group and Justice Powell appeared *in fact* to employ ends-means scrutiny stricter than that applied to economic legislation, but less strict than that applied to invidiously

⁹² One commentator has criticized the view that some persons are innocent of racial discrimination, and that discrimination can be attributed to particular deeds of particular actors, calling this the "perpetrator perspective." Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). To a certain extent, this criticism is valid. In a society where racial discrimination has been so pervasive, most white persons have both contributed to and benefited from discrimination to some degree. I cannot agree, however, that we should abandon the view that discriminatory acts are unjust and immoral, and that the wrongdoers should bear the consequences of their misdeeds. To place the blame generally on social institutions relieves us all, individually, of responsibility, and it postpones the achievement of racial justice until the coming of a new social, political, and economic order that may not prove desirable. I believe that racial equality is demanded by our liberal democratic system as it is now, and I hope that it can be attained without abandoning the fundamental structure of that system. Even within our present system, moreover, a nonperpetrator who has been unjustly enriched in an ascertainable way by discrimination may have to contribute to remedying the injury from such discrimination. See note 90 *supra*.

⁹³ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 361 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

discriminatory legislation.⁹⁴ This seems sensible: given the long history of misuse of racial classifications in this country, the variety of abuses that have occurred, and the danger to our democratic institutions inherent in governance by race, the courts cannot abdicate to the political branches their responsibility to enforce the equal protection clause, even when a challenged discrimination is purportedly "benign." But to treat efforts to remedy past injustice with the same disfavor as we treat invidious discrimination itself would be equally improper. A middle level of scrutiny, therefore, seems best.

The reasonableness of the racial classification may be judged from the viewpoint of whether it is overinclusive or underinclusive. For example, if the purpose of the program is to help persons from deprived backgrounds, we must ask whether the persons advantaged by the program in fact come from such backgrounds, and whether the persons disadvantaged by it come from an affluent background. Moreover, we must ask whether other persons, equally or more deprived than those of the preferred class, have been excluded from the program. The danger is ever-present that affirmative action programs will be set up for the benefit of only the strongest and most politically powerful of the minority groups.

Similarly, if the purpose of the program is to promote cultural diversity at a university, we must inquire whether inclusion of the preferred ethnic groups particularly promotes such diversity or whether preferment of other groups might do so as well or better. If the purpose of the program is to correct for errors in the testing process, we must ask whether the correction to the applicants' scores bears a relation to the groups' differences in testing accuracy. The courts need not engage in these inquiries *de novo*, but should ensure that the decisionmakers acted reasonably and conscientiously.

The principal result of this inquiry probably will not be to strike down many affirmative action programs. Rather, once the courts begin to scrutinize programs in this way, the universities,

⁹⁴ The Brennan group did so explicitly. See *id.* at 361-62. Although Justice Powell purported to employ "strict scrutiny," see *id.* at 305, he concluded that the promotion of diversity in education is a sufficiently compelling governmental objective, and that an admissions program that deems minority status a "plus" can be considered necessary to achieve that objective, *id.* at 315-19. This approach obviously falls shy of the "fatal in fact" scrutiny usually called "strict." See 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).

governments, and employers of this country should respond by being more careful in the design of their affirmative action programs. Instead of designing them to placate the demands of the most vocal and powerful of the minorities, they may seek to assist those persons and groups most in need of help. A serious ends-means analysis by the courts should promote more rational decisions by other institutions.

What other characteristics are used as criteria for selection? Much of the opposition to affirmative action programs is based on the view that such programs displace persons of *more ability* in favor of persons of *less ability*, with race as the determining factor. This opposition carries great weight, because in our meritocratic society, we believe that persons should advance on the basis of their ability and effort, both as a matter of efficiency and as a matter of justice. The American dream of equal opportunity is that all arbitrary barriers to advancement on the basis of personal worth can be eliminated, to the benefit of us all.

Affirmative action is not necessarily in conflict with this ideal, for two reasons. First, for many decisions, ability is not the sole or the principal criterion. Entrance to competitive universities may serve as an example. The number of qualified applicants to most such schools far exceeds the number of places available. To select among the pool of qualified applicants, the schools may use a variety of criteria: geographic balance, diversity of experience, relationship to alumni, athletic talent, sincerity or friendliness during an interview, or whatever. What is lost when membership in a disadvantaged race is added to such a list of factors? So long as members of the minority groups given preferential treatment possess the qualifications reasonably necessary to profit from education at the school, then their selection is no more arbitrary or invidious than is the selection of the son or daughter of a distinguished alumnus.

Second, in many contexts, "ability" is difficult, perhaps impossible, to define. Quantitative scores, such as standardized test results or grades, may not by themselves be reliable indicators of future success.⁹⁵ The meritocratic ideal does not mean that the person *predicted* to be the most worthy on the basis of incomplete or possibly faulty information deserves to advance the farthest; rather, it means that every person is entitled to the opportunity to attain the highest result he can, given his talents, dedication, and

⁹⁵ See Sexton, *supra* note 45, at 324-27, 333-34.

luck. A minority person admitted to a law school receives only the *chance* to make it in his profession. He is subjected to the same academic requirements, must pass the same tests, must attract the same clients, must win the same cases, as his white fellow classmates. His success in those endeavors is the true mark of his ability, not his LSAT scores and college grades. Unfortunately, the history of discrimination in this country has distorted the indicators of ability for persons of disadvantaged groups; now, special recognition of that distortion is needed so that genuine meritocratic selection can proceed fairly.

These considerations suggest that courts should consider what other characteristics are used as criteria for selection. If race is used as a supplement to other arbitrary, non-ability-related criteria, then there is little reason to object to it. Even if race is considered along with predictors of ability, the courts should be aware that such predictors may operate unfairly, and that a genuine commitment to equality of opportunity is often consistent with at least some consideration of race.

Are all applicants for the privilege granted equivalent procedural treatment? Behind the semantic dispute over the difference between "quotas" and "goals" is a fundamental point about procedural fairness: there is a difference between a system that accords members of a minority group an advantage in an otherwise competitive process, and a system that removes certain positions or privileges from competition altogether.⁸⁶ As Justice Powell saw the preferential admissions program at the University of California at Davis, its "principal evil" was the denial to Allan Bakke of his "right to individualized consideration without regard to his race."⁸⁷ It is appropriate for the courts to insist, as Justice Powell did in *Bakke*, that an affirmative action program guarantee to all applicants the right to compete—even as it recognizes the legitimacy of using race as one criterion for decision.

In his dissent from that portion of Justice Powell's *Bakke* opinion, Justice Brennan rejected the suggestion that there is a constitutional distinction between "adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference . . . and setting a fixed number of places

⁸⁶ See generally Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864, 867-73 (1979).

⁸⁷ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 n.52 (1978).

for such applicants.”⁹⁸ He insisted that the excluded white applicant under the fixed-quota system “receives no more or less ‘individualized consideration’” than under Justice Powell’s preferred alternative.⁹⁹ It cannot be denied, however, that Allan Bakke received no consideration at all for the sixteen reserved minority slots at the Davis medical school; nor can it be denied that this difference *seems* important. It is the difference between process and result, akin to the requirement of a hearing independent of the prospect of eventual success on the merits. We may therefore expect that in the post-*Bakke* world, the question whether applicants are accorded equivalent procedural treatment, or whether certain applicants are eliminated *en masse*, may determine the permissibility of the program.

Is the program temporary or permanent? It may seem a simple point, but an affirmative action program that will terminate is more defensible than one that may persist in perpetuity. Since affirmative action is principally designed to provide temporary assistance now that will enable minority group members to compete on an equal basis in the future, such a program will appear better suited to its ends if it is scheduled to end upon achievement of the intended outcome. Moreover, members of the public are more likely to cooperate with a plan that they see as temporary: part of the opposition to affirmative action can be understood as arising from the fear that whites are to be subject to disadvantage for all time. The demands by minority group members for redress would surely be treated with greater sympathy if the majority were assured that the need for affirmative action will end in the conceivable future.

This is one reason why the hiring program at issue in *Weber* was particularly meritorious. As Justice Blackmun noted in his concurring opinion, Kaiser Aluminum’s affirmative action plan was “a moderate one”:

[I]t ends when the racial composition of Kaiser’s craftwork force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to “maintain” a previously achieved balance. . . . Because the duration of the program is

⁹⁸ *Id.* at 378 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

⁹⁹ *Id.* at 378 n.63.

finite, it perhaps will end even before the "stage of maturity when action along this line is no longer necessary."¹⁰⁰

CONCLUSION

Affirmative action programs are now firmly entrenched in our public law as a means of eradicating the gross disparities in opportunity between the white majority and the nonwhite minorities. Recent decisions upholding affirmative action still receive strident criticism. But the permissibility—the necessity—of race-conscious remedies did not begin with *Weber* or *Bakke*, but was impliedly established at least by the time of *Griggs* and *Swann*.¹⁰¹ Indeed, such remedies are the necessary result of this nation's belated decision to cease its course of racial discrimination in favor of a regime of equality among the races. That principle, in turn, can be traced to the Civil War, and still farther to the Founding itself. The task now is not to justify remedies for the centuries of oppression of blacks by whites, but rather to ensure that the remedies we choose will create a nation of genuine equality in the future. For who are we to accept the bounty that this country presents us, if we do not seek to share that bounty with our fellow citizens?

It is time for the legal community to stop its squabbling: to admit that the Constitution and the Civil Rights Act permit us to remedy the wrongs of the past. It is time to abandon the abstractions of "color-blind" theory and admit that there can be no such thing as a "color-blind" approach to achieving racial equality. It is time now to concentrate our efforts on ensuring that the remedies we construct are humane and effective, that they respect, so much as is possible, the rights of all. Most important, we must be sure that—for the first time in history—we do the job right, so that succeeding generations will not still be faced with the odious sight of institutionalized racial injustice.

¹⁰⁰ *United Steelworkers v. Weber*, 443 U.S. 193, 216 (Blackmun, J., concurring) (quoting *Bakke*, 438 U.S. at 403). See also *id.* at 208 (Brennan, J.) ("Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.").

¹⁰¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).