The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence

By MARK STRASSER*

Table of Contents

Introduction 324
I. Intention, Motivation, and Irrationality 327
  A. Arbitrariness and Animus 327
    1. Invidiousness as Arbitrariness or Irrationality 328
    2. Why Invidiousness Is More Than Mere Arbitrariness 328
    3. Invidiousness and the Rational Basis Test 329
    4. Invidiousness and the Animus Requirement 331
    5. The Invidiousness Scale for Statutes Adversely Affecting Interests 332
    6. Invidiously Affecting Interests Versus Invidiously Affecting Groups 334
    7. The Promotion of (Unrealistic) Stereotypes Is Invidious 336
    8. Invidiousness and Race 337
  B. The Importance of the Presence or Absence of Antipathy 339
    1. The Distinction Between Motivations and Intentions 341
    2. The Court's Conflation of Intention and Motivation 342
    3. The Court's Reluctance to Find Benevolent Discrimination 343
    4. Making All Racial Classifications Pernicious by Fiat 345

* Visiting Assistant Professor, Capital University Law and Graduate Center. B.A. Harvard College; Ph.D. University of Chicago; J.D. Stanford Law School. I would like to thank Professor Gerald Gunther for his comments on an earlier draft and Professor Linda Krieger for her insightful discussion of some of the issues raised here. I would also like to thank Capital University Law School for providing a Faculty Summer Research Grant.

HeinOnline -- 21 Hastings Const. L.Q. 323 1993-1994

5. Making the Imposition of Strict Scrutiny Nonfatal 346
6. Invidiously Motivated Versus Noninvidiously Motivated Discrimination 347
7. Which Kinds of Intent are Actually Invidious? ... 349
8. The Role of Invidiousness 349
C. Intentions, Effects, and Perceptions 353
1. Negative Effects and the But-For Requirement... 355
2. The Importance of How Policies Are Perceived .. 357
3. The Invidiousness of Promoting Outmoded Ways of Thinking 358
4. Recognizing Formal but Not Substantive Equality 360
II. Affirmative Action in Education and Employment 361
A. Benign Discrimination in Education: *Bakke* and Its Implications 362
1. Facial Discrimination and Quotas 366
2. Reserving Slots Versus Recognizing Plus Factors . 367
B. The Role of Congress 369
C. Title VII 372
1. Two Different Kinds of Title VII Violations 373
2. The Court's Compromise 374
3. Disparate Impact and Fault 379
D. Nonfacially Discriminatory Legislation and Equal Protection 381
1. Blame Versus Remedy 386
2. *Morton* and Preferential Hiring 391
E. Individual Harm 394
III. The Court's Implicit View 398
Conclusion 402

Introduction

For the past several decades, the Supreme Court has been an unrelenting foe of invidious discrimination. The relevant question has been not whether the Court would strike down invidiously discriminatory practices, but which practices would be struck down as invidiously discriminatory.

The Court's policy with respect to which statutes or policies are invidious has changed over time. Regrettably, the Court has been even more unpredictable than would have been expected. That unpredictability can be attributed to a variety of factors: the changing political orientation of the Court, the growing sophistication and sub-

HeinOnline -- 21 Hastings Const. L.Q. 324 1993-1994

tlety of would-be discriminators, the difficulty of proving subjective intent, and the precariousness of making judgments based upon predictions of future consequences. All of these factors have received some attention in court opinions and the secondary literature.[1] What have received comparatively little attention are the way that the meaning of "invidious" itself has changed over time and the way that Court decisions have recently manifested a pattern in which the Court uses the word "invidious" in one sense in certain kinds of cases and in a different sense in others. While each sense has an historical basis, there is no basis for changing the meaning of the term when judging relevantly similar cases. Further, there has been surprisingly little analysis of when the Court is willing to presume antipathy,[2] or of when the presence of antipathy renders a policy unconstitutional. This kind of patterned, subtle, unconscious alternation both of the meanings of key terms and of the presumptions about the presence of antipathy fosters the perception that the Court has lost its commitment to rooting out invidious discrimination.

Recently, the Court has simultaneously made it more difficult to (1) establish that discrimination against minorities is taking place and (2) that affirmative action programs are *not* invidious. By doing this, the Court allows some of the racial progress that has been made to be lost, diminishes its own intellectual integrity, and promotes the view that affirmative action policies, which seek to rectify past injustices, are just as unacceptable as racist, sexist, and other discriminatory practices. For theoretical and practical reasons, the Court's position must change.

Part I of this article examines the definition of "invidious" as used by the United States Supreme Court, paying special attention to the

1. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 489 (1954) ("The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty."); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987) ("Improper motives are easy to hide."); Kathleen M. Sullivan, City of Richmond v. J.A. Croson Co.: *The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609 (1990) ("A societal backlash has set in against affirmative action . . . [which] has touched the Supreme Court.").

2. Antipathy may be defined as a hostile attitude towards a particular group or belief in another group's inferiority. *See* 1 OXFORD ENGLISH DICTIONARY 529 (2d ed. 1989). *See also* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985) (discussing laws which "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others").

HeinOnline -- 21 Hastings Const. L.Q. 325 1993-1994

assigned importance of an actor's intention and motivation. An actor's illicit motivation is neither a necessary nor a sufficient condition to finding a practice "invidious." Thus, legislation passed out of animus is not *per se* unconstitutional and legislation created out of benevolence is not guaranteed to pass constitutional muster. Similarly, an actor's illicit intention is neither a necessary nor a sufficient condition to holding that a practice is "invidious." A legislature's intention to discriminate will not make its legislation *per se* unconstitutional and a legislature's lack of intention to discriminate will not guarantee that legislation will be upheld.

The Court's "invidious" jurisprudence is confusing, in part, because the Court uses different criteria when judging the invidiousness of statutes which (a) adversely affect suspect classes, rather than (b) adversely affect fundamental interests. Yet, the Court's jurisprudence is inconsistent even when limited to the former category. Sometimes, the Court carefully distinguishes between the meanings of "intention" and "motivation" and very carefully articulates why particular statutes or policies are or are not constitutionally permissible. At other times, the Court conflates the terms' meanings and offers conclusory analyses of why particular policies or statutes pass or fail to pass constitutional muster. Were the Court's inconsistency to occur randomly, it would be regrettable but not pernicious. However, the Court's inconsistency manifests a disturbing pattern which leads one to infer that the Court is reneging on its commitment to achieving racial integration and equality.

Part II explores the conditions under which affirmative action policies in the education and employment contexts will be found invidious. Different standards are used in these different contexts because the former involves the Equal Protection Clause,[3] while the latter involves the less strict standards of Title VII.[4] Examining both gives insight into the Court's changing view of invidiousness; in both contexts, the Court has grown increasingly unwilling to impose burdens on nonminorities and has become less sympathetic to minority concerns.

Part III discusses the Supreme Court's implicit position on invidiousness. The Court implies that *all* race-conscious programs, whether benign or pernicious, are invidious and *equally* inappropriate. More surprisingly, the Court imposes a *stricter* standard in affirmative action cases than it does in cases involving the pernicious discrimination that

3. U.S. CONST. amend. XIV.
4. 42 U.S.C. § 2000e (1993).

HeinOnline -- 21 Hastings Const. L.Q. 326 1993-1994

has historically been practiced in this country. Unless the Court changes its current standards of review, the Court will end up promoting the effects which its invidious jurisprudence is designed to prevent.

I. Intention, Motivation, and Irrationality

A. Arbitrariness and Animus

The Court has not clearly articulated its criteria for invidiousness. Sometimes, the Court implies that arbitrariness is a necessary and sufficient condition for a statute's being invidious. At other times, the Court implies that more is required, such as that the statute's passage was motivated by animus.

The failure to articulate clear criteria may be due, at least in part, to the historical development of the concept. At one point, there seemed to be no need to clearly articulate the relevant standards; whether they involved arbitrariness or animus, it was clear which statutes were invidious. Invidious discrimination was relatively easy to identify when, for example, it involved statutes which adversely affected minorities because of an irrelevant characteristic such as race.[5] It was quite clear from the *Gomillion v. Lightfoot*[6] that blacks were having their votes diluted because of their race; it was similarly clear in *Loving v. Virginia*[7] that Virginia's antimiscegenation statute was motivated by the belief that blacks were less worthy than whites.

The use of race as a criterion for who may vote or who may marry whom is obviously irrational. Since all legislation must be rationally supportable to pass constitutional muster under equal protection doctrine, it would seem relatively easy to strike down such statute. What is less clear is whether those statutes were invidious because of their irrationality or whether something in addition was required, for example, an implicit claim that one race is inferior to another.[8]

---

5. *See* Kenneth L. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula"*, 16 UCLA L. REV. 716, 740 (1969) (noting that the easy cases are those involving discrimination against a racial minority which are written into laws and are obviously invidious and irrational).

6. 364 U.S. 339 (1960).

7. 388 U.S. 1, 7 (1967).

8. *See* Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 566 (1975) (purposes are called invidious because they impose a badge of inferiority and stigmatize); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 201 (1976) ("A law directed against members of . . . a minority . . ., classifying them by who they are rather than what they do, create[s] an 'invidious' or 'suspect' classification and w[ill] be subjected to 'strict scrutiny.'"); *id.* at 201-02 ("*Invidious* prejudgment [is] grounded in notions of superiority and inferiority, in beliefs

1. *Invidiousness as Arbitrariness or Irrationality*

Black's Law Dictionary defines "invidious" as "arbitrary, irrational, and not reasonably related to a legitimate purpose."[9] It is quite tempting simply to say that discrimination is invidious if it is arbitrary or irrational, and the Court has sometimes implicitly favored this view. For example, in *Levy v. Louisiana,*[10] the Court struck down a law preventing illegitimate children from recovering for the wrongful death of their mother. The Court concluded: "[I]t is invidious to discriminate against [the children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[11] Insofar as a statute imposes burdens on individuals or classes for no relevant reason, it is obviously constitutionally infirm.[12] The Court noted, "While a State has broad power when it comes to making classifications, it may not draw a line which constitutes an invidious discrimination against a particular class. Though the test has been variously stated, the end result is whether the line drawn is a rational one."[13]

It is unclear, however, whether statutes punishing illegitimates for no relevant reason are unconstitutional *because of their irrationality*, or for some other reason. Given the history of discrimination against individuals born out of wedlock, it would be unsurprising if such a statute had been passed out of antipathy. Thus, it is not clear whether the statute in *Levy* was struck down because of its arbitrariness or because it was motivated by animus.

2. *Why Invidiousness Is More Than Mere Arbitrariness*

Defining invidiousness solely in terms of arbitrariness and irrationality is mistaken. Such a definition is both overinclusive and underinclusive. It is overinclusive because some arbitrary and irrational methods of classification do not seem invidious.[14] For example, sup-

---

about relative worth, attitudes that deny the premise of human equality and that will not be readily sacrificed to mere facts.").

9. BLACK'S LAW DICTIONARY 826 (6th ed. 1990).

10. 391 U.S. 68 (1968).

11. *Id.* at 72 (footnotes omitted).

12. Karst, *supra* note 5, at 735 (words like "irrational" or "capricious" have come to be used as shorthand for the conclusion that the state's classification is unconstitutional).

13. *Levy*, 391 U.S. at 71 (citations omitted).

14. Admittedly, whenever one attacks a definition, one must have some frame of reference, for example, common usage or a different definition. Invidiousness does not involve arbitrariness alone, because it also involves feelings of ill will. *See, e.g.*, WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 966 (2d ed. 1983), where invidious is defined as "likely to incur ill will or hatred, or to provoke envy; giving offense, especially by dis-

HeinOnline -- 21 Hastings Const. L.Q. 328 1993-1994

pose that five people are to split a reward of one hundred dollars for finding someone's lost pet. Each participated equally in the location and recovery of the animal. One possibility would be to give each person twenty dollars. Another would be for each person to roll a pair of dice. The person with the lowest total would receive nothing while the other four would each receive twenty five dollars. While the latter method is arbitrary,[15] it does not seem invidious.[16] Each person is equally likely to receive a reward and there is no apparent desire to discriminate against any individual or group of individuals.

Defining invidiousness in terms of arbitrariness is underinclusive because many statutes and practices which the current Court believes are invidious promote legitimate purposes, such as rectifying some of the effects of past discrimination.[17] Were invidiousness solely limited to utterly arbitrary statutes, many statutes currently held invidious would be constitutionally permissible.[18]

3. *Invidiousness and the Rational Basis Test*

A *completely* arbitrary statute will be held unconstitutional even absent any evidence of animus. Such a statute could not pass the rational basis test.[19] However, it is more difficult to establish the complete arbitrariness of a statute than might be supposed. For example,

criminating unfairly; as, *invidious* comparisons," or 8 OXFORD ENGLISH DICTIONARY 50 (2d ed. 1989), where invidious is defined as "[o]f an action, duty, topic, etc.: Entailing odium or ill will upon the person performing, discharging, discussing, etc.; giving offence to others." *See infra* text accompanying notes 96-160 for discussion of how the Court tries to account for this visceral element.

15. In the case imagined, each person would be equally pleased to receive twenty dollars—the net marginal utility of each dollar is roughly equal. In a different case in which twenty five dollars met some kind of threshold, such that receiving twenty dollars was not worth very much at all but receiving twenty five dollars was worth a great deal, the dice method might be a rational way to divide up the reward.

16. Peter Brandon Bayer, *Rationality—And the Irrational Underinclusiveness of the Civil Rights Law*, 45 WASH. & LEE L. REV. 1, 87 (1988) ("[G]overnmental action violates equal protection standards if the choice of classifications is so random that a coin flip would serve as well to decide which classes would promote the governmental purposes or ends."); Stuart W. Tisdale, Jr., Comment, *Reasonable Accommodation and Non-Invidious Discrimination Under the Maine Human Rights Act*, 40 ME. L. REV. 475, 487 (1988) (noting that invidious might also describe antithesis of rational basis).

17. For example, in Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986), the Court struck down racial preferences in layoffs, denying that "societal discrimination alone is sufficient to justify a racial classification." *Id.* at 274.

18. *See* Karst, *supra* note 5, at 735 (irrationality or arbitrariness in the old sense of utter lack of justification is not required for a classification to be struck down).

19. For a discussion of the three-tiered test used by the Court to determine whether statutes pass constitutional muster, see Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 941-44 (1991).

a statute is not arbitrary merely because it is not perfectly crafted and a differently written statute would have better promoted the desired end. The Court has been unwilling to demand extreme precision from legislators, because such precision is not a "workable constitutional requirement."[20] Indeed, the Court may believe that a piece of legislation will have net harmful effects, yet hold the legislation constitutionally valid.[21]

More importantly, at least for the purposes of the current discussion, the Court may not always uphold a statute even if it is a rational means of promoting an arguably legitimate goal. The Court realizes that states will sometimes claim to be promoting legitimate purposes in an attempt to mask their illicit motivations. For example, in *McLaughlin v. Florida,*[22] the state of Florida tried to justify a law punishing interracial fornication more severely than intraracial fornication by claiming that the statute was designed "to prevent breaches of the basic concepts of sexual decency."[23] The Court accepted the state's characterization of the statute and the legitimacy of the state's goal of preventing interracial marriage, but nonetheless struck down the law as invidiously discriminatory because the "State's policy against interracial marriage [could] be . . . adequately served by the general, neutral, and existing ban on illicit behavior as by a provision . . . which singles out the promiscuous interracial couple for special statutory treatment."[24]

While the Court clearly reached the *correct* result, one would have expected it to reach the opposite conclusion. If Justice Stewart is correct that "the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious,"[25] and if Florida's distinction between interracial and intraracial cohabitation was rational, given its antimiscegenation law (which was still constitutional at the time), Florida's law would seem to have met the relevant test.

The Court held that the racial classification in the Florida statute was "an invidious discrimination forbidden by the Equal Protection

20. Reynolds v. Sims, 377 U.S. 533, 577 (1964).

21. *See* Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement.").

22. 379 U.S. 184 (1964).

23. *Id.* at 193.

24. *Id.* at 196.

25. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring).

HeinOnline -- 21 Hastings Const. L.Q. 330 1993-1994

Clause."[26] Had the Court been willing to hold that the goal (prohibiting racial intermixing) was illegitimate, it could then have argued that an invidious statute is one which (a) has an illegitimate end or (b) has a legitimate end but uses an irrational means to promote that end.[27] Perhaps the Court should be understood to have argued *sub silentio* in *McLaughlin* that prohibitions of racial intermarriage were and are illegitimate. That way, the Court's use of invidious would not be particularly confusing.[28]

4. *Invidiousness and the Animus Requirement*

Before discussing "invidiousness" in the affirmative action context,[29] it might be helpful to demonstrate how "invidious" and "noninvidious" are used in contexts which, at least facially, do not involve race. In *Jefferson v. Hackney*,[30] the Court reviewed a Texas policy detailing the allocation of government benefits. The Court held: "So long as its judgments are *rational, and not invidious*, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket."[31]

When the Court talks about judgments which are "rational and not invidious," it is not clear how the latter term is being used. "Invidious" might be (a) a synonym for arbitrary or irrational, (b) a stand-in for "racially discriminatory," where discrimination is measured solely in terms of disparate racial impact, or (c) a stand-in for "racially discriminatory," where discrimination is determined by looking at the motivation and the intention behind the legislation.[32] In allowing the Texas system to stand, the *Jefferson* Court concluded that the legislature's decision to provide less welfare to some groups was not necessarily "invidious or irrational."[33] Because it was clear that the individuals who would suffer from the decreased benefits were dispro-

26. *McLaughlin*, 379 U.S. at 192-93.

27. *See* Bayer, *supra* note 16, at 86 ("[A] governmental entity acts irrationally when it creates a classification which does not promote a legitimate goal or which pursues a goal through illegitimate means.").

28. The Court struck down antimiscegenation statutes a few years after *McLaughlin* in Loving v. Virginia, 388 U.S. 1 (1967).

29. Alternately labeled either "benign discrimination" or "invidious discrimination."

30. 406 U.S. 535 (1972).

31. *Id.* at 546 (italics added).

32. *See infra* text accompanying notes 96-169 on motivation and intention.

33. *Jefferson*, 406 U.S. at 549 ("Applying the traditional standard of review . . . , we cannot say that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is invidious or irrational.").

HeinOnline -- 21 Hastings Const. L.Q. 331 1993-1994

portionately either black or Hispanic,[34] the Court could not have been using "invidious" merely to indicate disparate racial impact.[35] While the Court might simply have been using "invidious" as a synonym for "arbitrary," it seems unlikely that the standard would simply be redundant. The most plausible interpretation is that the Court did not detect any animus and thus did not believe the statute invidious.[36]

In *New York City Transit Authority v. Beazer*,[37] the Court upheld the Transit Authority's refusal to employ individuals who used methadone. While the Court acknowledged that the majority of the affected individuals were black or Hispanic,[38] it found no evidence of invidious discrimination.[39] Here again, "invidious" cannot merely mean that which has a disparate impact, and the most likely interpretation is that the term requires some sort of animus.

In the cases cited,[40] the Court required an animus component before holding the statute or policy invidious. The Court focused its attention upon the motivation of the actor, among other factors. At times, however, the Court has adopted a different tack, ignoring whether animus was present and instead using "invidious" to indicate that the statute under examination could not be justified in light of the importance of the interest adversely affected.

5. *The Invidiousness Scale for Statutes Adversely Affecting Interests*

The Court uses a sliding scale when judging whether a statute adversely affecting interests is invidious. The more important the interest affected, the higher the standard that must be met for a statute to avoid being classified as invidious. Consider two kinds of statutes:

34. *See id.* at 575 (Marshall, J., dissenting) ("The evidence . . . shows that 87% of the AFDC recipients in Texas are either Negro or Mexican-American.").

35. For a discussion of disparate impact, see infra text accompanying notes 264-302.

36. *See Jefferson*, 406 U.S. at 575 (Marshall, J., dissenting) (suggesting that the Court had made the wrong decision because the funding of AFDC at a lower level was in fact motivated by animus towards African-Americans and Mexican-Americans).

37. 440 U.S. 568 (1979).

38. *Id.* at 579 ("The court, however, did not find that TA's policy was motivated by any bias against blacks or Hispanics; indeed, it expressly found that the policy was not adopted with a discriminatory purpose.").

39. In dissent, Justice White argued that an irrational and invidious distinction had been made. He pointed out that many people suffer from some handicap related to employability, but only the respondents had been singled out for their alleged risk of unemployability. "Such an arbitrary assignment of burdens among classes that are similarly situated with respect to the proffered objectives is the type of invidious choice forbidden by the Equal Protection Clause." *Id.* at 611 (1979) (White, J., dissenting) (footnote omitted).

40. That is, *McLaughlin*, *Jefferson*, and *Beazer*.

HeinOnline -- 21 Hastings Const. L.Q. 332 1993-1994

one which is completely arbitrary and the other which is (merely) rationally related to a legitimate state goal. In a case in which the classification is completely arbitrary, the classification cannot be justified insofar as it adversely affects any interest and thus is invidious regardless of the importance of the interest affected. In a case in which the classification is (merely) rationally related to a legitimate goal, the statute will be upheld unless it adversely affects a fundamental interest. For a statute adversely affecting a fundamental interest to avoid being classified as invidious, it must promote a compelling state interest.[41] For example, in *Shapiro v. Thompson*,[42] the Court held that a "statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws,"[43] while nonetheless recognizing that a state has a fundamental interest in preserving the fiscal integrity of [its] programs.[44]

In *Carrington v. Rash*,[45] the Court struck down a Texas constitutional provision which prevented enlisted soldiers from establishing residence, thereby preventing them from voting. The Court neither claimed that the Texas provision was motivated by animus nor that it was completely irrational—it was designed to prevent individuals who did not have a stake in a community from determining its future.[46] The Court merely claimed that Texas should allow individuals to establish their long-term intentions to remain in the state and, further, should allow such individuals to vote. Here, the importance of the right to vote justified the Court's striking a provision which was (merely) rationally related to legitimate end.[47]

In *Skinner v. Oklahoma*,[48] the Court struck down a law which allowed the state to impose a punishment of sterilization on a certain

41. *See* Karst, *supra* note 5, at 736 (noting that a classification that penalizes the exercise of a basic constitutional right is an unconstitutional invidious discrimination unless promoting a compelling government interest).

42. 394 U.S. 618 (1969). At issue in *Shapiro* was the fundamental right to travel.

43. *Id.* at 627.

44. *Id.* at 629.

45. 380 U.S. 89 (1965).

46. Many, but not all, servicepersons stationed in Texas would leave the state once their term had ended. Their voting might reflect their short-term commitment and thus might run counter to the long-term interests of their community.

47. For a discussion of how the importance of the right implicated affects the scrutiny the Court will impose on a statute adversely affecting the exercise of that right, see Strasser, supra note 19, at 942-44 (1991).

48. 316 U.S. 535 (1942).

HeinOnline -- 21 Hastings Const. L.Q. 333 1993-1994

class of felon but not on another.[49] The Court noted "Marriage and procreation are fundamental to the very existence and survival of the race,"[50] and held that "[w]hen the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as *invidious* a discrimination as if it had selected a particular race or nationality for oppressive treatment."[51]

The *Skinner* Court recognized that "a State is not constrained in the exercise of its police power to ignore experience which marks a class of offenders or a family of offenses for special treatment.[52] Indeed, the Court would have been wiling to give the state of Oklahoma "that large deference"[53] which would normally have been appropriate had the legislation not involved "one of the basic civil rights of man."[54] However, because sterilization was at issue, the Court decided that "strict scrutiny . . . [was] essential"[55] and invalidated the statute.

6. *Invidiously Affecting Interests Versus Invidiously Affecting Groups*

There is an important difference between statutes that are invidious because of how they affect fundamental rights and statutes that are invidious because of how they affect protected groups. A statute which adversely affects a fundamental right without promoting a compelling state interest may be declared invidious *even absent a showing of animus*.[56] Such a showing is usually required, however, if a statute is to be declared invidious because of its effect on a particular class.[57]

49. This is to be distinguished from castrating a sexual offender. While castration seems cruel and inhuman in any case, the alleged justification for it would presumably be that the offender would cease to perform these sexual offenses because of hormonal changes. (It is an empirical question whether these offenses are prompted by hormonal rather than, for example, psychological abnormalities.) Sterilization here is clearly aimed at preventing the offender from having any (more) children and would seem to be no more closely related to the prevention of felonies than would be any other severe penalty.

50. *Skinner*, 316 U.S. at 541.

51. *Id.* (emphasis added).

52. *Id.* at 540.

53. *Id.* at 541.

54. *Id.*

55. *Id.*

56. *See, e.g.*, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942) (because procreation is a fundamental right, Oklahoma sterilization law was unconstitutional).

57. Statutes adversely affecting groups must have a discriminatory purpose to be struck down as invidiously discriminatory. *See* Lawrence, *supra* note 1, at 318 (discussing the "well-established doctrine [which] requires plaintiffs challenging the constitutionality of a facially neutral law to prove a racially discriminatory purpose on the part of those responsible for the law's enactment or administration"); *see also infra* note 85.

HeinOnline -- 21 Hastings Const. L.Q. 334 1993-1994

There are at least two difficulties with the Court's not requiring a showing of animus when finding statutes invidious because of their effect on a fundamental right. First, it appears to make "invidious" a conclusory term with no independent meaning of its own.[58] "Invidious" should not merely be an empty term used as a rhetorical flourish. Second, when the Court calls some legislation "invidious" and strikes it down *despite the absence of animus*, but refuses to strike down other legislation *because of the absence of animus*, the Court appears to act capriciously. Lower courts cannot tell what role animus is to play in determining a statute's invidiousness and hence in its constitutionality. The Court's approach is "rudderless, affording no notice to interested parties of the standards governing particular cases and giving no firm guidance to judges who, as a consequence, must assess the constitutionality of legislation before them on an ad hoc basis."[59]

The Court seems unaware that it uses "invidious" differently when talking about statutes which adversely affect groups and those which adversely affect fundamental rights. In *Regents of the University of California v. Bakke*,[60] the plurality denied that "discreteness and insularity constitute necessary conditions to a holding that a particular classification is invidious,"[61] that is, the Court denied that groups had to have the indicia of suspect status in order to be protected by the Fourteenth Amendment. For support, the plurality cited *Skinner* and *Carrington*.[62] Both of those cases, however, implicated fundamental rights rather than protected groups. Because the Court has required no showing of animus when finding statutes invidious because of how they affect fundamental rights, and because *Bakke* did not involve a fundamental right,[63] the plurality's use of those cases

58. *See* Larry M. Lavinsky, *DeFunis v. Odegaard: The "Non-Decision" with a Message*, 75 COLUM. L. REV. 520, 526-27 (1975) (The terms "invidious" and "stigmatizing" "have frequently been used by the Court in describing invalid classifications, but only in a conclusory manner, following a finding of racial classification unsupported by a compelling state interest.").

59. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 321 (1976) (Marshall, J., dissenting).

60. 438 U.S. 265 (1978).

61. *Id.* at 290 (denying that "discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious"). This should not be understood to mean that the Court was trying to make the Fourteenth Amendment more robust in its protection. *See infra* text accompanying notes 390-407.

62. *Bakke*, 438 U.S. at 290 (citing Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) and Carrington v. Rash, 380 U.S. 89, 94-97 (1965)).

63. Primary and secondary education do not implicate fundamental interests. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *A fortiori*, a university education does not implicate such a right.

HeinOnline -- 21 Hastings Const. L.Q. 335 1993-1994

was a non sequitur. The plurality instead should have cited cases which involved statutes or policies adversely affecting groups and which were declared invidious despite the absence of animus.[64]

Occasionally, the Court has found statutes invidious when they adversely affect groups (rather than fundamental rights) even when they do not evidence any animus. For example, in *Craig v. Boren*,[65] the Court examined an Oklahoma law which made the drinking age for females eighteen and for males twenty-one. The Court concluded that "the relationship between gender and traffic safety [was] far too tenuous to satisfy [the] requirement that the gender-based difference be substantially related to achievement of the statutory objective."[66] Because the statute did not pass the relevant test, the Court held that the "statute invidiously discriminate[d] against males 18-20 years of age."[67] The majority did not, however, claim that the statute imposed a stigma on males or that the legislature had been motivated by some sort of animus toward males.[68]

7. *The Promotion of (Unrealistic) Stereotypes Is Invidious*

The rationale underlying the *Boren* decision involved an aversion to the existence and perpetuation of certain stereotypes about males and females, such as that women, but not men, do not or should not drink.[69] Indeed, the Court feared that the statistics presented concerning drunk driving arrests were skewed because of existing stereotypes. "The very social stereotypes that find reflection in age-differential laws, are likely substantially to distort the accuracy of these comparative statistics. Hence reckless young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home."[70]

The Court does not believe that all laws which differentiate on the basis of sex invariably reinforce impermissible stereotypes. When a law distinguishes between males and females in a way that passes

64. The Court might have cited Craig v. Boren, 429 U.S. 190 (1976). For a discussion of that case, see infra text accompanying notes 65-68.

65. 429 U.S. 190 (1976).

66. *Id.* at 204.

67. *Id.*

68. Only one Justice claimed that there had been a history of discrimination against males. *See id.* at 212 (Stevens, J., concurring) (The Oklahoma law "is a mere remnant of the now almost universally rejected tradition of discriminating against males in this age bracket.").

69. *See infra* text accompanying notes 186-204 (discussing the reinforcement of stereotypes).

70. *Boren*, 429 U.S. at 202 n.14 (citation omitted).

HeinOnline -- 21 Hastings Const. L.Q. 336 1993-1994

constitutional muster, the Court does not describe the statute as invidious. In *Michael M. v. Superior Court*,[71] the Court said that it would uphold "statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances."[72] The Court implied that a statute will not be deemed invidious as long as it realistically reflects dissimilarities[73] that are not merely trivial.[74]

If the Court really believed that statutes are not invidious as long as they reflect realistic, non-trivial differences, it would uphold virtually all statutes reflecting such differences. The Court makes quite clear, however, that the Equal Protection Clause requires no such result. For example, "if statistics were to govern the permissibility of state alcohol regulation without regard to the Equal Protection Clause as a limiting principle, it might follow that States could freely favor Jews and Italian Catholics at the expense of all other Americans."[75] After all, "available studies regularly demonstrate that the former two groups exhibit the lowest rates of problem drinking."[76] So, too, even if unassailable statistics were to show that women had a much lower rate of problem drinking than men, the Court presumably would not uphold drinking laws which favored the former at the expense of the latter.

8. *Invidiousness and Race*

The Court seems to be most wary of classifications based on race, probably because it believes that the central purpose of the Fourteenth Amendment is to eliminate all official, race-based, invidious

---

71. 450 U.S. 464 (1981).

72. *Id.* at 469.

73. *But see* Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (holding that real differences in longevity between men and women do not justify differences in benefit programs). *But see infra* text accompanying notes 196-203 for a discussion of the benefit programs in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and Geduldig v. Aiello, 417 U.S. 484 (1974).

74. The Court wrote:

> We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant, and they suffer disproportionately the profound physical, emotional, and psychological consequences of sexual activity. The statute at issue here protects women from sexual intercourse at an age when those consequences are particularly severe.

Michael M., 450 U.S. at 471-72.

75. Craig v. Boren, 429 U.S. 190, 208 n.22 (1976).

76. *Id.*

HeinOnline -- 21 Hastings Const. L.Q. 337 1993-1994

discrimination.[77] If statutes involving racial discrimination "are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[78] Yet, the Fourteenth Amendment did not preclude race-conscious measures designed to help blacks. During the period in which the Fourteenth Amendment was passed, Congress established Freedmen's Bureaus "to help blacks adapt to the white man's society and economy."[79]

Recently the Court has indicated that it may not uphold a racial classification, even if that classification is necessary to the accomplishment of permissible state objectives and even if that classification is independent of the racial discrimination against minorities which it was the object of the Fourteenth Amendment to eliminate.[80] Indeed, the current Court seems to have adopted a position similar to the one articulated by Justice Stewart in dissent in *Fullilove v. Klutznick*.[81] "[R]acial discrimination is by definition invidious discrimination."[82] Justice Stewart implies that racial discrimination is invidious regardless of *actual* motivation.

The Court's invidiousness jurisprudence is schizophrenic in that the Court changes its *definition* of invidious depending on the kind of case it is considering. In one kind of case, invidiousness involves arbitrariness and irrationality.[83] Invidious statutes may be utterly arbitrary and thus not meet the rational basis test, or they may adversely affect fundamental interests without promoting compelling state interests. When statutes are invidious in this sense, there need be no showing of malice.[84] In the other kind of case, however, motivation is quite important. A statute which is nonarbitrary and does not adversely

77. Loving v. Virginia, 388 U.S. 1, 10 (1967). The Court in *Loving* argued that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States." *Id.*

78. *Id.* at 11.

79. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 505 (2d ed. 1985).

80. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (plurality opinion).

81. 448 U.S. 448 (1980).

82. *Id.* at 526 (Stewart, J., dissenting). *But see* Louis Henkin, De Funis: *An Introduction*, 75 COLUM. L. REV. 483, 486 (1975) ("Racial classifications which, upon scrutiny, prove to be 'neutral,' having no invidious purpose or consequence, are not objectionable *per se*.") (emphasis added).

83. *See supra* notes 9-13 and accompanying text.

84. *See supra* notes 41-56 and accompanying text.

HeinOnline -- 21 Hastings Const. L.Q. 338 1993-1994

affect a fundamental interest may nonetheless be held unconstitutional if there is a showing of illicit motivation.[85]

Although the Court's definition of invidious is confusing because the word seems to change meaning depending upon the kind of case, that confusion could be cleared up relatively easily. The Court could simply stop using "invidious" when discussing "arbitrary" cases and fundamental rights cases, and could then require a showing of animus whenever finding a statute or policy invidious. Alternatively, the Court could make clear that "invidious" means different things in different contexts.

B. The Importance of the Presence or Absence of Antipathy

While the difficulties posed by the Court's ambiguous use of "invidious" are not particularly formidable, the Court's presumptions about when antipathy is present pose additional difficulties. On the one hand, absent some reason to infer antipathy, the Court believes that it should not presume that such sentiments are motivating the statute or practice under examination.[86]

Even intentional discrimination may not provide reason to infer antipathy. For example, in *United Jewish Organizations of Williamsburg, Inc. v. Carey*,[87] the Court upheld a voting redistricting plan despite the explicit consideration of race and despite the foreseen adverse effects on a racial group. "There is no doubt that . . . the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . . ."[88]

The absence of intent to make a slur or impose a stigma is often cited by the Court when it upholds legislation or policies which affect different races differently. The Court upheld the New York Transit Authority employment policy in *New York City Transit Authority v. Beazer*,[89] because it was "neither unprincipled nor invidious in the

85. Joseph Tussman & Jacobus ten Broek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 355 (1949) ("The argument does not deny that the classification in question may be reasonably related to a legitimate public purpose, but asserts that even if it is so related it is invalid.").

86. Vance v. Bradley, 440 U.S. 93, 97 (1979) ("The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.") (footnote omitted).

87. 430 U.S. 144 (1977).

88. *Id.* at 165.

89. 440 U.S. 568 (1979).

HeinOnline -- 21 Hastings Const. L.Q. 339 1993-1994

sense that it implie[d] disrespect for the excluded subclass."[90] In *Fullilove*, where the Court upheld a provision entitling minority-owned businesses to favorable treatment, the Court pointed out that there was no showing that "Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the . . . program."[91]

On the other hand, when there is evidence of antipathy, the Court will typically strike down the legislation or policy.[92] The important issue becomes what counts as evidence of antipathy. The Court could demand direct evidence of illicit motivation before finding animus. This predicate would be very difficult to establish[93] because individuals or legislators who wished to invidiously discriminate would be unlikely to reveal their actual motivations. Thus, the Court would uphold much invidiously discriminatory legislation if it required direct evidence of malice. Realizing this, the Court is sometimes willing to infer antipathy.[94]

While the Court's willingness to infer antipathy is commendable, the Court's position poses certain risks. If, for example, the Court requires that illicit motivation be demonstrated in cases involving discrimination against minorities (making it more difficult to establish that invidious discrimination is occurring) but is willing to infer illicit motivation in cases involving affirmative action, the Court may perpetuate exactly the kinds of practices it claims to want to eliminate.[95]

90. *Id.* at 592.

91. Fullilove v. Klutznick, 448 U.S. 448, 486 (1980).

92. *See, e.g.*, Palmore v. Sidoti 466 U.S. 429 (1984); Loving v. Virginia, 388 U.S. 1 (1967).

93. *See* Lawrence, *supra* note 1, at 319 ("[A] motive-centered doctrine of racial discrimination places a very heavy, and often impossible, burden of persuasion on the wrong side of the dispute. Improper motives are easy to hide.") (footnote omitted); Robert Nelson, Note, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. Rev. 334, 336 (1986) ("The standard essentially only protects against actions by officials who are either stupid or honest enough to express their racist, sexist, or otherwise unconstitutional purposes.").

94. International Bd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

95. *See infra* text accompanying notes 316-36 (discussing when the Court infers illicit motivation and when it demands that it be demonstrated).

HeinOnline -- 21 Hastings Const. L.Q. 340 1993-1994

1. *The Distinction Between Motivations and Intentions*

Before one can understand how illicit motivation can make an otherwise constitutionally permissible statute unconstitutional, one must make some distinctions which are implicit within the Court's decisions. Motivations and intentions are different things. While both are psychological constructs,[96] they perform different functions.

A person's motivation is what prompts him or her to behave in a particular way; for example, one might be motivated by love or hatred. Intention, or purpose, involves an aim or goal—it involves what one does or wants rather than why one did it.[97] *Black's Law Dictionary* states:

> In common usage intent and "motive" are not infrequently regarded as one and the same thing. In law there is a distinction between them. "Motive" is said to be the moving course, the impulse, the desire that induces criminal action on part of the accused; it is distinguished from "intent" which is the purpose or design with which the act is done, the purpose to make the means effective.[98]

This distinction is easily illustrated.

Suppose that Jones purposefully kills Smith. His intention is to bring about Smith's death. His motivation is not yet clear—it may be animus (Smith may be of the wrong race, religion, or sexual orientation) or it may be benevolence (Smith may be suffering horribly and Jones might want to put him out of his misery). Let us say that K_1 is Jones's killing Smith out of animus and that K_2 is Jones's killing Smith out of compassion. K_1 and K_2 are identical in terms of what was intended (bringing about the death of Smith), what was done (giving a lethal injection), and what consequences followed (the death of Smith), even though the motivations were vastly different.

---

96. *See* Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 297 (1971) ("The central causal concepts of the antidiscrimination prohibition, such as 'based on,' 'because of,' and 'on the grounds of,' are given a psychological gloss. They are thought to refer to the employer's state of mind.").

97. For a discussion of how the difference between intention and motivation can play an important role in moral evaluation, see Mark Strasser, *Hutcheson and Mill on Evaluating Actions and Characters*, 22 PHILOSOPHIA (forthcoming, 1992-93).

98. BLACK'S LAW DICTIONARY 1014 (6th ed. 1990). The failure to distinguish between the meanings of motive in the law and in common usage may cause courts to confuse the relevant issues. For example, the Supreme Court of Ohio cites WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1984) to support its equating a motive with a reason for acting. *See* State v. Wygant, 597 N.E.2d 450, 453 & n.6 (1992).

HeinOnline -- 21 Hastings Const. L.Q. 341 1993-1994

This distinction is easily misunderstood. One's motivation is not simply one's reason for acting[99]—one's reason for acting may be indistinguishable from one's intention.[100] In the above example, Jones's reason for giving the lethal injection was to kill Smith. His intention, or purpose, was to kill Smith. These were identical, although neither is equivalent to his motivation, which might have been either compassion or hatred.

2. *The Court's Conflation of Intention and Motivation*

Unfortunately, the Court has helped obscure the difference between intention and motivation. For example, in *General Building Contractors Association, Inc. v. Pennsylvania*,[101] the Court concluded that Title 42 U.S.C. section 1981, "like the Equal Protection Clause, can be violated only by purposeful discrimination."[102] Yet the Court explicated purposeful discrimination in terms of an "invidiously discriminatory animus behind the conspirators' action."[103] Indeed, for most of the history of discrimination law, the question has not been whether the intentional discrimination was motivated by malice, but whether the discrimination was in fact intentional.[104]

The Court has sometimes made use of this implicit relation (if intentionally discriminatory, then motivated by animus) to establish

---

99. Commentators sometimes make this claim. *See, e.g.*, Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 77 (1991) ("[M]otives are a kind of reason for acting.").

In Williamson v. Mitchell, 113 S. Ct. 2194 (1993), the Court noted Mitchell's argument that "the Wisconsin penalty-enhancement statute is invalid because it punishes the defendant's discriminatory motive, or reason, for acting." *Id.* at 2200. The Court did not point out that motive and intention had been conflated but instead argued that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge." *Id.*

100. Commentators do not seem to appreciate this. *See, e.g.*, Gudel, *supra* note 99, at 76 ("An explanation of an action in terms of a motive is an explanation in terms of some further end that the actor wants to attain.").

101. 458 U.S. 375 (1982).

102. *Id.* at 391. *But see id.* at 408 (Marshall, J., dissenting) (arguing that § 1981 focuses on the effects of discrimination on the protected class, and not on the intent of the person engaging in the discriminatory conduct).

103. *Id.* at 390 n.17 (quoting Griffin v. Breckenbridge, 403 U.S. 88, 102 (1971)).

104. *See* Paul Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 109 (1971) ("[I]t is highly probable that a racial classification reflects prejudice on the decisionmaker's part."). However, this may no longer be true. *See* Roy L. Brooks, *The Affirmative Action Issue: Law, Policy and Morality*, 22 CONN. L. REV. 323, 353 (1990) ("Traditional discrimination against minorities and females is motivated by an invidious discriminatory animus; discrimination through affirmative action programs is not.").

HeinOnline -- 21 Hastings Const. L.Q. 342 1993-1994

that a particular policy was *not* intentionally discriminatory. The Court has held that the absence of animus precludes the possibility that the discrimination was intentional. For example, in *Beazer*, the Court held that the "District Court's express finding that the rule was not motivated by racial animus forecloses any claim in rebuttal that it was merely a pretext for intentional discrimination,"[105] implying that there could be no intentional discrimination without animus.[106]

When the current Court finds a statute or policy intentionally racially discriminatory, it will find that policy or statute invidious—it will refuse to find that the statute or policy was motivated by benevolence, evidence to that effect notwithstanding. In explaining why it was skeptical of programs employing purportedly benign racial classifications, the *Croson* plurality wrote, "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 . . . ."[107]

3. *The Court's Reluctance to Find Benevolent Discrimination*

While it is clear that the current Court will refuse to find intentionally racially discriminatory statutes benevolently motivated, it is less clear why this is so. The *Croson* plurality's rationale is not particularly clear. Its concern might be to discover the motivation (what motivated passage of the measure), the intention (whether it was designed to be benign or remedial), or some of the background beliefs held by the policy-maker (false notions of racial inferiority). These factors should not be conflated. A policy-maker might hold "illegitimate notions of racial inferiority" as background beliefs, yet be motivated by benevolence to create a program intended to compensate for this perceived inferiority. A different policy-maker might hold those same beliefs and be motivated by malice to create a program intended to exploit this perceived inferiority.

One possible explanation for the Court's reluctance to find statutes benevolently motivated is that the Court lacks confidence in its own ability to distinguish between invidious and noninvidious statutes

105. New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979).

106. Basically, the Court is arguing: if x (intentional discrimination), then y (motivated by animus); if -y (no animus), then -x (no intentional discrimination). While the argument is valid (the conclusion follows from the premises), it is not clear that it is sound (i.e., that the argument is valid and the premises are true). Justice White, for example, casts doubts on the truth of the premises. *See supra* text accompanying note 39.

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

HeinOnline -- 21 Hastings Const. L.Q. 343 1993-1994

or policies. The Court has at least three worries. First, the Court is concerned about its ability to detect animus.[108] Second, the Court is concerned about its ability to infer the true intention behind legislation and refuses to take claims of good intention at face value.[109] As Justice Brennan pointed out, "a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. Accordingly courts might face considerable difficulty in ascertaining whether a given race classification truly furthers benign rather than illicit objectives."[110] Third, the Court is concerned about its ability to predict the net effects of legislation. A preferential race assignment might in fact perpetuate disadvantageous treatment, for example, because of unforeseeable complicating factors. As the First Circuit Court of Appeals pointed out, "Once racial classifications are imbedded in the law, their purpose may become perverted: a benign preference under certain conditions may shade into a malignant preference at other times."[111] That a piece of legislation was motivated out of benevolence does not guarantee that it will have no ill effects, especially if one considers the precedential value of the legislation.[112] Sometimes, however, the Court is quite confident of its ability to differentiate between benevolent and malicious legislation with respect to the motivation behind it, its purpose, and the effects that will result from it.[113]

108. Palmer v. Thompson, 403 U.S. 217, 224 (1971) ("[I]t is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment.").

109. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.") (footnote omitted); *Croson*, 488 U.S. at 500 ("The mere recitation of a 'benign' or legitimate purpose for a racial classification is entitled to little or no weight.").

110. United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 172-73 (1977) (Brennan, J., concurring in part) (citation omitted). *See also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 310 (1986) (Marshall, J., dissenting) ("The concerns that have prompted some Members of this Court to call for narrowly tailored, perhaps court-ordered, means of achieving racial balance spring from a legitimate fear that racial distinctions will again be used as a means to persecute individuals, while couched in benign phraseology.").

111. Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9, 17 (1st Cir. 1973).

112. United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 219 (1979) (Burger, C.J., dissenting) ("There is always the danger that the seeds of precedent sown by good men for the best of motives will yield a rich harvest of unprincipled acts of others . . . .").

113. Metro Broadcasting v. F.C.C., 497 U.S. 547, 565 n.12 (1990) (Court was "confident that 'an examination of the legislative scheme and its history' [would] separate benign measures from other types of racial classifications.") (citing *Weinberger*, 420 U.S. at 648 n.16).

HeinOnline -- 21 Hastings Const. L.Q. 344 1993-1994

4. *Making All Racial Classifications Pernicious by Fiat*

It is one thing for the Court to claim that it cannot confidently distinguish between benign and invidious discrimination. It is quite another to suggest that all racial discrimination is pernicious and should be prohibited. In his dissent in *Fullilove*, Justice Stewart made clear his belief that the Equal Protection Clause prohibits all racial discrimination.[114] In her dissent in *Metro Broadcasting*, Justice O'Connor argued, " "Benign' racial classification' is a contradiction in terms,"[115] and "[d]ivorced from any remedial purpose and otherwise undefined, 'benign' means only what shifting fashions and changing politics deem acceptable."[116]

The Court will examine almost all racial classifications with strict scrutiny.[117] But in equating the kind of scrutiny appropriate for benevolent and malicious discrimination, the Court sends the wrong message to society. In his *Croson* dissent, Justice Marshall argued that by imposing the same standard of review on "remedial classifications" as on "the most brutal and repugnant forms of state-sponsored racism," the Court sends a signal that "it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice."[118] This is an especially offensive signal because the majority does not need protection from the minority. As the Court in *Hunter v. Erickson*[119] pointed out, "The majority needs no protection from discrimi-

114. *Fullilove*, 448 U.S. at 524 (Stewart, J., dissenting) ("[O]ur cases have made clear that the Constitution is wholly neutral in forbidding . . . racial discrimination, whatever the race . . . [of] its victims.") (citations omitted).

115. *Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting).

116. *Id.* at 615.

117. *See Fullilove*, 448 U.S. at 491 ("Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."). *Id.* at 537 (Stevens, J., dissenting) ("Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."). *See also Croson*, 488 U.S. at 520 (Scalia, J., concurring) ("[S]trict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'"); *Metro Broadcasting* 497 U.S. at 609 (O'Connor, J., dissenting) (strict scrutiny is the appropriate standard for racial classifications); *Wygant*, 476 U.S. at 273 ("[T]he level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination."). *But see Wygant*, 476 U.S. at 301-02 (Marshall, J., dissenting) (noting that when remedying vestiges of past discrimination, a less exacting standard of review is appropriate).

118. *Croson*, 488 U.S. at 552 (Marshall, J., dissenting).

119. 393 U.S. 385 (1969).

HeinOnline -- 21 Hastings Const. L.Q. 345 1993-1994

nation and if it did, a referendum might be bothersome but no more than that."[120]

5. *Making the Imposition of Strict Scrutiny Nonfatal*[121]

Even if strict scrutiny is imposed, this does not imply that all race-conscious statutes or policies must be struck down. Insofar as strict scrutiny is imposed to determine whether animus motivates a particular piece of legislation, a variety of statutes and policies would seem constitutionally permissible, such as affirmative action policies to assure that role models are present as teachers in schools.[122] Because assuring the presence of role models in no way stigmatizes those who do not get the jobs, this rationale would seem to be a noninvidious justification for intentional discrimination. The Court, however, has rejected this rationale because it "has no logical stopping point."[123] The Court fears that the role model theory "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration."[124]

The most obvious rationale for affirmative action has been articulated by Justice Marshall. "[R]acial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society."[125] The Court, however, believes that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[126]

In *Wygant*, the Court insisted "upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[127] Justice Stewart argued that there is only one kind of case in which an

120. *Id.* at 391.

121. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (strict scrutiny is "strict in theory and fatal in fact"). There is no reason that strict scrutiny must be fatal.

122. *Cf. Wygant*, 476 U.S. at 316-17 (Stevens, J., dissenting) (arguing that inclusion of minority teachers tends to dispel the illusion that there are significant differences between the races).

123. *Id.* at 275.

124. *Croson*, 488 U.S. at 498.

125. *Id.* at 552 (Marshall, J., dissenting).

126. *Wygant*, 476 U.S. at 276.

127. *Id.*

HeinOnline -- 21 Hastings Const. L.Q. 346 1993-1994

affirmative action policy is permissible—"where its sole purpose is to eradicate the actual effects of illegal race discrimination."[128]

When the Court refuses to accept past societal discrimination as a valid justification for affirmative action, it is not denying the existence of past discrimination.[129] Nor, presumably, is it claiming that charges of past discrimination somehow stigmatize the descendants of those discriminators.[130] Rather, the Court seems to fear that upholding the validity of such a justification would lead to "too much" affirmative action. The Court seems to fear that "[i]n the absence of particularized findings, [other courts] could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."[131]

Perhaps such a fear would be warranted in a country very different from ours, in which the justification would be used as a rationale for pervasive race-conscious programs which caused minorities to be "overrepresented." That scenario is not credible in this country at this time.[132]

6. *Invidiously Motivated Versus Noninvidiously Motivated Discrimination*

In its intentional discrimination jurisprudence, the Court blurs the difference between two kinds of discrimination. One involves invidiously motivated policies or statutes, which the Court rightly refuses to uphold. The other involves noninvidiously motivated, intentionally discriminatory legislation. There seems to be little controversy about whether intentional discrimination which harms minorities and is motivated by animus should be struck down. It is a different and far more difficult question whether intentional discrimination which does not harm minorities and is not motivated by animus should also be struck down.

Regrettably, the Court has not been particularly consistent in explaining why the latter is usually constitutionally offensive. Sometimes the Justices simply presume that intentional discrimination is

128. *Fullilove*, 448 U.S. at 528 (Stewart, J., dissenting).

129. *See infra* text accompanying notes 325-26.

130. *But see infra* text accompanying note 177.

131. *Id. See also infra* text accompanying notes 220-21.

132. *See* Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstracts of the United States 395 (113th edition 1993) (Table 625) (comparing unemployment rates of blacks and whites). It should be clear that blacks are not "overrepresented" in the work force.

motivated by animus.[133] At other times the Court admits that such discrimination can be motivated by benevolence but is too worried about the potential risks of making racial distinctions. In *Fullilove*, the Court expressed its misgivings about benevolent discrimination. "The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications."[134] In her dissent in *Metro Broadcasting*, Justice O'Connor explained her resistance to racial classifications. "The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[135] But the effect of prohibiting remedial race-conscious measures is uncertain. It is at least as likely, if not more likely, that the Court's refusal to allow race-conscious affirmative action policies will *increase* rather than decrease racial division and animosity. It would seem that the most direct method of rectifying past injustice would be by allowing reverse discrimination.

The Court disfavors race-conscious measures because it believes them intentionally discriminatory in a pejorative sense. When deciding which policies or statutes are in fact intentionally discriminatory, the Court must make a decision analogous to the one it must make when deciding which policies or statutes are adopted out of an invidious motivation. Just as the Court could require a demonstration of invidious motivation, or, instead, infer it from the circumstances, the Court could require direct evidence of intentional discrimination,[136] or, instead, infer discriminatory intent from the circumstances. There are dangers, however, in adopting either approach. Adopting the former may lead to numerous instances of discrimination not being found discriminatory because no smoking gun was found, while adopting the latter may lead to numerous instances being found discriminatory that arguably were not.[137]

133. *See e.g.*, Loving v. Virginia, 388 U.S. 1, 7 (1967) (concluding that Virginia's antimiscegenation law was not only intentionally discriminatory, but was "obviously an endorsement of White Supremacy."

134. *Fullilove*, 448 U.S. at 486-87.

135. *Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J., dissenting).

136. *See, e.g.*, Pullman-Standard v. Swint, 456 U.S. 273, 289-90 (1982) ("Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive.").

137. *See* Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407, 1443 (1990) (suggesting that *Croson* was wrongly decided).

HeinOnline -- 21 Hastings Const. L.Q. 348 1993-1994

7. *Which Kinds of Intent Are Actually Invidious?*

The Court is divided about what kinds of intent are actually invidious. Sometimes the Court will refuse to strike down an intentionally discriminatory statute or policy unless some antipathy to the disadvantaged class is established.[138] In *Southeastern Community College v. Davis*,[139] the Court justified its holding that a nursing program had not been guilty of invidious discrimination against the handicapped. "The uncontroverted testimony . . . established that the purpose of its program was to train persons who could serve the nursing profession in all customary ways. This type of purpose, far from reflecting any animus against handicapped individuals, is shared by many if not most [similar] institutions."[140] Because of its finding that no animus was involved, the Court concluded that the policy was not invidious. The Court has articulated the same position in other cases.[141]

The Court has made clear that its equal protection cases have recognized a distinction between

> "invidious discrimination"—i.e., classifications drawn "with an evil eye and an unequal hand" or motivated by "a feeling of antipathy" against a specific group of residents, and those special rules that "are often necessary for general benefits [such as] supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects."[142]

8. *The Role of Invidiousness*

Even if classifications are drawn "with an evil eye and an unequal hand," this will not end the matter. Suppose, for example, that it can be established that a legislature, motivated by malice, passed intentionally discriminatory legislation. There is still the further question of how much of a role that motivation played in the passage of the bill. Such a bill might have passed even if no animus had been present. An

138. Tussman & ten Broek, *supra* note 85 at 358 ("Laws are invalidated by the Court as discriminatory because they are expressions of hostility or antagonism to certain groups of individuals."). *See also* Robert W. Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 Nw. U. L. Rev. 1009, 1009 (1984) (illegitimate motivation required if seeking to strike invidiously discriminatory action).

139. 442 U.S. 397 (1979).

140. *Id.* at 413 (citation omitted).

141. *See, e.g.*, United Jewish Org. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977).

142. New York City Transit Auth. v. Beazer, 440 U.S. 568, 593 n.40 (1979) (citations omitted).

HeinOnline -- 21 Hastings Const. L.Q. 349 1993-1994

illicitly motivated law might nonetheless be a good law.[143] Further, if such a statute were declared unconstitutional solely because there had been evidence of animus, the legislature could simply pass a very similar statute, this time making sure that no such evidence existed.[144] While the Court would know that the previous bill had been passed out of animus, the Court might nonetheless feel constrained to uphold the law if indeed it was a permissible law and if indeed there was no showing of animus this time. In *Arlington Heights v. Metropolitan Housing Development Corporation*,[145] the Court upheld the lower court's determination that racial animus had not been established. The Court commented:

> Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.[146]

The Court imposes this but-for condition because it believes that legislation struck down because of the motivation behind it would have to be upheld were it repassed without a showing of illicit motivation.

> [T]here is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.[147]

---

143. Tussman & ten Broek, *supra* note 85 at 360 ("it is altogether possible for a law which is the expression of a forbidden motive to be a good law"). *See also* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1274 (1970) ("The considerations which support a reference to unconstitutional motivation in discretionary choice situations suggest that when an unconstitutionally motivated choice can be thus defended in terms of a legitimately defensible difference, motivation should not be considered."); Larry G. Simon, *Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination*, 15 SAN DIEGO L. REV. 1041, 1064-65 (1978) (An overt rule effected by prejudice should be upheld if a court is entirely confident that the same rule would have been enacted even apart from prejudice."); *Contra* Brest, *supra* note 104 at 119 ("It should suffice to demonstrate that illicit motivation played a non-trivial part in the decisionmaking process, so it might have affected the outcome.").

144. *See* Ely, *supra* note 143, at 1214 (arguing that there is little point in demanding correct motivation if legislature can reenact the statute by stressing the "right" factors).

145. 429 U.S. 252 (1977).

146. *Id.* at 271 n.21.

147. *Palmer*, 403 U.S. at 225. *See also Michael M.*, 450 U.S. at 472 n.7 ("The question for us—and the only question under the Federal Constitution—is whether the legislation

HeinOnline -- 21 Hastings Const. L.Q. 350 1993-1994

The Court appears to be very clear about what the Fourteenth Amendment prohibits. "[P]roof of discriminatory racial purpose is . . . necessary in making out an equal protection violation."[148] Yet, the Court is quite unclear about when discriminatory intention may be inferred. The *Bakke* plurality wants everyone to understand that the "guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of a different color. If both are not accorded the same protection, then it is not equal."[149] By the same token, in *Orr v. Orr*[150] the Court refused to consider which sex was being disadvantaged by the statute under consideration. "The fact that the classification expressly discriminates against men rather than women does not protect it from scrutiny."[151] Yet, the *UJO* Court did not apply a race-blind test and the *Michael M.* Court did not apply a sex-blind test.

When spelling out what unequal treatment and intentional discrimination involve, the *Bakke* plurality suggested, "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[152] While the Court clearly accepts "the general equal protection principle that the 'invidious quality' of governmental action claimed to be racially discriminatory 'must ultimately be traced to a racially discriminatory purpose,'"[153] the current Court seems to find any racially discriminatory purpose offensive, that is, it does not seem to care about the motivation of the actor.

The *Bakke* plurality offered a justification for this position by pointing out that

> the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no princi-

violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted.") (citation omitted).

148. Washington v. Davis, 426 U.S. 229, 244-45 (1976).

149. *Bakke*, 438 U.S. at 298-90.

150. 440 U.S. 268 (1979).

151. *Id.* at 279.

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

153. Batson v. Kentucky, 476 U.S. 79, 93 (1986) (citing Washington v. Davis, 426 U.S. 229, 240 (1976)).

pled basis for deciding which groups would merit "heightened judicial solicitude" and which would not.[154]

If in fact there is no principled way to decide which groups deserve special judicial solicitude and which do not, the Court's suspect class jurisprudence is itself rendered questionable.[155] Interestingly, the *Bakke* plurality did not seem worried about the extension of this analysis to gender issues, pointing out that "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."[156]

Rather than cast doubt on the Court's whole strict scrutiny jurisprudence, the plurality might have argued that all racial classifications will receive strict scrutiny and that all gender-based classifications will receive heightened scrutiny.[157] That way, the basic structure of the Court's strict scrutiny standard would be supported rather than undermined. Instead, the *Bakke* plurality merely suggested that "gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender there are only two possible classifications."[158] Yet it is not particularly more difficult to find out whether an individual fits into one of several categories (for example, American Indian or Alaskan Native, Filipino, Origins in Indian subcontinent, Hispanic, Black, Asian, Pacific Islander, White) than one of two categories.[159]

154. *Bakke*, 438 U.S. at 295-96.

155. For an analysis suggesting that the Court's suspect class jurisprudence is questionable even if one brackets the Court's confusing position on affirmative action, see Strasser, supra note 19, at 937.

156. *Bakke*, 438 U.S. at 303.

157. *See* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.")

In many instances, a program will be designed to benefit both women and racial minorities. The reviewing court might subject the entire program to strict scrutiny. *See* Cone v. Hillsborough County, 908 F.2d 908, 912-13 (11th Cir. 1990) or Conlin v. Blanchard, 890 F.2d 811, 816 (6th Cir. 1989). Or it might divide the program into two parts, employing strict scrutiny when reviewing the part involving racial classifications and heightened scrutiny when reviewing the part involving the gender classification. *See* Coral Construction v. King County, 941 F.2d 910, 930-32 (9th Cir. 1991).

Some commentators suggest that affirmative action programs involving gender classifications should be subjected to strict scrutiny. *See* John Galotto, Note, *Strict Scrutiny for Gender, Via* Croson, 93 COLUM. L. REV. 508 (1993). Yet, employing strict scrutiny for affirmative action programs benefiting women but only heightened scrutiny for policies adversely affecting women is grossly unfair.

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

159. The question would not be whether a person could fit into *more* than one category, but rather whether the person would fit into *at least* one category.

HeinOnline -- 21 Hastings Const. L.Q. 352 1993-1994

When the Court expresses its misgivings about affirmative action, it is not merely pointing out that some individuals will have benefits or burdens that others will not; this happens whenever classifications are made. "[I]t is axiomatic that the consequence of regulating by setting apart a classified group is that those in it will be subject to some restrictions or receive certain advantages that do not apply to other groups or to all the public."[160] Nonetheless, the dangers which the Court sees and the prophylactic measures which it is willing to take seem *greater* in the affirmative action context. Further, in its invidious discrimination jurisprudence, the Court conflates a number of factors which must be kept separate if it is to offer a coherent analysis capable of providing consistent guidance to lower courts and public and private actors. As suggested above, the Court conflates motivation and intention. It also conflates different senses of intention, sometimes concentrating on the actor's specific goal and sometimes concentrating on the possible effects of the statute or policy regardless of the actor's goal.

C. Intentions, Effects, and Perceptions

The Court weighs a variety of considerations when deciding whether a particular policy or statute is invidious. Sometimes, it considers the legislature's intention construed narrowly, and at other times more broadly. A very narrow sense of "intention" includes only the legislature's aims or goals. In *Personnel Administrator of Massachusetts v. Feeney*, the Court denied that a statute which differentiated among groups on its face was necessarily discriminatory or invidious. "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[161] The effects must be desired in order to be intended. Foreseen but undesired consequences are not intentional by this account.

A somewhat broader (although still fairly narrow) sense of intention includes both the legislature's goals and the foreseen consequences of its actions. A still broader sense of intention includes those consequences which were not only intended but reasonably

160. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 556 (1947).

161. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (citation and footnote omitted).

HeinOnline -- 21 Hastings Const. L.Q. 353 1993-1994

foreseeable.[162] At least in part because the Court is sometimes concerned with a very narrow sense, sometimes with a slightly broader sense, and sometimes with a very broad sense of intention, its rulings have been confusing and confused.[163]

Not only does the Court seem confused about what sense of intention it should use, it also seems confused about how heavily it should weigh particular factors when determining whether a statute or practice involves invidious discrimination. For example, it seems clear that "classifications drawn 'with an evil eye and an unequal hand' or motivated by 'a feeling of antipathy' against a specific group" offend the Constitution.[164] Yet the Court does not believe that the presence of antipathy alone will justify striking down a statute as invidiously discriminatory.[165] An illicit motivation coupled with actual or probable negative effects *may* invalidate legislation. Thus, when there is evidence of malice *and* the target group is suffering, a statute or policy *may* be struck down as invidious.[166] Unfortunately, the Court will not always strike down a statute or policy even when there is proof of malice, discriminatory intent, and harm to a protected group. In *Palmer v. Thompson*,[167] the Court refused to prevent the city of Jackson from closing down its swimming pools rather than integrating them. The Court noted first that "neither the Fourteenth Amendment nor any Act of Congress purports to impose an affirmative duty on a State to begin to operate or to continue to operate swimming pools."[168] The Court held that the presence of animus did not, without more, justify enjoining the pool closings, arguing that "no case in this Court has held that a legislative act may violate equal protection solely because of the motivations of the men who voted for it."[169] In

162. *See* MARK STRASSER, AGENCY, FREE WILL, AND MORAL RESPONSIBILITY 47-50 (1992) (discussing some of the different senses of intention).

163. *Cf.* Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 978 (1984) (arguing that the notion of intent as purpose represents a rejection of the traditional tort view of intent in which the term generally is defined without regard to purpose, and merely distinguishes conduct that is deliberate from conduct that is accidental). Unfortunately, the Court is less consistent in the invidious discrimination context than Brodin implies.

164. *Beazer*, 440 U.S. at 593 n.40 (citations omitted).

165. *See* Palmer v. Thompson, 403 U.S. 217, 224 (1971).

166. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980) 136-37.

167. 403 U.S. 217 (1971).

168. *Id.* at 220.

169. *Id.* at 224. *See also Michael M.*, 450 U.S. at 472 n.7 (1981) ("The question for us—and the only question under the Federal Constitution—is whether the legislation violates the Equal Protection Clause of the Fourteenth Amendment, not whether its supporters may have endorsed it for reasons no longer generally accepted.").

HeinOnline -- 21 Hastings Const. L.Q. 354 1993-1994

one of its more embarrassing decisions, the Court concluded that there was no violation, despite evidence of both animus and harm.

1. Negative Effects and the But-For Requirement

The Court will not strike down a piece of legislation merely because it was intended to harm a group not deserving that harm. Actual harm must have occurred or be likely to occur. Thus the Court imposes (at least) two conditions: actual (or probable) harm, and intent to harm.

When seeking to discover an actor's intentions, one can ask the actor, hoping that she will have enough insight to know her own intentions and enough honesty to reveal them. One can infer what her intentions were, given her actions and the surrounding circumstances. If one infers the actor's intention, the actor may deny the accuracy of the inference, for example, claiming that she had no intention of discriminating against anyone. While one may not believe her, one should be very careful before discounting her claims about her own intentions.[170]

A different question is whether the agent foresaw the consequences of her action, even if she did intend the results. If she foresaw that a particular practice would have very negative consequences and, without desiring those consequences, nevertheless acted in a way which she knew would bring them about, one can infer that she was at least willing to countenance those consequences, as long as she could bring about the intended results as well. It is precisely because the foreseen consequences of our actions enter into our calculations about whether to bring about our intended results that intended and foreseen consequences are sometimes reasonably grouped together when discussing intentions.[171] While it would be inaccurate to say that the agent intended to bring about the foreseen consequences in and of themselves, it is accurate to say that she intended to bring about the

170. *But see* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motive Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 87 (1991) ("Human actions are complex; the world is complex. But what is striking is the extent to which we can and do feel confident enough about the intentions of others that even their own disavowals do not shake our impressions."). Yet, what is striking about this may be that it evidences our own hubris rather than our ability to detect others' intentions. *Cf.* Gerald C. MacCallum Jr., *Legislative Intent*, 75 YALE L.J. 754, 760 (1966) (noting that because "the legislator may simply have misjudged the effectiveness of the statutory scheme," it is a mistake "to interpret the words of the statute so that the statute *will be* an effective instrument for the achievement of the [purported] purpose").

171. For an extended discussion of this point, see MARK STRASSER, AGENCY, FREE WILL AND MORAL RESPONSIBILITY 206-210 (1992).

foreseen consequences given that she could bring about the intended consequences as well. The Court seemed to capture this point in *United States v. O'Brien* when it suggested that "the inevitable effect of a statute on its face may render it unconstitutional."[172] The Court concluded that "the purpose [that is, the intention in the narrowest sense of that word] of the legislation was irrelevant, because the inevitable effect . . . abridged constitutional rights."[173]

One consequence (whether intended or foreseen) which will not be countenanced by the Court is the imposition of stigma on a particular race. In *Loving*, the Court invalidated Virginia's antimiscegenation law because it imposed a stigma on blacks.[174] The Court has also taken into account which group is adversely affected by a statute's distribution of benefits and burdens. For example, the *United Jewish Organization* Court upheld an intentionally discriminatory redistricting plan because it did not impose a racial stigma or slur on the disadvantaged class.[175]

Commentators have recognized the Court's tendency to look at whether the disadvantaged class is stigmatized, and have pointed out that affirmative action policies do not impose a stigma on whites.[176] This point has not convinced the Court. Indeed, Justice Stevens suggests that affirmative action policies may "stigmatize[ ] the disadvan-

172. 391 U.S. 367, 384 (1968). *See also* Ira Michael Heyman, *The Chief Justice, Racial Segregation, and The Friendly Critics*, 49 CAL. L. REV. 104, 119 (1961) (The Court has more difficulty in determining when an illicit classification has been used "when the statute uses a nonracial classification and the classification seems to support a generally accepted policy, but in fact casts disadvantages much more heavily on Negroes than on others."); D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 773 (1987) ("Since purposefully discriminatory conduct is no longer generally acceptable in our society, it is often disguised through the use of rules or procedures which have some plausible relation to legitimate concerns."); *id.* at 776 ("Times have changed. The main problem now is not blatant, malicious acts, but the perpetuation of unknowing categorization and stereotyping which is just as effective (perhaps more effective) in denying people the opportunity to realize their humanity.").

173. *O'Brien*, 391 U.S. at 385 (citation omitted).

174. Loving v. Virginia, 388 U.S. 1, 7 (1967). *See also* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954); Strauder v. West Virginia, 100 U.S. 303, 308 (1879).

175. United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 165 (1977).

176. *See* Paul Brest, *The Supreme Court 1975 Term Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 17 (1976) (Commenting that in affirmative action cases, it is unlikely that stigmatic injury will accompany deprivation); Arval A. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions:* De Funis v. Odegaard, 49 WASH. L. REV. 1, 36 (1973) (noting that preferential admissions policies are not a covert attempt to stigmatize the majority white race as inferior, and hence are not invidious.)

HeinOnline -- 21 Hastings Const. L.Q. 356 1993-1994

taged class with the unproven charge of past racial discrimination."[177] Justice Kennedy acknowledges that racial preferences need not stigmatize. Arguably, in the affirmative action context, "the group disadvantaged by the preference should feel no stigma at all, because racial preferences address not the evil of intentional discrimination but the continuing unconscious use of stereotypes that disadvantage minority groups."[178] Nevertheless, Justice Kennedy rejected this argument because "this is not a proposition that the many citizens, who to their knowledge 'have never discriminated against anyone on the basis of race,' will find easy to accept."[179] Insofar as the issue is *unconscious* racism, however, it would be unsurprising for individuals to fail to realize that they hold racially prejudiced views.[180]

Currently, the Court will seek to determine whether the statute or policy stigmatizes either the advantaged or the disadvantaged class. It fears that affirmative action policies may impose a stigma on blacks.[181] Indeed, the plurality in *Bakke* worried that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[182]

2. *The Importance of How Policies Are Perceived*

Many members of the Court worry about how affirmative action policies will be perceived. It is very dangerous to base decisions on possible perceptions, however, if only because they might not occur. Further, notwithstanding the plurality's fears in *Bakke*, people might actually believe that affirmative action programs exist because minorities require protection from lingering racist tendencies.

Perhaps the most serious difficulty with basing Supreme Court decisions on possible perceptions is that people are likely to be di-

177. *Croson*, 488 U.S. at 516-17 (1989) (Stevens, J., concurring in part and concurring in the judgment); *see also* Paul N. Cox, *The Supreme Court, Title VII and "Voluntary" Affirmative Action—A Critique*, 21 IND. L. REV. 767, 775 (1987) ("[T]he argument fails to account for the attitude of the disfavored majority person toward the remedial motivation. . . . If the majority person accepts the remediation rationale, he is likely to regard himself as morally inferior.").

178. *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting).

179. *Id.*

180. *Cf.* Lawrence, *supra* note 1, at 321 ("[T]he illness of racism infects almost everyone."); *id.* at 322 ("[M]ost of us are unaware of our racism.").

181. *See* Brest, *supra* note 176, at 21 ("A court or other decisionmaker confronted with an apparently benign race-dependent practice should [determine] . . . whether it seems to reflect assumptions of racial inferiority or selective indifference and whether it seems likely to inflict stigmatic injury or add to cumulative harms.").

182. *Bakke*, 438 U.S. at 298.

vided no matter what the Court does. While it is likely that some will view the Court's upholding of affirmative action policies as granting a special preference to less qualified individuals, it is also likely that some will view the Court's striking down of such policies as evidence that the Court itself is racist. Being guided by the possible reactions to its decisions will guarantee that the Court will act wrongly no matter what decision it finally renders.

In *City of Richmond v. J.A. Croson Co.*,[183] the plurality argued, "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[184] The Court seems not to appreciate the possible effects of refusing to eradicate racist practices and of implying that racism and discrimination are no longer pervasive problems. If minorities are significantly underrepresented in the workplace and the Court implies that this cannot be attributed to discrimination, the Court itself may be reinforcing "common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[185]

3. *The Invidiousness of Promoting Outmoded Ways of Thinking*

The Court will strike down statutes which promote outmoded ways of thinking about specific groups,[186] for example, "stereotypes about the 'proper place' of women and their need for special protection."[187] Yet when striking down such statutes, the Court must evalu-

183. 488 U.S. 469 (1989) (plurality opinion).

184. *Id.* at 493; *see also Metro Broadcasting*, 497 U.S. at 604 (O'Connor dissenting). Justice O'Connor worries that "[r]acial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit." *Id.*

185. *Bakke*, 438 U.S. at 298.

186. *Michael M.*, 450 U.S. at 478 (Stewart, J., concurring) (citations omitted) ("Gender-based classifications may not be based upon . . . archaic assumptions about the proper roles of the sexes.")

187. *Id.* (citation omitted). *See* J. Morris Clark, *Legislative Motivation and Fundamental Rights in Constitutional Law*, 15 SAN DIEGO L. REV. 953, 965 (1978) (arguing that invidious discrimination need not involve a malicious or even conscious discounting of individuals; many legislators who passed sexually discriminatory laws sincerely believed that they were benefiting women.); Stuart W. Tisdale Jr., Comment, *Reasonable Accommodation and Non-Invidious Discrimination Under the Maine Human Rights Act*, 40 ME. L. REV. 475, 486 (Invidious motivation includes the malicious desire to relegate a particular group to second class citizenship or the more subtle, pernicious attitude that singles out an identifiable group for special protection because of the belief that the group's inferiority requires solicitude.).

HeinOnline -- 21 Hastings Const. L.Q. 358 1993-1994

ate which statutes promote outmoded or current views about a class, and which legislatures or agencies can be trusted to have accurate views about that class. The Court has been inconsistent with respect to which "realistic" differences it will take judicial cognizance of and whose judgment will be used to determine which differences are realistic.

In *Orr v. Orr*, the Court struck down a statute designed to protect women, despite the Alabama legislature's apparent belief that the statute reflected a realistic difference between the sexes.[188] In *Michael M. v. Superior Court of Sonoma County*, the Court upheld a statute "where the gender classification [was] not invidious, but rather realistically reflect[ed] the fact that the sexes are not similarly situated in certain circumstances."[189] The Court refused to substitute its own judgment about the proper role of women, claiming that the "decision of the California Legislature is as good a source as is this Court in deciding what is 'current' and what is 'outmoded' in the perception of women."[190]

In *Rotsker v. Goldberg*,[191] the Court refused to decide whether combat restrictions on women involved an invidious discrimination, deferring to the judgment of Congress. Given the permissibility of the restriction, the Court upheld a policy which distinguished between men and women for draft purposes. "Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft."[192]

Perhaps the above position is not surprising. If indeed combat restrictions are constitutionally permissible and if indeed the number of noncombat personnel required by the Armed Forces is sufficiently small that it would be counterproductive to draft noncombat personnel, the Court should have no qualms about upholding the constitutionality of a facially discriminatory draft. Yet, the Court did have some constitutional qualms about such a policy. In *Personnel Administrator of Massachusetts v. Feeney*,[193] the Court implied that the draft might involve invidious discrimination.[194] Because the history of discrimination against women in the military [was] not on trial in *Fee-*

188. 440 U.S. 268 (1979).
189. 450 U.S. 464, 469 (1981).
190. *Id.* at 471 n.6.
191. 453 U.S. 57 (1981).
192. *Id.* at 78.
193. 442 U.S. 256 (1979).
194. *Id.* at 278 (citations omitted) ("The enlistment policies of the Armed Services may well have discriminated on the basis of sex.").

ney,[195] however, the Court upheld Massachusetts' policy of giving hiring preferences for individuals who perform military service. The difficulty here was not that veterans are rewarded for their service, but merely that the Court should be more consistent with respect to which differences reflect reality and with respect to who will be trusted to decide which differences are real.

4. Recognizing Formal but Not Substantive Equality

When the Court wants to uphold a discriminatory policy, it will sometimes demand only that the policy meet certain formal requirements. For example, in *Geduldig v. Aiello*,[196] the Court upheld California's refusal to offer pregnancy insurance benefits for public employees. The Court noted that the state had a "legitimate interest in maintaining the self-supporting nature of its insurance program" and held that the state's legitimate interests provided "an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has."[197] The Court denied that "the selection of the risks insured by the program worked to discriminate against any definable group or class," pointing out that there "is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not."[198]

The Court held that no invidious distinction had been made, suggesting that the "program divides potential recipients into two groups—pregnant women and nonpregnant persons."[199] The Court noted that "[w]hile the first group is exclusively female, the second includes members of both sexes," concluding that the "fiscal and actuarial benefits of the program thus accrue to members of both sexes."[200]

The Court offered a similar analysis in *General Electric v. Gilbert*,[201] this time explaining that the refusal to offer pregnancy benefits did not violate Title VII.[202] Justice Brennan argued that this same principle might be used to justify something obviously unconstitu-

195. *Id.* (citations omitted).
196. 417 U.S. 484 (1974).
197. *Id.* at 496-97 (footnote omitted).
198. *Id.* (footnote omitted).
199. *Id.* at 496-97 n.20.
200. *Id.*
201. 429 U.S. 125 (1976).
202. *Id.* at 136.

HeinOnline -- 21 Hastings Const. L.Q. 360 1993-1994

tional.[203] In a narrow sense of intention, the goals of General Electric and the state of California presumably did not involve discrimination against women. It is clear, however, that an inevitable effect of these policies would be to disadvantage women. Thus, these policies would be discriminatory using a broad sense of intention.

In *Geduldig* and in *General Electric*, the Court did not worry about whether the failure to provide insurance coverage for pregnant women might have been viewed by those adversely affected as a blatant attempt to discriminate. In cases involving affirmative action, however, the Court worries about the possible reactions of the individuals adversely affected by the legislation; for example, individuals who, because of the adoption of an affirmative action policy, do not receive a benefit they otherwise would have received. The Court's inconsistency with respect to when the reactions of those adversely affected will be given weight does little to bolster the Court's reputation for fairness. By the same token, the Court's use of a very narrow view of intention in upholding certain arguably intentionally discriminatory statutes or policies and use of a broader view in striking down other statutes or policies, which seem no more intentionally discriminatory than those upheld, does not engender feelings of confidence in the Court's ability to make rulings evenhandedly and impartially.

II. Affirmative Action in Education and Employment

The Court has made clear that a statute or policy might offend Title VII without offending the Constitution—a higher standard must be met in order to establish that a particular statute or policy is invidious in a constitutional sense.[204] It is helpful to examine the Court's recent pronouncements on these two different standards because the Court's views on one tend to cast light on its views on the other.

203. *Id.* at 152 n.5 (Brennan, J., dissenting) ("Had General Electric assembled a catalogue of all ailments that befall humanity, and then systematically proceeded to exclude from coverage *every* disability that is female-specific or predominantly afflicts women, the Court could still reason as here that the plan operates equally: Women, like men, would be entitled to draw disability payments for their circumcisions and prostatectomies, and neither sex could claim payment for pregnancies, breast cancer, and the other excluded female-dominated disabilities. Along similar lines, any disability that occurs disproportionately in a particular group—sickle-cell anemia, for example—could be freely excluded from the plan without troubling the Court's analytical framework.").

204. *See* Washington v. Davis, 426 U.S. 229, 239 (1976).

HeinOnline -- 21 Hastings Const. L.Q. 361 1993-1994

A. Benign Discrimination in Education: *Bakke* and Its Implications

Commentators suggest that invidious discrimination in the educational setting may be even more pernicious than in other areas, because its victims will thereby be precluded from competing on an equal footing in other areas of life as well.[205] It is thus imperative that invidious discrimination in education be prevented. The difficult issue involves determining which kinds of discrimination in education are in fact invidious.

Some commentators argue that all race-conscious policies in public education are invidious and prohibited by *Brown v. Board of Education*,[206] regardless of whether anyone suffers harm.[207] To prohibit all race-conscious policies, however, may be quite counterproductive because such a prohibition may simply allow covert discrimination to continue, paradoxically, in the name of fairness.[208] Individuals who wish to discriminate invidiously will continue to do so, although hiding their illicit motivation.[209] Individuals who wish to discriminate benignly because of past societal discrimination will have a much more difficult task—they may have to establish *their own* past invidious discrimination in order to justify their benign discrimination.[210]

205. *See* Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 906 (1985) (arguing that one of the principal evils of invidious discrimination in education is that it deprives its victims of the means to compete on an equal footing with others for scarce jobs).

206. 347 U.S. 483 (1954).

207. *See* Heyman, *supra* note 172, at 105 (arguing that *Brown* establishes the proposition that the Fourteenth Amendment renders invalid laws employing racial classification in public education regardless of harm). *But see* Morris, *supra* note 176, at 19 ("*Brown*'s holding . . . is that only those racial classifications used by a state that have the effect of stigmatizing and imposing detriments on a racial group in the field of education are invidious and thus violate . . . equal protection.").

208. *See* Donald E. Lively, *The Supreme Court and Affirmative Action: Whose Classification Is Suspect?* 17 HASTINGS CONST. L.Q. 483, 486 (1990) ("If a competition were conducted to determine the most effective means for paying tribute to minority interests in word but not deed, it is doubtful that any methodology would surpass the discriminatory purpose standard."); Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 692 (1975) ("Racial and ethnic preferences are . . . the most [if not] only feasible means of achieving substantial representation of certain racial and ethnic groups in law schools.").

209. *Cf.* Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886, 900 (1961) (Brennan, J., dissenting) ("[U]nless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ 'security requirements' as a blind behind which to dismiss at will for the most discriminatory of causes."); Lively, *supra* note 208, at 486 ("When officials are on notice that they must conceal illicit motive to avoid constitutional consequences, searching for wrongful intent becomes an exercise well known for its futility.").

210. *See* Ronald W. Adelman, Note, *Voluntary Affirmative Action Plans by Public Employers: The Disparity in Standards Between Title VII and the Equal Protection Clause*, 56

HeinOnline -- 21 Hastings Const. L.Q. 362 1993-1994

The Court continues to emphasize the difference between facial and nonfacial discrimination. "[T]he differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to discriminate."[211] Invidiousness in education must be linked to a racially discriminatory purpose.[212]

Even absent a showing of a facial intent to discriminate, the Court may infer invidiously discriminatory intent from the circumstances. For example, "where a school system has been operated on a segregated basis in the past, and where ostensibly neutral attendance zones or district lines are drawn where none have existed before," the Court members will "not close [their] eyes to the facts in favor of theory."[213] Further, the mere recitation of noninvidious motivation will not establish the good faith of the school authorities.[214]

The question of interest, here, however is not whether the Court should prevent counties from having segregated schools, but whether a school's preferential admissions for minorities constitutes an invidious discrimination prohibited by the Constitution. Such a policy may be facially discriminatory, but not intended to stigmatize or adversely affect anyone. Thus, there is an important difference between an attempt to bring about segregation—which is often both intended to

FORDHAM L. REV. 403, 405 (1987) (Plaintiffs attacking affirmative action must prove that past school board action was not illegal racial discrimination or that past racial discrimination was not the board's. The school board must prove itself guilty of past discrimination.); *id.* ("Under the guise of strict judicial scrutiny of racial or gender classifications, the standard appears to require a showing of actual past discrimination by the employer or his predecessors."). *But see Wygant*, 476 U.S. at 286 (O'Connor, J., concurring) (noting that remedial affirmative action need not be accompanied by contemporaneous findings of actual discrimination as long as public actor has a firm basis for believing that remedial action is required); *id.* at 290 (O'Connor, J., concurring) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."). *See also id.* at 305 (Marshall, J., dissenting) ("[F]ormal findings of past discrimination are not a necessary predicate to the adoption of affirmative-action policies, and . . . the scope of such policies need not be limited to remedying specific instances of identifiable discrimination.").

211. Keyes v. School Dist., 413 U.S. 189, 208 (1973) (citing Swann v. Charlotte-Mecklenburg of Educ., 402 U.S. 1, 17-18 (1971)).

212. Washington v. Davis, 426 U.S. 229, 240 (1976) ("The school desegregation cases have . . . adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

213. Wright v. Council of City of Emporia, 407 U.S. 451, 472 (1972) (Burger, J., dissenting).

214. *Keyes*, 413 U.S. at 210 ("[I]t is not enough . . . that the school authorities rely upon some allegedly logical, racially neutral explanation for their actions. Their burden is to adduce proof sufficient to support a finding that segregative intent was not among the factors that motivated their actions.").

HeinOnline -- 21 Hastings Const. L.Q. 363 1993-1994

stigmatize and invidiously motivated—and an attempt to increase integration—which often involves neither an illicit motivation nor an illicit intention.

In the graduate school setting, the Court has not held that a preferential admissions policy is *per se* unconstitutional. Such preferential programs are acceptable, as long as they consider race as one factor among many which might enhance an individual applicant's chances of being accepted.[215] The Court, however, has refused to uphold minority set-asides. In *Bakke*, the plurality suggested that a university's interest in seeking "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin . . . must be rejected not as insubstantial but as facially invalid," because the university's "[p]reference for members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[216]

It is hardly accurate to say that affirmative action policies involve discrimination for its own sake. Rather, such policies promote a variety of goals, for example, assuring diversity or compensating for past discrimination either by society as a whole or by the institution itself. It might seem that the Court would not object to a university's instituting an affirmative action policy if the university had itself discriminated against minorities in the past. While that may be true, the *Bakke* plurality rejected the proposition that a university could determine that it itself had engaged in discriminatory practices. The University's purpose "is education, not . . . the adjudication of particular claims of illegality."[217] To justify a policy of facial benign discrimination, a governmental body, rather than the university itself, must "establish, in the record, that the classification is responsive to identified discrimination."[218]

Yet, there are a number of reasons why this is a surprising tack for the Court to take. In other contexts, where someone admits having acted wrongfully in the past, the Court does not require an independent fact-finder to verify that the wrong had in fact occurred before allowing the admitted wrongdoer to make amends. Indeed, in other contexts, persons *accused* of wrongdoing are sometimes allowed to make compensation, for example, by paying a certain amount or by

215. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).

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

217. *Bakke*, 438 U.S. at 309 (footnote omitted).

218. *Id.* (footnote omitted).

HeinOnline -- 21 Hastings Const. L.Q. 364 1993-1994

changing internal procedures, without having to admit, much less establish, wrongdoing.

The *Bakke* plurality was disingenuous when charging that the university, by adopting its affirmative action policy, had been engaging in discrimination for its own sake. Basically, the plurality rejected a number of other justifications and then concluded that the university could not justify its policy.[219] For example, the plurality held that "the purpose of helping certain groups . . . perceived as victims of 'societal discrimination' does not justify a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[220] Allegedly, allowing such policies would cause a host of problems. "To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."[221]

There are several difficulties with the plurality's position. First, there is no reason to believe that a university's voluntarily-adopted race-conscious admissions program would result in minority members taking more than their fair share of slots.[222] Second, the plurality's references to groups that are "*perceived* as victims," or who are "*thought* to have suffered" suggests that blacks may not have suffered or do not still suffer discrimination in this country.[223] Third, even if the adoption of such a program would be unwise, the Court's suggestion that the policy involves discrimination for its own sake is too strong. There was no evidence that the university had adopted the program out of animus or out of a desire to stigmatize or even because it held illegitimate notions of racial inferiority as background beliefs.

While denying the constitutionality of a university's adopting a race-conscious program to remedy past societal discrimination, the *Bakke* plurality affirmed the constitutionality of a university's implementing a system to attain "a diverse student body."[224] Indeed, "the interest of diversity is compelling in the context of a university's ad-

219. In Freeman v. Pitts, 112 S. Ct. 1430 (1992), the Court suggested, "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." *Id.* at 1447.

220. *Bakke*, 438 U.S. at 310.

221. *Id.*

222. *See supra* text accompanying note 131.

223. *See infra* text accompanying notes 325-26.

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

missions program."[225] Nonetheless, the particular admissions program at issue in *Bakke* was struck down because the plurality substituted its own judgment for the university's and decided that the university's "racial classification [was not] necessary to promote this interest."[226]

1. *Facial Discrimination and Quotas*

One of the more confusing aspects of the controversy surrounding affirmative action in higher education is that there has been a conflation of facial discrimination with the imposition of quotas. An admissions program which considers race or ethnicity a "plus" in a particular applicant's file will be upheld, as long as the admissions program does "not insulate the individual from comparison with all other candidates for the available seats."[227] A permissible admissions program must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."[228] Even in such a program, some applicants may not be accepted because they do not have the racial "plus" factor. However, the

> applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant.[229]

The plurality distinguishes the above kind of program which facially considers race to be *one* of the factors of admission from a program in which a necessary condition for being awarded a particular slot is that the applicant be of a particular race. The latter involves a "facial intent to discriminate."[230] No facial infirmity exists where ethnic background or race is only *one* factor to be considered in conjunction with other factors.[231]

225. *Id.* at 314-15.
226. *Id.*
227. *Bakke*, 438 U.S. at 317.
228. *Id.*
229. *Id.* at 318.
230. *Id.*
231. *Id.*

HeinOnline -- 21 Hastings Const. L.Q. 366 1993-1994

2. *Reserving Slots Versus Recognizing Plus Factors*

It is misleading to say that a program is "facially" discriminatory if certain slots are reserved for individuals of a particular race but not "facially" discriminatory if race is but one of several weighted factors. In both cases, race consideration is explicitly a facial consideration of the program. Indeed, given that the Court will not oversee how heavily each factor is weighted, the two admissions programs might yield identical results.[232] The *Bakke* plurality realized this, but suggested that "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."[233]

Suppose that a university were to deny that its admissions policy involved invidious facial discrimination because it merely assigned a "minus" factor to an individual's being African-American rather than simply rejected him on that account. The Court would (presumably) hold that this was an invidious, facially discriminatory policy.

Apparently, the *Bakke* plurality is not worried about facially discriminatory admissions policies *per se*; rather, it is worried about facially discriminatory policies based on the sole criterion of race. Yet, it is inaccurate to depict the admissions program at issue in *Bakke* as facially discriminating on the one criterion of race—it is not as if the university set aside a particular number of slots for individuals of a particular race and then filled those slots by choosing randomly among the relevant applicants. Rather, the best minority candidates were chosen through a nonrandom process. This might be likened to a process in which a university reserves a number of slots for the children of alumni, and then chooses the best candidates among that group.

The *Bakke* plurality would also find offensive an admissions program which had a "goal" of admitting a certain number of students of a particular race. "Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status."[234] The plurality notes, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of a different color. If both are not accorded the same

232. *Id.* at 369 (Brennan, J., concurring in part and dissenting in part) (holding that no sensible or constitutional distinction between adding a set number of points to the admissions rating of disadvantaged minority applicants and setting a fixed number of places for such applicants).

233. *Id.* at 318.

234. *Id.* at 289 (footnote omitted).

protection, then it is not equal."[235] The plurality view echoes a position articulated by Justice Rehnquist. "Whether described as 'benign discrimination' or 'affirmative action,' the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another."[236] Apparently, this is true even if there is no suggestion that the program stigmatizes or singles out any identifiable, nonminority group.[237]

It is surprising that the *Bakke* plurality equates quotas and goals, finding both invidious regardless of motivation, intention, or effect. One would have expected the Court to distinguish between the two. Quotas might be thought invidious and demeaning because in the extreme case an unqualified person might be accepted to fill the quota. With a system of goals or targets, however, there is no *requirement* that a certain number of individuals be admitted and thus, in the hypothesized extreme case, the unqualified person would not be admitted and the goal would not be reached that year.

There are other difficulties with the plurality's position. For example, consider two admission policies, one which considers race among several factors and the other which reserves certain slots for individuals of a particular race, as long as those individuals have scored above the cut-off point on the relevant test such as the SAT, LSAT, or MCAT. The motivation (benevolence or duty), the intention (to achieve diversity), and the effect (accepting a certain number of students) might be identical in both cases. Nonetheless, the Court would strike down the latter but not the former admissions program.

Universities cannot be assured of circumventing *Bakke* by adopting multi-factored approaches which would roughly approximate the results which they would have achieved by reserving slots. It is not at all clear that the Court would uphold any admissions program which used several factors in its admissions decision-making, regardless of the relative weight given to each factor. The Court might decide that a particular program was "the functional equivalent of a quota system,"[238] no longer presume "good faith"[239] on the part of the university, and might then become even more intrusive in admissions procedures. Indeed, given the aversion to affirmative action policies manifested in *Bakke*, it would be unsurprising for the Court to be-

235. *Bakke*, 438 U.S. at 289-90.

236. United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S. 193, 254 (1979) (Rehnquist, J., dissenting).

237. *Bakke*, 438 U.S. at 369 (Brennan, J., concurring in part and dissenting in part).

238. *Id.* at 318.

239. *Id.* at 318-19.

HeinOnline -- 21 Hastings Const. L.Q. 368 1993-1994

come even more aggressive in striking down university affirmative action programs.

The *Bakke* plurality worried that "innocent" applicants will be resentful if denied admission because some slots have been reserved for minorities. Individuals may be no less resentful, however, for having been rejected for want of a "plus" factor than they would be for having been rejected because slots were reserved. Indeed, many students do not know whether the university they desire to attend has an affirmative action policy or, if it does, how it achieves its admissions goals. These students might perceive the university's admissions policy as invidious, regardless of the policy's content. The would-be student who knows that race is but one of several factors considered in admissions might still be resentful if she is not admitted, especially if she does not know how heavily that factor is weighed.

The Supreme Court's implicit messages are rather disquieting. The *Bakke* plurality suggested that race should be treated the same way that other distinguishing features are treated. Race contributes to diversity as does "unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor,"[240] etc. The Court thus trivializes the role of race in our country.[241] Perhaps the more dangerous message is the one implicit in several of the Court's recent decisions,[242] namely, that race is inappropriately considered in any but the most limited of contexts, regardless of motivation, intention, or consequences, and further, that the use of race as a consideration is *appropriately* resented. What better way to prevent the rectification of past and current racial injustice than to claim that the remedy itself is appropriately resented as racist.

B. The Role of Congress

One of the reasons that universities are not allowed to set up race-conscious quotas, even if they are guilty of past discrimination, is that they are allegedly unequipped to make the relevant factual finding.[243] The Court will not approve "a classification that aids persons

240. *Id.* at 317.

241. *See* Lawrence, *supra* note 1, at 323 (discussing "the profound effect that the history of American race relations has had on the individual and collective unconscious").

242. *See, e.g.*, Freeman v. Pitts, 112 S. Ct. 1430 (1992); Board of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991); Wards Cove Packing v. Atonio, 490 U.S. 642 (1989); and City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989) (plurality opinion).

243. *See Bakke*, 438 U.S. at 309 (footnote omitted).

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."[244]

While "government bodies constitutionally may adopt racial classifications as a remedy for past discrimination,"[245] such classifications will face heightened or strict scrutiny. In *Croson*,[246] the Court made clear that a municipal government set-aside program will be examined with strict scrutiny.[247]

The Court is not thereby barring states from adopting remedial programs,[248] although state and local governments "must identify that discrimination, public or private, with some specificity before they may use race-conscious relief."[249] The Court gives more deference to Congressional findings, feeling bound to give "appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."[250]

---

244. *Id.* at 307.

245. Local 28 of Sheet Metal Worker's Int. Assoc. v. Equal Employment Opportunity Comm., 478 U.S. 421, 480 (1986).

246. 488 U.S. 469 (1989) (plurality opinion).

247. *Cf. id.* at 490, where the Court noted,

> The mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment, who desired to place clear limits on the State's use of race as a criterion for legislative action, and to have the federal courts enforce those limitations.

248. *Id.* at 504 ("[T]he States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination.").

249. *Id.*

250. *Fullilove*, 448 U.S. at 472 (citing U.S. CONST. art. 1, § 8, cl. 1; U.S. CONST. amend XIV, § 5). In *Metro Broadcasting*, 497 U.S. at 564-65 (footnote omitted), the Court held that "benign race-conscious measures mandated by Congress . . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." In *Fullilove*, 448 U.S. at 483-84, the Court recognized as "fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." Further, the Court rejected "the contention that in the remedial context the Congress must act in wholly,'color-blind' fashion." *Id.* at 482. *See also* J. Edmond Nathanson, *Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict*, 27 WM. & MARY L. REV. 331, 336 (1986) (noting that in *Fullilove*, the Court allowed Congress to use its Fourteenth Amendment enforcement power to establish affirmative action quotas for minority business participation).

HeinOnline -- 21 Hastings Const. L.Q. 370 1993-1994

As Justice Scalia explains, the Court quite consciously distinguishes between federal action on the one hand and state and local action on the other. The distinction "between federal and state (or local) action based on race rests not only upon the substance of the Civil War Amendments, but upon social reality and governmental theory.[251] According to Justice Scalia, the Court believes that "the dispassionate objectivity [and] the flexibility that are needed to mold a race-conscious remedy around the single objective of eliminating the effects of past or present discrimination . . . are substantially less likely to exist at the state or local level."[252]

Merely because Congress, rather than a state or locality, adopts a particular policy does not "render it immune from judicial scrutiny."[253] That scrutiny will not be strict, however, as it would be were a municipality to adopt the same kind of program.[254] Rather, it will be heightened.[255] The program merely needs to be *substantially* related to an *important* governmental interest (the heightened scrutiny test) rather than *narrowly* tailored to promote a *compelling* state interest under the strict scrutiny test.

It might seem that the Court is allowing the following scenario: In its fact-finding role, Congress might find pervasive discrimination in a variety of areas. States and municipalities might then adopt benign discrimination policies based on the congressional fact-finding. The Court, however, will not allow this. "[W]hen a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion to the classification's relevance to its goals."[256] The Court noted, "Congress has made national findings that there has been societal discrimination in a host of fields. If all state or local government need do is find a congressional report on the subject to

251. *Croson*, 488 U.S. at 522 (Scalia, J., concurring in the judgment).

252. *Id.* (Scalia, J., concurring in the judgment) (citing *Fullilove*, 448 U.S. at 527 (Stewart, J. dissenting)). *But see Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J. dissenting) ("The Court's application of a lessened equal protection standard to congressional actions finds no support in our cases or in the Constitution.") and *id.* at 605 (O'Connor, J. dissenting) ("the Court does not lightly set aside the considered judgement of a coordinate branch. Nonetheless, the respect due to a coordinate branch yields neither less vigilance in defense of equal protection principles nor any corresponding diminution of the standard of review."

253. *Fullilove*, 448 U.S. at 473.

254. *Cf. Metro Broadcasting*, 497 U.S. at 564-65 (citing *Croson*, 488 U.S. 469 (1989)).

255. *Id.* at 597 ("a congressionally mandated benign race-conscious program that is substantially related to the achievement of an important governmental interest is consistent with equal protection principles so long as it does not impose undue burdens on nonminorities.")

256. *Croson*, 488 U.S. at 500.

HeinOnline -- 21 Hastings Const. L.Q. 371 1993-1994

enact a set-aside program, the constraints on the Equal Protection Clause will, in effect, have been rendered a nullity."[257] The state or local government will have to make particularized findings of past discrimination to justify its instituting an affirmative action program.

The Court's approach is rather surprising. Its presumption regarding the likelihood of a race-conscious remedy being invidious is based on the *identity* of its creator rather than on the *content* of the policy. Further, despite its alleged deference to Congress, the Court gives short shrift to Congressional findings of discrimination, instead requiring state and local actors to identify discriminatory policies and practices with particularity. It would be unsurprising for someone reading the Court's decisions to conclude that the Court is not really interested in rectifying past and present discrimination, protestations notwithstanding.

C. Title VII

One of the most discussed and litigated Congressional enactments in discrimination law is Title VII of the Civil Rights Act of 1964,[258] which prohibits intentional employment discrimination against certain groups. There are several reasons for the large amount of litigation arising from Title VII, not the least of which is that the Court has not been entirely consistent with respect to what the Act requires.

The Court has made clear that the standards for invidious discrimination that makes legislation constitutionally infirm are not identical to the standards for violations of Title VII.[259] The absence of animus will not prevent an intentionally discriminatory policy from offending the Act. "[T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination."[260]

Although the criteria for constitutional violations and Title VII violations differ, examining Title VII jurisprudence clarifies the shifts

257. *Id.* at 504.

258. 42 U.S.C.A § 2000(e) (West 1981).

259. Washington v. Davis, 426 U.S. 229, 239 (1976) ("We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII.").

260. International Union, United Auto., Aerospace and Agric. Implement Workers of America v. Johnson Controls, 111 S. Ct. 1196, 1203-04 (1991).

HeinOnline -- 21 Hastings Const. L.Q. 372 1993-1994

in the Court's position with respect to whose interests must be weighed more heavily and with respect to which presumptions will be employed by the Court. In cases involving either kind of violation, the Court has made it more difficult to establish that discrimination against minorities has occurred *and* more difficult to establish the permissibility of affirmative action programs. The implicit suggestion is that the Court has lost its resolve to eradicate discrimination against minorities in this country.

1. Two Different Kinds of Title VII Violations

In Title VII cases, the complainant might take two different tacks. On the one hand, the complainant might have been personally discriminated against on the basis of race or sex.[261] Here, the individual might point to specific comments made by management to establish that there was discrimination in her case.[262]

On the other hand, the complainant might argue that the employment policy had an unjustified disparate impact. Even if an employment policy was facially neutral and thus did not involve a facial intention to discriminate, it might nonetheless violate the Act. "[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."[263] The Court recognizes that "a prima facie violation of Title VII can be established in some circumstances upon proof that the *effect* of an otherwise facially neutral plan or classification is to discriminate against members of one class or another."[264] The Court has held that "facially neutral employment practices that have significant adverse effects on protected *groups* . . . [may] violate the [Civil Rights] Act without proof that the employer adopted those practices with a discriminatory intent."[265] In these kinds of cases, the evidence "usually focuses on statistical disparities, rather than specific incidents, and on competing explanations for those disparities."[266] If there is no innocent explanation for the disparities, the Court will pre-

261. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that particular individual denied promotion because she was not sufficiently feminine).

262. *See id.* at 251 (stereotypical remarks used as evidence of gender bias).

263. Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

264. General Electric Co. v. Gilbert, 429 U.S. 125, 137 (1976) (emphasis in original) (citing Washington v. Davis, 426 U.S. 229, 246-48 (1976)).

265. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 986-87 (1988) (emphasis in original).

266. *Id.* at 987.

sume that the employer intended to discriminate. "[W]hen all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race."[267]

The Court does not insist that an individual applicant establish that when she applied for the job her race was explicitly discussed and was the reason that she was not offered a job. As Justice Powell explained, the plaintiff may simply show that "an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs."[268] Once the discriminatory pattern is established, the Court will presume that the applicant was the subject of discrimination unless the employer can show that the person would not have been hired in any case. "The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy."[269] To be entitled to relief, an "alleged individual discriminatee" would merely need to show that she had "unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination."[270]

The Court is wise not to require in disparate impact cases that would-be employees prove that they in particular had been the victims of discrimination. The burden should be on the employer. To hold otherwise would erect a barrier very difficult if not impossible for the complainant to overcome.

2. *The Court's Compromise*

The Court's policy involves a compromise. It erects a presumption in favor of the applicant, but requires that the person have in fact applied for the job in order to be eligible for relief. Individuals who were dissuaded from applying (because they knew it would simply be a waste of time) will not be compensated. The policy excludes "from the Act's coverage the victims of the most entrenched forms of discrimination. Victims of gross and pervasive discrimination [can] be denied relief precisely because the unlawful practices had been so successful as totally to deter [their] job applications . . . ."[271]

267. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978).
268. Connecticut v. Teal, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting).
269. International Bhd. of Teamsters v. United States, 431 U.S. 324, 362 (1977).
270. *Id.*
271. *Id.* at 367.

HeinOnline -- 21 Hastings Const. L.Q. 374 1993-1994

The Court's position is sensible, given both the difficulty in determining which would-be applicants were in fact dissuaded from applying because of discriminatory hiring practices, and the Court's willingness to impose class-wide remedies which assure that such practices will not continue. While it is unfortunate that those deterred from applying because of discriminatory hiring practices will not be compensated and will have suffered a real injustice without receiving redress, there is at least the consolation that others (and, perhaps, those individuals themselves) will no longer be subjected to such discrimination. Precisely because of the likelihood that individuals in fact discriminated against will have been wronged and not compensated, however, the Court must not make it overly difficult to establish disparate impact. Regrettably, the Court has recently changed the terms of the compromise, becoming less willing to impose class-wide remedies and more insistent that intentional discrimination on the part of the employer be established.[272]

If one can establish that there was a pattern of discriminatory treatment, then an applicant denied employment will be presumed to have been a victim of discrimination. Recently, however, the Court has limited what inferences will be made, given a showing of disparate impact. For example, disparate impact in one employment sector will not establish disparate impact in a different sector of the same firm. "Racial imbalance in one segment of an employer's work force does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions, *even where workers for the different positions have somewhat fungible skills*."[273] Indeed, the Court has imposed fairly strict requirements, insisting that alleged discriminatees demonstrate how the specific challenged employment practices caused the disparate impact. The alleged victims must "demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking . . . , specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and nonwhites."[274] That this requirement was overly demanding may be inferred from Congress' overruling the decision in the Civil Rights Act of 1991.[275]

272. *See infra* notes 290-95 and accompanying text.

273. Wards Cove Packing v. Atonio, 490 U.S. 642, 653 (1989) (citation omitted) (emphasis added).

274. *Id.* at 657.

275. *See* 42 U.S.C.A. § 1981 (West 1981).

HeinOnline -- 21 Hastings Const. L.Q. 375 1993-1994

Merely because a business uses employment tests or criteria that result in statistical disparities in the workforce does not establish that the business is violating Title VII. The key consideration is whether the practice can be justified for business reasons. "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[276] Thus, an "employer may not . . . condition employment opportunities on the satisfaction of facially neutral tests or qualifications that have a disproportionate, adverse impact on members of protected groups when those tests or qualifications are not required for performance of the job."[277]

Suppose that an employer uses job-related tests which "select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.[278] The complaining party will have the option of showing that "other tests or selection devices, without a similar undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[279] If such a showing could be made, this "would be evidence that the employer was using its tests merely as a 'pretext' for discrimination."[280]

The Court distinguishes between two kinds of relief: affirmative action policies and make-whole relief to individuals who themselves have been victims of discrimination. Courts have "remedial powers . . . both to eradicate the effects of unlawful discrimination as well as to make the victims of past discrimination whole."[281] The remedies that are appropriate for bringing about these two different kinds of relief are quite different.

An identified victim of discrimination may be awarded seniority—"a court may award competitive seniority to individuals who show that they had been discriminated against."[282] Indeed, this is true *even if the expectations of other innocent individuals might thereby be frustrated.* Were the Court to deny "seniority relief to identifiable victims of racial discrimination on the sole ground that such relief diminishes the expectations of other, arguably innocent, employees, [this]

276. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

277. Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

278. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

279. *Id.* (citing *McDonnell Douglas*, 411 U.S. at 801).

280. *Id.* (footnote omitted).

281. Local 28 of Sheet Metal Worker's Int'l. Assn. v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 471 (1986).

282. *Id.* at 472-73.

HeinOnline -- 21 Hastings Const. L.Q. 376 1993-1994

would if applied generally frustrate the central 'make whole' objective of Title VII."[283]

The identified victim of discrimination may also be awarded back-pay, even if the employer discriminated without any animus. The relevant consideration is whether the employer discriminated, not whether the employer acted maliciously. The Court's concern is to compensate the victim rather than to punish the discriminator. "If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries."[284] The Court notes that "a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'"[285]

The remedies are more limited for violations of Title VII where there are no *identified* victims of discrimination. "[A] court can award competitive seniority *only when* the beneficiary of the award has actually been a victim of illegal discrimination."[286] Indeed, the remedy for a Title VII violation might simply involve an order for the discrimination to cease. "In most cases, the court need only order the employer or union to cease engaging in discriminatory practices . . . ."[287] Sometimes, however, stronger steps will be necessary if there is a pattern of discrimination which is particularly longstanding or egregious. "[I]t may be necessary to require the employer or union to take affirmative steps to end discrimination effectively to enforce Title VII where an

283. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 774 (1976). *See also* United States v. Paradise, 480 U.S. 149, 188-89 (1987) (Powell, J., concurring) (citation omitted) ("Unlike layoff requirements, the promotion requirement at issue in this case does not 'impose the entire burden of achieving racial equality on particular individuals,' and does not disrupt seriously the lives of innocent individuals."); *Franks*, 424 U.S. at 771 ("[T]he denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'" (citation omitted)). *But see* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579 (1984) (citing *Teamsters*, 431 U.S. at 367-71) ("[M]ere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him."); *Franks*, 424 U.S. at 780-81 (Burger, C. J., concurring in part and dissenting in part) ("[A]lthough retroactive benefit-type seniority relief may sometimes be appropriate and equitable, competitive-type seniority relief at the expense of wholly innocent employees can rarely, if ever, be equitable if that term retains traditional meaning.").

284. Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975).

285. *Id. See also* Lawrence, *supra* note 1, at 319 ("[t]he injury of racial inequality exists irrespective of the decisionmakers' motives").

286. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579-80 (1984) (emphasis added).

287. Local 28 of Sheet Metal Worker's Int'l. Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421, 448 (1986).

employer or union has engaged in particularly longstanding or egregious discrimination."[288] In these kinds of cases, the Court may require "recalcitrant employers or unions to hire and to admit qualified minorities roughly in proportion to the number of qualified minorities in the work force" because that "may be the only effective way to ensure the full enjoyment of the rights protected by Title VII."[289]

While the Court recognizes that requiring affirmative action policies may be necessary, it believes that such a remedy should be used sparingly. The Court denies that "race-conscious affirmative measures [should] be invoked simply to create a racially balanced work force."[290] Because "an employer [does] not violate the statute merely by having a racially imbalanced work force, . . . a court [should] not order an employer to adopt racial preferences merely to correct such an imbalance."[291] The Court wants to avoid a system in which "any employer who had a segment of his work force that was . . . racially imbalanced could be haled into court and forced to engage in the expensive and time-consuming task of defending the 'business necessity' of [his employment] methods . . . ." The Court believes that were this the rule, employers would be forced by practical necessity "to adopt racial quotas."[292]

The Court is trying to balance competing considerations. It wants to eradicate invidious discrimination but also does not want to "punish" individuals who have done no wrong, neither by making false accusations of intentional discrimination nor by requiring the employer to spend large amounts of money to meet the relevant standard or to defend his employment methods. The difficulty with the Court's position is not something obvious like a refusal to strike policies which it nonetheless recognizes as invidiously discriminatory, but something subtle like the Court's being less likely to hold that a given policy or practice which adversely affects minorities is in fact invidiously discriminatory. Certainly, that would be bad enough, given the growing subtlety and sophistication of would-be discriminators. What is worse

288. *Id.*

289. *Id.* at 448-49.

290. *Id.* at 475.

291. *Id.* at 453.

292. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 652 (1989). *See also* Connecticut v. Teal, 457 U.S. 440, 463-64 (1982) (Powell, J., dissenting) ("For state and local governmental employers with limited funds, the practical effect of today's decision may well be the adoption of simple quota hiring. This arbitrary method of employment is itself unfair to individual applicants, whether or not they are members of minority groups."(footnote omitted)).

HeinOnline -- 21 Hastings Const. L.Q. 378 1993-1994

is that the Court is now more likely to hold that a given affirmative action policy or practice is invidiously discriminatory.

3. *Disparate Impact and Fault*

A subtle shift regarding which policies are invidious can have significant effects. So, too, a subtle shift in definitions or presumptions can have significant implications. Consider disparate impact. It would seem clear what that term means—a significantly disproportionate effect on a relevant group. Yet, the definition of disparate impact is hardly straightforward. For example, the Court may deny that an employment policy has a disparate impact if the reasonably related employment criteria or tests act to exclude when the exclusion is not the defendant's "fault." "If the absence of minorities holding . . . skilled positions is due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault) petitioners' selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites."[293]

The Court does not want to impose a burden on a business if the statistical disparities are "innocent," believing that "the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance."[294] It would also be "unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces."[295]

Disparate impact analysis was to obviate the need to establish intentional discrimination. By bringing in notions of fault, the Court undermines one of the purposes and attractions of disparate impact analysis. Suppose that an employer has a pro-nepotism hiring policy—family members of employees will be given a preference over others for employment slots which become available. This employer might use this policy because he wants to discriminate by race but

293. *Wards Cove*, 490 U.S. at 651-52 (footnote omitted).

294. Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 992 (1988) (citing Sheet Metal Workers v. EEOC, 478 U.S. 421, 489 (1986) (O'Connor, J., concurring in part and dissenting in part)).

295. *Id.*

wants to mask that intention,[296] or he might use that policy for more innocuous reasons, for example, to promote employee loyalty.[297]

There would be a number of ways to analyze the above pro-nepotism policy. Certainly, it *could* be viewed as intentionally discriminatory. If the Court, however, requires that a policy be adopted because of rather than in spite of its adverse effects in order for it to be held intentionally discriminatory, calling this pro-nepotism hiring policy intentionally discriminatory would be inaccurate.[298] Even if there were not many minority individuals working at this company (and the nepotism policy would have a tendency to preserve the disproportionate status quo), the Court would require more before concluding that the policy was invidiously discriminatory.[299]

Depending upon the make-up of the work force, such a nepotism policy might not pass Title VII requirements.[300] If 25% of those qualified for these jobs in the local workforce were minorities but the firm workforce was only 3% minority, it is clear that Title VII would have been violated.[301] It is not at all clear, however, that even given the scenario in which the actual workforce was only 3% minority and the

296. *See* Fiss, *supra* note 96, at 296 ("For example, if there is an all-white work force, the employer may use a nepotism criterion because it will produce the same result if he used race.").

297. *Cf.* Robert Belton, *Causation and Burden-Shifting Doctrines in Employment Discrimination Law Revisited: Some Thoughts on* Hopkins *and* Wards Cove, 64 TUL. L. REV. 1359, 1392 (1990) (suggesting that nepotism may be acceptable as a reason for not hiring a minority whereas customer preferences would not be).

298. According to the Court, the question is not whether a policy *could* be viewed as discriminatory but, rather, whether *in fact* the policy was adopted because of rather than in spite of its adverse effects. Some commentators do not seem to appreciate this. *See* Gudel, *supra* note 99, at 93 ("An action is discriminatory if it can be interpreted *as* discriminatory in light of all the facts and circumstances of the case.").

299. *Cf.* Fiss, *supra* note 96, at 267 (discussing a case in which the recruitment program—using ads in certain newspapers, word-of-mouth, etc.—is based on costs but foreseeably disadvantages blacks).

300. *See* Mark S. Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII*, 62 N.C. L. REV. 943, 944 (1984) ("Since 1971, the Supreme Court has interpreted Title VII to prohibit employment practices that are discriminatory in their effect even if such result is unintended and the employer acted with no design to discriminate.").

301. Using the percentage of qualified minorities in the relevant workforce as a benchmark is not without its critics. If invidious discrimination prevented people from *becoming* qualified, they could not be included in the statistics to establish invidious discrimination and thus the employer would not be justified in implementing a race-conscious program. *See* Johnson v. Transportation Agency, 480 U.S. 616, 633 n.10 (1987) (Using this benchmark would entail that "employers in precisely those industries in which discrimination has been most effective would be precluded from adopting training programs to increase the percentage of qualified minorities.").

HeinOnline -- 21 Hastings Const. L.Q. 380 1993-1994

local qualified workforce was 25% minority, this employment policy would be held invidious and thus constitutionally impermissible.[302]

D. Nonfacially Discriminatory Legislation and Equal Protection

A Title VII violation can be established by showing disparate impact.[303] If there is a significantly higher concentration of qualified minorities in the available workforce than in the company's workforce, there will be a prima facie Title VII violation. A comparable showing, without more, however, will not establish a violation of the Equal Protection Clause.

Sometimes the Court implies that the salient distinction for equal protection purposes is whether the statutes or policies in question are facially discriminatory rather than "merely" have a disparate impact.[304] While disproportionate impact may be an indicator of discriminatory intent—"when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may . . . be at work"[305]—the Court nonetheless follows "the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results."[306]

Although the Court refuses to accept that disparate impact, by itself, establishes (even prima facie) invidious discrimination,[307] this is a tempting standard to use. A court using this standard has no need to inquire into an actor's intention or motivation and instead presumes

302. D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather than Intent*, 60 S. CAL. L. REV. 733, 760 (1987) (citing Washington v. Davis, 426 U.S. 229, 239 (1976)) ("'invidious' discrimination by the federal government or a state . . . must be 'purposeful.'").

303. *See* Wards Cove Packing v. Atonio, 490 U.S. 642, 645-46 (1989) ("A facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate . . . .").

304. *See* United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713 n.1 (1983) ("We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants."); *Feeney*, 442 U.S. at 260 (A "neutral law does not violate the Equal Protection Clause solely because it results in a racially disproportionate impact; instead the disproportionate impact must be traced to a purpose to discriminate on the basis of race."); *see also Arlington Heights*, 429 U.S. at 264-65 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)) ("official action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

305. *Feeney*, 442 U.S. at 273.

306. *Id.*

307. Washington v. Davis, 426 U.S. 229, 242 (1976) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.").

the intention. As Justice Stevens explained, "Frequently 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. For normally the actor is presumed to have intended the natural consequences of his deeds."[308] This point is especially telling in cases involving government action, "which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."[309]

If disparate impact analysis is rejected, then it may be very difficult to establish invidious discrimination if the statutes or policies are not facially discriminatory.[310] In the absence of facial discrimination, the plaintiff must establish discriminatory intent.[311] That burden of proof is difficult, but not impossible, to meet. "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[312] However, "such cases are rare."[313]

The Court would claim that it is trying to achieve a difficult balance. On the one hand, it wants to assure that a "statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.[314] On the other hand, all else being equal, the Court will presume that no invidious intent is involved. In the vast majority of cases, "impact alone is not determinative, and the Court must look to other evidence."[315] The Court leaves open the possibility that discriminatory purpose can be inferred from state action. "[A]n invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another."[316] If indeed the impact of a "statute could not be plausibly explained on a neutral

308. *Id.* at 253 (Stevens, J., concurring).

309. *Id.*

310. The Court has failed to appreciate the difficulty of establishing invidious discrimination even where statutes *are* invidiously discriminatory, given that the discrimination must be *because of* rather than *in spite of* its adverse effects. *See supra* text accompanying note 169.

311. *Bakke*, 438 U.S. at 289 n.27; *see also* Max J. Schott, Note, *Title VII Mixed-Motive Cases: The Eighth Circuit Adds a Second Track of Liability and Remedy*, 36 DRAKE L. REV. 155, 162 (1986-87) (If the plaintiff is unable to successfully carry the burden of persuasion in establishing pretext, the employer is completely exonerated in terms of liability.).

312. *Arlington Heights*, 429 U.S. at 266.

313. *Id.*

314. Washington v. Davis 426 U.S. 229, 241 (1976).

315. *Arlington Heights*, 429 U.S. at 266 (footnote omitted).

316. *Washington*, 426 U.S. at 242.

HeinOnline -- 21 Hastings Const. L.Q. 382 1993-1994

ground, impact itself would signal that the real classification made by the law was in fact not neutral."[317] The Court, however, has made clear that "[j]ust as there are cases in which impact alone can unmask an invidious classification, there are others, in which—notwithstanding impact—the legitimate noninvidious purposes of a law cannot be missed."[318]

If disproportionate impact alone sufficed to establish discriminatory purpose, it would be very difficult to draft nondiscriminatory legislation.

> There is hardly a law on the books that does not affect some people differently from others. But the basic concern of the Equal Protection Clause is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. And with respect to such legislation, "it has long been settled that the Equal Protection Clause is offended only by laws that are invidiously discriminatory—only by classifications that are wholly arbitrary or capricious."[319]

If the Court had to subject all statutes which either benefited or burdened one race over another to strict scrutiny, this "would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes . . . ."[320] Thus it is not difficult to understand why the Court is reluctant to find a statute or policy invidiously discriminatory absent convincing evidence of illicit intent.

Although the Court realizes that it cannot subject all legislation which has a disparate impact to strict scrutiny, it has nonetheless failed to come up with a consistent, fair policy with respect to which statutes will be strictly scrutinized and which will not. On the one hand, the Court seems to take seriously that it should be difficult to establish an intention to discriminate, and that absent evidence of an intention to discriminate, legislation should be upheld if it promotes a legitimate purpose. The Court upheld the insurance plans in *Geduldig v. Aiello* and *General Electric Co. v Gilbert* because there was no "showing that [the] distinctions involving pregnancy [were] mere pre-

317. *Feeney*, 442 U.S. at 275.

318. *Id.* (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

319. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring); *see also* Tussman & ten Broek, *supra* note 85, at 343 ("It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.").

320. *Washington*, 426 U.S. at 248.

HeinOnline -- 21 Hastings Const. L.Q. 383 1993-1994

texts designed to effect an invidious discrimination against the members of one sex or the other . . . ."[321]

On the other hand, the Court believes that racial classifications are so pernicious that they can rarely if ever be upheld. It is surprising that the Court is willing to allow any racial preferential treatment at all, given the view announced by the *Bakke* plurality which worried that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[322] Further, even if common stereotypes would not thereby be promoted, the plurality denied that helping individuals who have been subject to societal discrimination justifies "a classification that imposes disadvantages upon persons . . . who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[323] The plurality argued that allowing an institution to compensate individuals who had not been victimized by that institution itself "would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."[324]

This reasoning is instructive. The plurality worries that allowing people who have *allegedly* been subjected to discrimination to receive special benefits would open the door to the allocation of benefits to undeserving individuals. This is rather misleading, because it is "plainly true that in our society blacks have suffered discrimination immeasurably greater than any directed at other racial groups."[325] The question is not whether certain minority groups, such as African Americans, have been subjected to discrimination in this country;[326] the real question involves whether societal discrimination "alone is sufficient to justify a racial classification."[327] The *Wygant* Court rejected that criterion and instead required "some showing of prior dis-

321. General Electric Co. v. Gilbert, 429 U.S. 125, 134-35 (1976) (discussing Geduldig v. Aiello, 417 U.S. 484 (1974)).

322. *Bakke*, 438 U.S. at 298.

323. *Id.* at 310; *see also infra* text accompanying notes 371-90 (discussing individual harm).

324. *Bakke*, 438 U.S. at 310; *but see* Frank Askin, *The Case for Compensatory Treatment*, 24 RUTGERS L. REV. 65, 70 (1969) (though wholly innocent himself, the white worker may not reap the benefits of a discriminatory system).

325. *Croson*, 488 U.S. at 527-28 (Scalia, J., concurring).

326. *Wygant*, 476 U.S. at 278 n.5 ("[N]o one disputes that there has been race discrimination in the country.").

327. *Id.* at 274.

HeinOnline -- 21 Hastings Const. L.Q. 384 1993-1994

crimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination."[328] The Court made an analogous claim in *Freeman v. Pitts*. "Past wrongs to the black race, wrongs committed by the State and in its name, are a stubborn fact of history. And stubborn facts of history linger and persist."[329] Nonetheless, the Court refused to recognize that those wrongs carried much legal weight, holding that "[b]ut though we cannot escape our history, neither must we overstate its consequences in fixing legal responsibilities."[330] The Court suggested that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications."[331]

The Court argues here that although societal discrimination provides some reason for a benign discrimination policy, that reason alone is not good enough. It is only when the state itself has been the discriminator that the state should act to rectify the situation. Such a policy minimizes the worth of eradicating invidious discrimination regardless of its source.

It is not open to the Court to argue that it cannot countenance affirmative action policies because, after all, it has already demonstrated its commitment to striking down all "arbitrary" policies. The Court refuses to strike down University admissions policies which are clearly more arbitrary, for example, which give a preference to the children of alumni.[332]

The Court claims that discriminatory purpose is ultimately a question of fact,[333] but it is quite difficult to determine what consti-

328. *Id.*; *see also Feeney*, 442 U.S. at 278 (citations omitted) (denying that the State of Massachusetts had discriminated against women, although admitting that the "enlistment policies of the Armed Services may well have discriminated on the basis of sex. But the history of discrimination against women in the military is not on trial in this case.").

329. 112 S. Ct. 1430, 1448 (1992).

330. *Id.*

331. *Id.*; *see also* Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237, 243 (1991) (noting that school district returned to local control because "present residential segregation was the result of private decisionmaking and economics" rather than some action taken by the school board itself).

332. *See, e.g., Bakke*, 438 U.S. at 404 (Blackmun, J., dissenting) ("It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning . . . have given conceded preferences . . . to those possessed of athletic skills, to the 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.").

333. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.").

HeinOnline -- 21 Hastings Const. L.Q. 385 1993-1994

tutes a discriminatory purpose. The Court often implies that animus is required to establish discriminatory purpose but then turns around and presumes as a matter of law that racial classifications satisfy the requirements.[334] Facially discriminatory statutes will not be deemed intentional discrimination only if they will be remedying particularized instances of discrimination.[335] A policy which favored minorities without evidence of past discrimination *by that institution* may be struck down as purposefully discriminatory and hence unconstitutional, even though the policy arguably promotes the goals of the Fourteenth Amendment.[336]

1. *Blame Versus Remedy*

When deciding whether remedies are required or even permissible, the Court concentrates its attention on *who* did the discriminating rather than on *whether* discrimination occurred. This is true whether the Court is considering the kind of discrimination prohibited by the Fourteenth Amendment or the kind prohibited by Title VII.

Suppose that a firm had two kinds of employees (management and factory workers) and that it would hire its managers from within. Suppose further that the firm admits that it formerly discriminated against minorities when hiring factory workers and has now adopted measures to rectify that situation. The firm claims not to have dis-

334. For example, in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the Court refused to consider whether the Richmond plan was benignly motivated and subjected it to the same level of scrutiny as would be appropriate for the most maliciously motivated plan. *See id.* at 493.

335. *See* Sullivan, *supra* note 1, at 1612 ("*Croson* culminated the Court's long-mounting trend toward limiting the justification for affirmative action to a narrow brand of corrective justice: remedying particularized past discrimination.").

336. *See* Robert M. O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925, 932 (1974) (arguing that "any classification which furthers or serves the goals of the Fourteenth Amendment is not invidious"); Sandalow, *supra* note 208, at 665-66 ("But if it is undesirable to be governed by the past, it is worse to be ruled by a misconception of the past. And only a misconception of the past leads to the conclusion that it imposes upon government an obligation of 'colorblindness.'"); Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 U. VA. L. REV. 753 (1985) (affirmative action is in accord with intentions of Framers of the Fourteenth Amendment because special benefits were set aside for blacks); *but see* Greenawalt, *supra* note 8, at 571 ("Even benign classifications are in obvious tension with Fourteenth Amendment values, since benign classifications have some malign results."); Lavinsky, *supra* note 58, at 527 ("The argument that a racial classification which discriminates against white people is not inherently suspect implies that the white majority is monolithic and so politically powerful as not to require the constitutional safeguards afforded minority racial groups."); *Cf.* Adelman, *supra* note 210, at 413-14 (suggesting that some believe Equal Protection Clause color-blind; others that it is color conscious, merely barring invidious discrimination but allowing benign discrimination such as affirmative action).

HeinOnline -- 21 Hastings Const. L.Q. 386 1993-1994

criminated when considering promotions and thus argues that it should not be forced to adopt an affirmative action policy with respect to management positions. The Court would quickly point out that "[d]iscrimination at the entry level necessarily precluded blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities."[337]

Suppose that the situation is somewhat different. This time, there are two firms. Firm D clearly discriminates against minorities. Firm ND hires its employees from Firm D, because that is the only place where individuals can get the requisite training. ND has no desire to discriminate against minorities—it would like to hire more but has found that there are no qualified minority employees in the area. It seems clear that the Court would not require ND to implement an affirmative action program.

Suppose, however, that ND believes the current situation so intolerable that it voluntarily decides to adopt an explicitly race-conscious program to ameliorate the situation. The Court's reasoning implies that ND should be prohibited from voluntarily implementing a program to remedy the effects of D's invidious discrimination.[338] Here, it would not be as if the Court were striking down a law which *required* employers to adopt affirmative action policies even if those employers had not discriminated in the past. Rather, it would be as if the Court were striking down a law which *permitted* employers to adopt race-conscious affirmative action policies to help remedy some of the discrimination which clearly had occurred in the past and was still occurring.

Some commentators suggest that the Court's position is muddled.[339] It would be difficult to disagree with that assessment, although it would be unfair to imply that only the Court is confused. For example, some commentators imply that affirmative action policies are invidious because of the bad effects which might result.[340]

337. United States v. Paradise, 480 U.S. 149, 168 (1987).

338. Because Title VII applies to private as well as public employers, there is no state action requirement at issue here.

339. *Cf.* Ely, *supra* note 143, at 1211-12. ("The Court should stop pretending it does not remember opinions on which the ink is barely dry and try to formulate principles for deciding on what occasions and in what ways the motivation of legislators or other government officials is relevant to constitutional issues.").

340. *See* Greenawalt, *supra* note 8, at 571 (Benefits to groups fosters racial politics and perpetuates thinking in racial terms.); John Kaplan, *Equal Treatment in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw. U. L. Rev. 363, 375 (1966) (attempts to secure preferential employment for blacks will be very divisive); *id.* at 379 (any legal classification by race weakens the government as an education force). *But*

Certainly, we might look at the bad effects to help determine whether the legislation had in fact been motivated by animus[341] or, perhaps, a devaluing of the dignity and worth of the affected class.[342] However, this involves looking at effects as an indicator of motivation. It does not involve seeing whether the effects are negative and, if so, therefore concluding that invidious discrimination is taking place. Thus, even were it true that affirmative action had some net effects, that would not establish its invidiousness.

The Court has made clear that while negative effects should be avoided, their existence does not establish the presence of invidious motivation.[343] Ironically, the only (unstated) exception to the Court's explicit rule that negative effects do not establish invidiousness seems to be where affirmative action policies are at issue.

The current Court seems to believe that any negative effects produced by a race-conscious policy supply the requisite predicate to establish that the policy is invidiously discriminatory, ignoring the Court's previous claim that a policy must be adopted because of, rather than in spite of, its negative effects in order to be held invidiously discriminatory. This new policy, in effect, precludes any attempts to remedy directly past discrimination, because it is plausible that any race-conscious program will have some negative effects. Even in a case in which the particular person who had suffered invidious discrimination was compensated, there would be some resentment.[344] Indeed, one would not have to extend the Court's articulated position much further to argue that even identified victims of invidious racial discrimination should not be compensated. Many individuals are denied employment for arbitrary reasons and allowing

see O'Neil *supra* note 336, at 940 (arguing that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term).

341. Simon, *supra* note 143, at 1058 (noting that cases may be difficult if they involve so-called benign classifications in which an inquiry into whether an action harms the group purportedly helped is an important part of evidentiary process through which we determine which is prejudiced).

342. *See* Clark, *supra* note 187, at 966-67 ("[I]nvidious motivation or invidious purpose consists of devaluing needs, wants, capabilities, or dignity of members of a group, whether for reasons of hostility or of other prejudice, on the unwarranted assumption that such members are less capable or less worthy of consideration than other members of society.").

343. For example, the negative effects produced by Texas' decision to reduce welfare benefits did not establish the presence of invidious motivation. *See* Jefferson v. Hackney, 406 U.S. 535 (1972).

344. *See* Rosenfeld, *supra* note 205, at 902 (noting that whether preferential treatment is granted to a victim of actual past discrimination or whether it is accorded to distribute a given percentage of available jobs to members of underrepresented class, effect on innocent non-minority member losing seniority rights is likely the same).

HeinOnline -- 21 Hastings Const. L.Q. 388 1993-1994

arbitrary rejection because of race to be compensable but the arbitrary rejection on other grounds not to be compensable will (allegedly) promote the Nation's thinking in racial terms.

The Court has held that illicit motivation, without more, will not establish that a statute or policy is unconstitutional. In addition, harmful effects must be likely to result. Further, the Court imposes a but-for condition. Thus, a statute or policy should not be struck down unless it can be established that without the discriminatory intent the policy or statute would not have been passed.[345] It seems underappreciated how the Court's holdings in discrimination cases where affirmative action is not at issue play out in cases in which affirmative action is at issue.

For example, it would be difficult to establish animus if a predominately white City Council passed an affirmative action policy, because it is not likely that the group would have a racial animus towards whites.[346] In most cases, in order to establish animus, the Court will have to presume it despite the facts; the Court members will have to choose to "close [their] eyes to the facts in favor of the theory."[347] Even were the Council controlled by blacks, there would be no reason (without more) to infer antipathy, given all the possible justifications for an affirmative action policy.[348] Indeed, there is some reason to believe that minority groups in power might disadvantage minorities.[349]

345. *See* Simon, *supra* note 143, at 1065 (the determinative issue in a racial equal protection suit is whether the challenged action would not have been taken but for racial prejudice).

346. *See* United Jewish Org. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 178 (1977) (Brennan, J., concurring in part) (The "obvious remedial nature of the Act and its enactment by an elected Congress that . . . [cannot] be viewed as dominated by nonwhite representatives belie the possibility that the decisionmaker intended a racial insult or injury to those whites . . . adversely affected by the operation of the Act's provisions."); Simon, *supra* note 143, at 1108 (noting that when the proportionate disadvantage is instead suffered by the majority white group, an inference of anti-white prejudice will ordinarily not be warranted without very substantial additional evidence, given the improbability of this group's taking prejudicial actions against itself).

347. Wright v. Council of Emporia, 407 U.S. 451, 472 (1972) (Burger, J., dissenting).

348. Sullivan, *supra* note 1, at 1617 (suggesting that the *Croson* plurality view implied that "the representative process could not be trusted to protect white interests when a black faction had come to power").

349. *See* Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring) (footnote omitted) ("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 toward the minority.").

HeinOnline -- 21 Hastings Const. L.Q. 389 1993-1994

Suppose that the Court was willing to infer an invidious motivation when a black-controlled City Council adopted an affirmative action policy, as the plurality did in *Croson*.[350] Even so, the but-for clause adds another condition, namely, that there must be good reason to believe that without that animus the Council would not have passed the policy. Because there are a variety of noninvidious reasons to adopt an affirmative action policy, the but-for condition would seem particularly difficult to satisfy.[351]

The Court's current Title VII jurisprudence and, even more starkly, its invidious discrimination jurisprudence, reflect a change in emphasis regarding which innocents must be protected, where those innocents include minorities who have suffered discrimination, nonminority workers who might not now receive a benefit which they otherwise would have received had their employer not adopted a race-conscious policy, and employers whose policies (which have a disparate impact) are related to legitimate business concerns. Twenty years ago, the Court's concern was to compensate innocent minorities who had suffered discrimination. In *Griggs v. Duke Power Co.*,[352] the Court was concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.[353] Now the Court seems

350. *Croson*, 488 U.S. at 524 (Scalia. J., concurring in the judgment). Justice Scalia noted

> The prophecy of these words came to fruition in Richmond in the enactment of a set-aside clearly and directly beneficial to the dominant political group, which happens also to be the dominate group. The same thing has no doubt happened before in other cities (though the racial basis of the preference has rarely been made textually explicit)—and blacks have often been on the receiving end of the injustice. Where injustice is the game, however, turnabout is not fair play.

But see id. at 55 (Marshall, J., dissenting). Justice Marshall noted

> The majority's view that remedial measures undertaken by municipalities with black leadership must face a stiffer test of Equal Protection Clause scrutiny than remedial measures undertaken by municipalities with white leadership implies a lack of political maturity on the part of this Nation's elected minority officials that is totally unwarranted. Such insulting judgments have no place in constitutional jurisprudence.

Id.

351. *See* Henkin, *supra* note 82, at 489 (arguing that justifications for preferential treatment in education, for example, include: (a) compensation for past and presentation discrimination, (b) raising self-respect and providing role models, (c) compensation for individual past wrongs, (d) providing more black lawyers to benefit community and society as a whole, (e) enriching all learning experiences).

352. 401 U.S. 424 (1971).

353. *Id.* at 431.

HeinOnline -- 21 Hastings Const. L.Q. 390 1993-1994

more concerned about assuring that innocent nonminority workers or employers are free from "punishment."

It is difficult to explain from the language or history of Title VII why the Court believes "the statute compels race-conscious remedies where a recipient institution has engaged in past discrimination but prohibits such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, [have been] excluded . . . ."[354] Nonetheless, that seems to be the current Court's view. As long as "a challenged practice serves, in a significant way, the legitimate employment goals of the employer,"[355] the Court will not impose burdens on the employer. Even if an employer could set up the workplace differently to achieve the same output with a more integrated workforce,[356] the Court will not require the employer to do so.

2. Morton *and Preferential Hiring*

Ironically, the Court is sometimes willing to uphold preferential hiring even absent a showing of animus or intentional discrimination. The Court, in *Morton v. Mancari*,[357] upheld preferential hiring in the Bureau of Indian Affairs, even though there had been no showing of wrongdoing. The Court justified its position by pointing out that a policy of preferential hiring would promote a variety of worthwhile goals. "One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations."[358] The Court recognized that Native Americans would be at a disadvantage were they not given a preference. "In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions . . . ."[359] The point here is not that this policy is somehow inappropriate, but that it seems contrary to most of the policies which the Court has set out.

As Justice Kennedy said, "The history of governmental reliance on race demonstrates that racial policies defended as benign often are

354. *Bakke*, 438 U.S. at 344 (Brennan, J., concurring in part and dissenting in part).

355. *Wards Cove*, 490 U.S. at 659.

356. *See generally* Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 Harv. L. Rev. 1157 (1991) (suggesting that altering the workplace might be an appropriate requirement).

357. 417 U.S. 535 (1974).

358. *Id.* at 543 (footnote omitted).

359. *Id.* at 544 (quoting 78 Cong.Rec. 11729 (1934)).

not seen that way by the individuals affected by them."[360] People who were not able to secure employment in the Bureau of Indian Affairs because of the preferential hiring might not have seen the preferential hiring as benign. The Court is guilty of two offenses with respect to its reliance on individual perceptions: it takes judicial cognizance of resentment even if that resentment is not justified, and it has no consistent policy with respect to when innocent parties' feelings of resentment will be given weight.

The Court understood that upholding preferential hiring in the BIA might seem to set a precedent for racial affirmative action elsewhere, and tried very hard to prevent this. The Court denied that this was a racial preference at all, both because this was not a racial group and because the objective was not intentional racial discrimination. To establish that this was not a racial group, the Court wrote, "The preference is not directed towards a 'racial' group consisting of 'Indians'; instead, it applies only to members of 'federally recognized' tribes."[361] The Court concluded that because the classification "operates to exclude many individuals who are racially to be classified as 'Indians', . . . the preference is political rather than racial in nature."[362]

If the Court can hold that a statute does not discriminate against women because only some women will need pregnancy benefits, then the Court can hold that a statute does not favor Native Americans because only some Native Americans will be benefitted. To the extent that the former claim seems specious, however, so does the latter. For example, affirmative action programs are not designed for all minorities, but only for those who are qualified (or would be qualified with the relevant training) for the position,[363] who are old enough to work but are not past retirement age, etc. Using the Court's own reasoning, it would seem that affirmative action programs are political rather than racial because they "exclude many individuals who are racially to be classified as [minorities]."[364]

Consider an employer who, adopting the Court's reasoning, denied that its policy of excluding minorities was invidiously discriminatory because the policy only affected certain African Americans—qualified ones. The others would be rejected on the ground that they

360. *Metro Broadcasting*, 497 U.S. at 635 (Kennedy, J., dissenting).

361. *Morton*, 417 U.S. at 553 n.24.

362. *Id.*

363. *See Fullilove*, 448 U.S. at 521 (Marshall, J., concurring in the judgment) ("[U]nder the set-aside provision a contract may be awarded to a minority enterprise only if it is qualified to do the work.").

364. *Morton*, 417 U.S. at 553 n.24.

HeinOnline -- 21 Hastings Const. L.Q. 392 1993-1994

were not qualified for the job. The Court would reject this claim out of hand. Yet, such a claim seems no more specious than that a policy does not discriminate against women because it only disadvantages pregnant women or that a policy does not involve a racial preference because it only benefits members of federally recognized tribes.

To establish in *Morton* that the government was not using a racial preference even if one accepted that the target group was a racial group, the Court denied that the preference involved racial discrimination or "even a 'racial' preference. Rather, it [was] an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups."[365] A corporation which adopted an affirmative action program, however, might deny that it was employing a racial preference and might instead claim to be promoting good public relations, perhaps by promoting its image of being a good corporate citizen or by giving something back to a community which was a large consumer of its products or services.

The Court made clear its real reason for upholding the preference in *Morton*, namely, that it was only in the BIA.

> The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, "the preference is reasonably and directly related to a legitimate nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination."[366]

The court is implicitly arguing that the issue is not whether there is animus against a particular group or even a facial intention to discriminate. The question, rather, is how much integration will we have. The Court apparently believes that we already have enough (conscious) integration and that any further steps to achieve integration of the sexes and races must occur "naturally."[367]

365. *Id.* at 553-54 (footnote omitted).

366. *Id.* at 554.

367. One might have difficulty distinguishing the positions of the *Plessy* Court and the current Court. Compare Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (The argument . . . assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals.") and *Pitts*, 112 S. Ct. at 1448 ("[W]here resegregation is a product not of state actions but of private choices, it does not have constitutional implica-

HeinOnline -- 21 Hastings Const. L.Q. 393 1993-1994

E. Individual Harm

The Court sometimes views racial discrimination as if it were simply a matter of individual harm,[368] accepting Justice Scalia's reasoning that the "relevant proposition is not that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, 'created equal,' who were discriminated against. And the relevant resolve is that that should never happen again."[369] Justice O'Connor has said that the "right to equal protection of the laws is a personal right, securing to each individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group."[370] In *Croson*, the plurality rejected a Richmond set-aside program because it denied "certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race."[371] The plurality held that regardless of the racial group to which the affected individuals belong, "their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."[372]

The current Court views affirmative action with a jaundiced eye when the institution itself has not been shown to have discriminated,[373] or when competitive benefits are being given to minority individuals who cannot establish that they themselves were victimized by the institution's discriminatory practices.[374] The Court overlooks important issues, however, when it equates benign and malicious discrimination. For example, the *Bakke* plurality wrote, "When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect."[375] Affirmative action proponents do not claim, however, that an individual should be burdened solely because of her

---

tions. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.").

368. *Cf.* Brest, *supra* note 176, at 39 ("[H]iring quotas and the protection of recently hired minority workers against layoffs under the 'last hired, first fired' rule are indifferent to whether the preferred individuals were victims of the employer's discrimination and thus present more difficult issues of fairness.").

369. *Croson*, 488 U.S. at 528 (Scalia, J., concurring).

370. *Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting) (citing Shelley v. Kraemer, 334 U.S. 1 (1948)).

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

372. *Id.*

373. *See Croson*, 488 U.S. at 485.

374. *See* Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 579-80 (1984).

375. *Bakke*, 438 U.S. at 305.

HeinOnline -- 21 Hastings Const. L.Q. 394 1993-1994

race. The Court's equating benign and malicious discrimination actually reformulates the relevant issue. While the claim that people should not be punished solely because of their race is correct, it has relevance to so few cases in the context of benign discrimination that its very utterance is misleading. Affirmative action programs are designed to promote a number of legitimate goals. They are not designed to punish or burden individuals solely because of their race.

As Justice Blackmun explained, the purpose of affirmative action "is not to make whole any particular individual, but rather to remedy the present class-wide effects of past discrimination or to prevent similar discrimination in the future. . . . [S]uch relief is provided to the class as a whole rather than to its individual members."[376] Where there is a showing of past discrimination, the people who benefit from an affirmative action policy need not be those who were specifically victimized.[377] The Court has recognized that "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."[378]

The question then becomes how much of a burden an individual may be asked to bear in order for society to remedy the effects of past discrimination. One might distinguish between hires and layoffs, for example, because "denial of a future employment opportunity is not as intrusive as loss of an existing job."[379] The distinctions become less easy to draw when one considers related areas, like promotion and seniority. On the one hand, a denial of a promotion might not unsettle any "legitimate, firmly rooted expectation[s]."[380] The Court has also held that "employee expectations arising from a seniority system agreement may be modified by statutes furthering a strong public policy interest."[381]

On the other hand, such a policy may foster resentment. In a particular case where "[n]one of the racially preferred blacks . . . was

376. Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 613 (1984) (Blackmun, J., dissenting).

377. Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986) ("It is . . . clear that the voluntary action available to employers and unions seeking to eradicate race discrimination may include reasonable race-conscious relief that benefits individuals who were not actual victims of discrimination.").

378. *Wygant*, 476 U.S. at 280-81.

379. *Id.* at 282-83. *But see id.* at 296 (Marshall, J., dissenting) ("[L]ayoffs are unfair. But unfairness ought not be confused with constitutional injury.").

380. Johnson v. Transportation Agency, 480 U.S. 616, 638 (1987).

381. Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 778 (1976).

shown to have been a victim of discriminatory promotion practices; and none of the whites denied promotion was shown to have been responsible or in any way implicated in the discriminatory practices recited in the decree,"[382] the white individuals who were denied promotion might be quite dissatisfied.

If this situation arose today, the Court would probably offer the following analysis:

> 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. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin.[383]

While such an analysis might be initially appealing, its attractiveness disappears upon further reflection. In affirmative action cases, benefits are not being allocated because of an *arbitrary* preference for one race over another. This allocation is instead made because of a previous arbitrary racial preference, either by the institution itself or by society at large. While an arbitrary racial preference system may be inherently unfair, a compensatory system is not. The relevant question is not whether a system will be resented, but whether it should be resented.

There is another difficulty with the current application of the analysis, namely, that the Court would not be giving adequate weight to how minorities would react to the state's failure to "rearrange burdens and benefits."[384] They would likely find "little comfort in the notion that the deprivations they [were] asked to [continue to] endure [were] merely the price of membership"[385] in a minority in a society which had historically subjected them to discrimination. A system

382. Local Number 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 535 (1986) (White, J., dissenting).

383. *See Bakke*, 438 U.S. at 294 n.34.

384. *Id.*

385. *Id.*

HeinOnline -- 21 Hastings Const. L.Q. 396 1993-1994

which not only does not eradicate discrimination but which prohibits others from attempting to do so is inherently unfair.[386]

Suppose that resentment does occur when race-conscious systems are used. This does not mean that the appropriate object of resentment is the individual who is a member of the group against whom the employer or society has discriminated. For instance, when an individual tortfeasor is forced to pay civil damages to another party, innocent members of the tortfeasor's family may feel some resentment because they will not be able to live as well as they otherwise would have. Even if it is appropriate for those family members to feel some resentment (they may be completely innocent and may not have benefitted at all from the tort), the resentment should be directed toward the tortfeasor rather than the victim. The argument here is not that the family members should feel no resentment—as if they somehow were responsible for the tortfeasor's action—but merely that they should resent the tortfeasor rather than the victim or her family or her friends.

Basically, the current Court believes that all laws should be race-blind except in very narrowly defined circumstances. Perhaps this would be a sensible policy were one designing a new society—the state might decide not to incorporate racial classifications in its laws and might decide not to allow others to incorporate such classifications in their policies. The wisdom of such a policy would depend on a variety of factors. For example, even in a new such society, if individuals resorted to subtle, invidious discrimination, it might be necessary for the state to make race-conscious classifications to counteract these invidious practices.

In any case the court cannot pretend this is a new country with no history. Given the history of discrimination and racial tension in this country, it is an empirical question whether allowing race-conscious measures will escalate rather than de-escalate racial tensions and hostilities. It is at least as likely, if not more likely, that the Court's *refusal* to allow race-conscious affirmative action policies will *increase* rather than decrease racial division and animosity.

Given our history, it would seem that the most direct method to rectify past injustice would be to allow reverse discrimination. By prohibiting race-conscious measures, the Court forces institutions to adopt indirect means to compensate for past injustice.[387] Not only is

386. *See Id.*

387. *See Croson*, 488 U.S. at 528 (Scalia, J., concurring) (since blacks have been disproportionately disadvantaged by racial discrimination, only a race-neutral remedial program

HeinOnline -- 21 Hastings Const. L.Q. 397 1993-1994

the adoption of indirect methods inefficient, but the use of such methods will be very tempting for courts to strike down precisely because they are inefficient and precisely because they are not sufficiently narrowly tailored to achieve the state's purposes. In what seemed to approach the height of disingenuousness, the city of Richmond was criticized by members of the *Croson* Court for adopting a measure which was both too narrowly tailored and, in the same respect, not sufficiently narrowly tailored.[388]

The *Bakke* plurality wrote, "If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently."[389] Yet if the status quo must be maintained unless the particular individual harmed is herself found and compensated, there will be little deterrent to continuing invidiously discriminatory practices, especially given the possible difficulties in proving invidious racial discrimination.[390]

III. The Court's Implicit View

The most surprising aspect of the Court's position is what it is saying implicitly. The Court seems to have rejected its own invidious discrimination jurisprudence when analyzing whether intentional racial discrimination is invidious. It is unlikely that most race-conscious policies which are even plausibly thought benign were designed be-

---

aimed at the disadvantaged as such will have a disproportionately beneficial impact on blacks. Only such a program, and not one that operates on the basis of race, is in accord with the letter and the spirit of our Constitution).

388. The *Croson* plurality noted "There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry," implying that the classification was not sufficiently narrowly drawn. *Croson*, 488 U.S. at 506. Justice Scalia implied that the classification was too narrowly drawn, because it was (allegedly) obviously intended to benefit blacks at the expense of whites.

> Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.

Id. at 528 (Scalia, J., concurring).

389. *Bakke*, 438 U.S. at 299.

390. *Cf.* Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971) ("Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.").

HeinOnline -- 21 Hastings Const. L.Q. 398 1993-1994

cause they would disadvantage certain groups. If intentional discrimination must be "selected or reaffirmed . . . at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group,"[391] then it is not even clear that benign discrimination policies are appropriately viewed as intentionally discriminatory, much less as prompted by malice. Insofar as animus is the feature which makes intentionally discriminatory practices constitutionally offensive, it seems absurd to strike most benign discrimination programs as unconstitutional.

It might be argued that the Court must impose strict scrutiny when examining any racial classifications, because otherwise the Court would be forced to examine such statutes in light of the rational basis test and uphold any statute which promotes any legitimate goal. The Court might examine such statutes or policies with heightened rather than strict scrutiny. The *Bakke* minority recognized that there is a "significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications,"[392] concluding that it was "inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead to justify such a classification an important and articulated purpose for its use must be shown."[393] Or the Court might impose strict scrutiny, but limit the content of that scrutiny to determining whether animus had in fact motivated passage of the bill or adoption of the policy.[394]

When the Court explains why it finds affirmative action programs constitutionally infirm, it tends to emphasize the potential negative effects of the institution of such programs. Justice O'Connor said, "The dangers of such classifications are clear. They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."[395] The *Croson* plurality said, "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferi-

391. *Feeney*, 442 U.S. at 279 (citation and footnote omitted).

392. *Bakke*, 438 U.S. at 361.

393. *Id.* Thus, the Court would not accept at face value an assertion that a particular policy was benign. The policy or statute would be examined closely to assure that it was indeed credibly classified as benign.

394. *Bakke*, 438 U.S. at 361-62 (Brennan, J., concurring in part and dissenting in part) (footnote omitted).

395. *Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J., dissenting).

HeinOnline -- 21 Hastings Const. L.Q. 399 1993-1994

ority and lead to a politics of racial hostility."[396] Even the *Bakke* minority warned, "State 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."[397] Indeed, a whole host of dangers may be promoted by the government's countenancing benign discrimination. "Government recognition and sanction of racial classifications may be inherently divisive, reinforcing prejudices, confirming perceived differences between the races, and weakening the government's educative role on behalf of equality and neutrality."[398]

The difficulty here is not that an absurd analysis is being offered—it may be that benign discrimination programs will have these effects. The difficulty is that the Court refuses to consider whether striking down benign discrimination programs will have an even worse effect. It is at best unclear whether racial harmony and acceptance would be better promoted by the presence rather than by the absence of race-conscious programs. In any case, the Court's likening benign discrimination programs to the kinds of policies and statutes that were once common in this country does not inspire confidence in the Court's reasoning or impartiality. The Court refuses to take to heart Justice Marshall's point that "profound difference[s] separate . . . governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism."[399] By lumping all of these practices together, the Court implies that they are all on the same moral level. By reinforcing that view, the Court may actually be unintentionally lending support to racist views, enhancing both their credibility and acceptability.

A legislature which adopts affirmative action guidelines might have any of a number of legitimate goals: rectifying past discrimination, assuring that there are role models within particular professions,

396. *Croson*, 488 U.S. at 493. *See also Metro Broadcasting*, 497 U.S. at 604 (O'Connor, J., dissenting) ("Racial classifications, whether providing benefits to or burdening particular racial or ethnic groups, may stigmatize those groups singled out for different treatment and may create considerable tension with the Nation's widely shared commitment to evaluating individuals upon their individual merit.").

397. *Bakke*, 438 U.S. at 360 (Brennan, J., concurring in part and dissenting in part).

398. Associated Gen. Contractors of Mass., Inc. v. Altshuler, 490 F.2d 9, 17 (1st Cir. 1973).

399. *Croson*, 488 U.S. at 551-52 (Marshall, J., dissenting).

HeinOnline -- 21 Hastings Const. L.Q. 400 1993-1994

etc. None of these involve an attempt to impose a stigma or assert the inferiority of the disadvantaged group. A legislature which adopts discriminatory measures against a minority is presumably trying to impose a stigma or assert the dominant group's superiority. While the former group of goals is quite compatible with (and indeed supports) the ideals reflected in the Fourteenth Amendment, the latter set is incompatible with those goals. By equating these two practices, the court obfuscates an important difference between them.

It is an empirical question whether benign discrimination policies will reinforce rather than destroy prejudice. It is surprising that the Court would hold those policies unconstitutional on the basis of predictions which societal scientists could not confidently make. It may be that the Court is not holding that such policies are unconstitutional because of a finding that they will in fact promote harm than good, but instead because of the very possibility that they might have the effects described above. Because the Court's holding these policies unconstitutional might itself have these very negative effects, however, it seems ironic that the Court would not subject its own policies and actions to the standard it uses for the policies of others.

If the Court is going to strike down affirmative action policies or statutes because of the fear that they will be perceived as pernicious, then the Court should manifest equal concern about other kinds of policies and statutes which may also be perceived as pernicious. Having a presumption of animus in affirmative action cases and a presumption of no animus in disparate impact cases seriously weakens the Court's appearance of impartiality.

When a university or governmental agency tries to impose a benign discrimination program, it does not seek to deprive someone of benefits solely because of race or ethnic background. It seeks to remedy past discrimination, among other goals.[400] The Court recognizes that the "State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[401] By implying that benign discrimination programs burden individuals solely because of race, the Court belies

400. *See* Brest, *supra* note 176, at 31 ("Past and remote discrimination often manifest themselves in racially disproportionate impact, and the antidiscrimination principle may therefore support its amelioration or elimination.").

401. *Bakke*, 438 U.S. 265, 307. *See also Croson*, 488 U.S. at 552 (Marshall, J., dissenting) ("racial classifications drawn for the purpose of remedying the effects of discrimination that itself was race-based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.").

its own admission that one of the goals of such programs is to remedy past discrimination.

The Court admits that there has been identified discrimination—that blacks specifically have been the victim of past discrimination. The Court nonetheless insists that the specific discriminator be identified, as if benign discrimination were a sort of punishment to be imposed on a guilty party. By adopting this view, the Court promotes the view that integration is an undesirable burden which will only be placed on individuals who flout the law. By suggesting that resegregation that "is a product not of state action but of private choices . . . does not have constitutional implications,"[402] the Court implies that although it will not allow the state to officially promote racial separation, it will protect those private actors who do so on their own. The Court seems to believe that "residential segregation [which is] the result of private decisionmaking and economics"[403] is beyond the scope of appropriate state influence.[404]

In the past several years, the Court has made it harder to show that institutions are discriminating against minorities and also harder for institutions to adopt affirmative action policies. The implicit message is that the Court is losing its resolve to promote integration and equality. The implicit view in *Dowell* and *Pitts* that while state-sponsored intentional discrimination is prohibited private intentional discrimination is understandable and must be permitted[405] further demonstrates the Court's change in position. While the Court is correct in holding that state-sponsored intentional discrimination is worse than private intentional discrimination, the Court is incorrect in asserting that the latter is something which the state does not have a legitimate interest in eliminating. As the Court in *Palmore v. Sidoti* noted, "The Constitution cannot control . . . prejudices, but neither cannot it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[406]

Conclusion

The Court seems to have adopted a schizophrenic attitude with respect to discriminatory practices. On the one hand, the Court bends

402. Freeman v. Pitts, 112 S. Ct. 1430 (1992).

403. Board of Educ. of Oklahoma City Pub. Sch. v. Dowell, 498 U.S. 237 (1991).

404. The claim here is not that the State should prohibit people from moving where they want but merely that it seems appropriate for the state to create incentives to prevent resegregation.

405. *See supra* text accompanying notes 402-04.

406. 466 U.S. 429, 433 (1984).

HeinOnline -- 21 Hastings Const. L.Q. 402 1993-1994

over backwards not to impose penalties for intentional discrimination, by presuming that intentional discrimination is not present unless the evidence establishes otherwise. On the other hand, the Court presumes invidious intentional discrimination when examining benign discrimination policies. It is the Court's imposition of a standard which makes it relatively difficult to strike pernicious discrimination but relatively easy to strike benign discrimination that makes its current policy so objectionable.

One way of illustrating the problem is to examine the Court's position with respect to the importance of the "victims'" views. When considering the effects of benign discrimination, the Court seems to worry a great deal about the possible resentment which might be felt by those who do not receive certain benefits. When the Court considers cases in which individuals are accused of pernicious discrimination, however, the Court gives short shrift to the "victims'" views. At the very least, the Court should use the same exacting standard for benign and invidious discrimination.[407]

One difficulty with the Court's view is that it seems so capricious. "There is an undoubted public interest in 'stability and orderly development of the law,'"[408] and the Court's invidious discrimination jurisprudence sacrifices that interest.

There are other difficulties as well. The Court's implicit double standard will not promote the racial acceptance and harmony which the Court claims to want. The Court's alternating presumptions concerning intentional discrimination and emphases on "victim's" perceptions cannot help but promote the view that the Court does not want to rectify past injustice or even extirpate inappropriate views about race, but rather wants to maintain the status quo or, perhaps, the status quo of a bygone era. That the Court uses its concept of invidiousness to effect these ends, whether consciously or unconsciously, illustrates how invidious some classifications can be.

407. *See* Sullivan, *supra* note 1, at 1623 ("If racially divisive effects help support strict scrutiny of affirmative action measures, then such effects should do similar work when the resentment is on the other side. Utilitarian concern about the consequences of racial measures for social harmony should apply equally no matter whose ox is gored.").

408. Johnson v. Transportation Agency, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) (citing Runyon v. McCrary, 427 U.S. 160, 190 (1976)).

HeinOnline -- 21 Hastings Const. L.Q. 403 1993-1994

HeinOnline -- 21 Hastings Const. L.Q. 404 1993-1994