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DISCRIMINATORY IMPACT, AFFIRMATIVE ACTION, AND INNOCENT VICTIMS: JUDICIAL CONSERVATISM OR CONSERVATIVE JUSTICES?

David Chang*

There is no satisfactory explanation of why the judge has the authority to impose his morality upon us. Various authors have attempted to explain that but the explanations amount to little more than the assertion that judges have admirable capacities that we and our elected representatives lack. The utter dubiety of that assertion aside, the professors merely state a preference for rule by talented and benevolent autocrats over the self-government of ordinary folk. Whatever one thinks of that preference, and it seems to me morally repugnant, it is not our system of government, and those who advocate it propose a quiet revolution, made by judges.

Robert Bork1

It is a tour de force . . . to suggest that the courts can elaborate a strong set of fundamental rights against which to test the outcomes of the fair political process in the name of such amorphous concepts as ensuring the common good or a "just constitutional order." Any such freewheeling judicial lawmaking is inconsistent with "[t]he policymaking power of representative institutions, born of the electoral process [which] is the distinguishing characteristic of the [constitutional] system."

Henry Monaghan2

INTRODUCTION: SHADES OF INNOCENCE

Imagine a white person. He is of moderate means, attended suburban schools, and has worked hard to become a police officer. Today he is unemployed, however, because the government, his employer, has adopted an affirmative action program. Suffering from a governmental choice to cure the lingering effects of historic injustices, he is an "inno-

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cent victim" of the racial discrimination pervasive in America's past. He believes this is unfair. He hopes it is unconstitutional.

Now imagine a black person. He is poor, attended inner city schools, and has worked hard because he wants to become a police officer. He will not achieve this goal, however, because he cannot pass the government's qualifying test. Suffering from a governmental choice not to address the lingering effects of historic injustices, he, also, is an "innocent victim" of the racial discrimination in America's past. He believes this is unfair. He hopes it is unconstitutional.

In Wygant v. Jackson Board of Education, the Supreme Court determined that harmful effects suffered by whites from government policies designed to serve the permissible purpose of redressing the continuing effects of past racial discrimination are constitutionally significant inequities that can be justified only by "compelling" state interests. In Washington v. Davis, however, the Court determined that the harmful effects disproportionately suffered by blacks from government policies designed to serve a permissible purpose, but which reinforce the effects of past racial discrimination, have no such constitutional significance, but are matters of equity fully within legislative discretion. In both cases, the Court's decisions were formed and supported by self-professed judicial conservatives—advocates of judicial restraint who claim that courts should invalidate legislative choices not when a judge's personal values are offended, but only when constitutionally rooted public values clearly have been violated. Indeed, Justice White's majority opin-

4. Four Justices embraced this view in Wygant. Chief Justice Burger and Justice Rehnquist joined the relevant portion of Justice Powell's plurality opinion. See infra text at notes 11-18. Justice White concurred separately, stating that "[w]hatever the legitimacy of hiring goals or quotas may be, the discharge of white teachers to make room for blacks" is unconstitutional because of its "effect" on those white teachers. Wygant, 476 U.S. at 295. Justice O'Connor, who otherwise joined Justice Powell's opinion, later explicitly embraced the view that permissibly motivated policies could be unconstitutional because of their impact on "innocent" parties. See infra note 17. Justice Stevens also expressed this view in Wygant, but determined that the harmful effects suffered by whites in that case were not sufficiently important to outweigh the state's interests. See infra note 101. He has, however, voted to invalidate affirmative action programs based on this principle in other cases. See id. Justices Scalia and Kennedy embraced this principle soon after joining the Court. See infra text at notes 42-44, 105-111.

6. Judicial conservatives believe that constitutional interpretation should not be based only on a judge's personal values. See, e.g., R. Bork, supra note 1, at 146 (judge "must not[] make unguided value judgments of his own" in interpreting Constitution). Dissenting in Roe v. Wade, 410 U.S. 113 (1973) and in Doe v. Bolton, 410 U.S. 179 (1973), Justice White, joined by Justice Rehnquist, said: "Whether or not I might agree with [Justice Blackmun's] marshaling of values, . . . I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States." Bolton, 410 U.S. at 222 (White, J., dissenting). Justice Scalia has criticized the Court's "self-awarded sovereignty" over the abortion issue, "where it has little proper business
ion in *Davis* rested squarely on premises of judicial conservatism: he viewed the equities of allocating the harmful consequences of laws “designed to serve neutral ends” as posing political questions fit not for courts, but rather for “legislative prescription.”

This Article considers whether there is a valid justification for according a different constitutional status to these two questions of social equity from the perspective of the principled judicial conservative. Since the answers to most of the cruel questions posed are political and not juridical.” *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3064 (1989) (Scalia, J., concurring). Thus, the essence of judicial conservatism is a reluctance to make choices among controversial competing policies—to weigh competing permissible interests—without clear guidance from a constitutionally rooted hierarchy of values.


> [T]he supplying of content to this Constitution[,] . . . has not been one where judges have felt free to roam where unguided speculation might take them. The balance . . . is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

*Cf. R. Bork*, supra note 1, at 253 (arguing that candid nonoriginalist methods of interpretation at least would have to derive values “upon which all persons of good will and adequate intelligence must agree”). For the implications of a “conventional morality” approach to derive values for defining unconstitutional racial discrimination, see infra notes 69, 71, 146.

7. 426 U.S. at 248.

Part I considers whether Davis and Wygant can be reconciled on the ground that the cases involved different kinds of harm. It concludes that the harmful effects felt by individual claimants in each case are not distinguishable in any relevant manner. Part II considers whether the cases can be reconciled on the ground that Davis concerned the effects of facially neutral laws, whereas Wygant concerned the effects of racial classifications. It concludes that from the perspective of a consistent judicial conservative, reasons for denying special constitutional status to the equities of harmful impact suffered by disappointed black employees from traditional, facially neutral employment policies apply with equal force to the equities of harmful impact suffered by disappointed white employees from racially-specific affirmative action policies.

Part III suggests that those "judicial conservatives" (notably, Justices Rehnquist, White, Kennedy, Scalia, and O'Connor)—as well as the "swing Justices" (Stevens and Powell)—who have viewed discriminatory impact on "innocent white victims" as constitutionally significant have pursued the very sort of judicial activism by personal predilection that was rejected in Washington v. Davis. It then argues that a principled judicial conservative should enforce the same values when scrutinizing claims of unconstitutional racial discrimination by either facially neutral laws or affirmative action programs: in both contexts, the challenged regulation should be invalidated only upon a finding that it was adopted for purposes that are constitutionally prohibited—specifically, purposes reflecting racial prejudice.9

Finally, Part IV explores how a judicial conservative should determine whether any given affirmative action program was adopted for the permissible purpose—untainted by racial animus, favoritism, or stereo-

9. Proscribed racial prejudice includes both the prescriptive (animus or favoritism) and the descriptive (stereotype). See infra text at notes 38–39. This is not to suggest that the Court should be deferential in determining whether prejudice has infected a challenged program. See infra text at notes 144–175. Rather, so long as the legislature has employed a racial classification for constitutionally permissible purposes, evils such as harmful impact should not be viewed as constitutionally relevant, but as matters for legislative accommodation. See also J. Ely, Democracy and Distrust 135–72 (1980) (urg ing equal protection concern with racial prejudice); Simon, Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 San Diego L. Rev. 1041, 1043 (1978) (finding that governmental action motivated by racial prejudice should be sufficient and necessary condition for unconstitutionality). But see Boyd, Purpose and Effect in the Law of Race Discrimination: A Response to Washington v. Davis, 57 U. Det. J. Urb. L. 707, 713–37 (1980) (making argument not based on judicial conservatism that racial impact should be constitutionally relevant irrespective of discriminatory purpose); Ortiz, The Myth of Intent in Equal Protection, 41 Stan. L. Rev. 1105, 1115–19, 1134–42 (1989) (criticizing conceptualization of unconstitutional racial discrimination in terms of impermissible purposes). For an examination of the relationship between originalism and a principle prohibiting all government actions motivated by racial prejudice, see infra note 146.
This Article suggests that personal values of political conservatism have pervaded the Supreme Court’s decisions constraining legislative discretion to redress perceived racial inequity. The resulting conservative judicial activism reveals that protestations of judicial conservatism have been merely a facade.10 I write with the hope that through open recognition of this degeneration to conservative judicial activism, the Court’s “judicial conservatives”—present and future—might retreat within the self-proclaimed limits of their role, and return to electorally accountable policymakers the discretion to make either traditional (and nonracist) or nontraditional (and nonracist) judgments about the just distribution of public goods.

I. Wygant and Davis: Indistinguishable Harms to Individuals

In Wygant v. Jackson Board of Education,11 a group of white public school teachers challenged the constitutionality of a layoff provision in a collective bargaining agreement. The provision required that in the event of teacher layoffs, “teachers with the most seniority . . . shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff.”12 “Minority personnel” included “employees who are Black, American Indian, Oriental, or of Spanish descendancy.”13 The program was justified as “an attempt to remedy societal discrimination by providing ‘role models’ for minority schoolchildren.”14

Justice Powell, in an opinion joined by Justices Rehnquist,
O'Connor, and Chief Justice Burger, viewed this affirmative action program as constitutionally problematic for several reasons. Most significant for present purposes was his concern that the program imposed "discriminatory legal remedies that work against innocent people." He elaborated:

[T]he means chosen to achieve the Board's asserted purposes [of curing the effects of past racial discrimination] is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority. . . . In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

That burden is too intrusive. We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Thus, even if the School Board had pursued permissible purposes, its chosen means were unconstitutional because they imposed an excessively harmful effect on "innocent white employees." Justice White, who provided the crucial fifth vote, concurred in the judgment, and expressed a similar concern with the "effect" of the policy in "laying off whites who would otherwise be retained in order to keep blacks on the job."

In Washington v. Davis, black applicants for jobs as District of Columbia police officers challenged a hiring test (known as "Test 21") that disqualified black candidates at four times the rate that it disquali-
fied white candidates. They argued that because of the harmful impact that blacks disproportionately suffered, the test should be deemed presumptively unconstitutional: it should be upheld only if the government could demonstrate that it was necessary for predicting job performance.

Justice White, for a majority of seven, held that the harmful impact disproportionately suffered by blacks is not a constitutionally problematic inequity requiring extraordinary justification. Rather, under the majority's view, racial discrimination is unconstitutional only if the government has pursued a racially discriminatory purpose:

The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially discriminatory impact. "A purpose to discriminate must be present...."

Justice White refused to accord constitutional status to these harmful effects because he feared that doing so would provide precedent for invalidating "a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white." In his view, the sort

20. Id. at 237.
21. See id.
22. Davis rejected the proposition that the fourteenth amendment's standard for impermissible racial discrimination is the same as the Title VII standard elucidated in Griggs v. Duke Power, 401 U.S. 424 (1971). In Griggs, the Court determined that even without discriminatory purpose, "the consequences of employment practices" could be the basis for their invalidation under Title VII if they were not sufficiently related to job performance. Id. at 432. "What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." Id. at 431. Thus, in Title VII, Congress made a judgment about the importance of employer discretion to use traditional selection criteria, and the importance of a racially discriminatory harmful impact, and struck a balance at the point of job-relatedness. For a suggestion that any definition of "job-relatedness" itself requires contestable judgments about the relative importance of public (or employer) goals versus private (or employee) interests, see infra note 85.
23. Davis, 426 U.S. at 239 (quoting Akins v. Texas, 325 U.S. 398, 403-04 (1945)). Justice White acknowledged, however, that discriminatory impact could be evidence of an impermissible racially discriminatory purpose. See id. at 242.
24. Id. at 248 (emphasis added). Although it is unclear whether Justice White would agree, it is reasonable to attribute the racially discriminatory impact of the broad range of governmental policies about which he was so concerned to the effects of past racial discrimination pervasive in American society. In Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989) (plurality opinion), Justice O'Connor recognized historical reality to some degree noting that "there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs." Id. at 724.
of judgment required for balancing the importance of harmful effects disproportionately felt by blacks against the importance of policies that cause those effects was not for courts, but for "legislative prescription."  

Consider two arguments that the harms involved in Davis and Wygant are distinguishable in some relevant way and, therefore, that the cases do not inconsistently treat the constitutional status of harmful impact. First, one might argue that the harm in Davis—being denied a new job—is far less significant than the harm in Wygant—losing a job already held. This argument misses the mark because Davis held that harmful impact is constitutionally irrelevant except as evidence of impermissible purpose. There was no suggestion that the black police applicants had suffered harms insufficiently serious to warrant invalidating Test 21. Indeed, one can construct a Davis-type case (i.e., a challenge to facially neutral selection criteria that disproportionately harm blacks) involving Wygant-type harms (i.e., losing a job). If, for example, black teachers challenged a seniority system on the ground that blacks were disproportionately harmed by the loss of their jobs, the Court would apply Davis's doctrine that harm disproportionately suffered by blacks from facially neutral selection criteria has no intrinsic constitutional significance. Despite the harms suffered in losing jobs once held—the same harms as those at issue in Wygant—the seniority system would be upheld without considering whether the government's underlying objectives were "compelling."  

Second, one might argue that the two cases involve two very differ-

25. Davis, 426 U.S. at 248. For an analysis of the kind of judgments one must make in order to evaluate the relative importance of harmful effects disproportionately suffered by blacks versus the importance of traditional policies that cause those effects, see infra text at notes 63–90. For further suggestions that ad hoc judicial balancing transgresses limits on the judicial role, see Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 984–85 (1987).  

26. Indeed, in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984), the Court invalidated a district court injunction against a public fire department's traditional seniority system. The injunction was based in part on the seniority system's racially discriminatory effects—its "undue hardship" on the respondent class of black firefighters. Id. at 576. Justice White held for the Court that the district court exceeded its authority in entering the injunction because Title VII creates an explicit exception to the statute's general policy that employment policies having a racially discriminatory impact are presumptively invalid. See id. at 576–77; see also 42 U.S.C. § 2000e-2(h) (1988) (seniority standards that "are not the result of an intent to discriminate because of race" are not unlawful). Perhaps because it was so clearly established by Davis that harmful impact disproportionately suffered by one race or another has no intrinsic constitutional significance, the argument that the seniority system was invalid was based only on Title VII; the equal protection clause was ignored. Furthermore, because Congress has no constitutional authority to regrant to states discretion denied to them by judicial interpretations of the equal protection clause, see Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966), the Court in Stotts, by enforcing § 703(h) of Title VII, implicitly affirmed the Davis doctrine that the effect of losing a (government) job—i.e., a Wygant-type harm—is constitutionally irrelevant.
ent claims of constitutional harm: harm to a group versus harm to individuals. In _Davis_, harm to a group was rejected as being constitutionally insignificant. That members of a certain group—blacks—were disproportionately denied jobs was not enough to require extraordinary justification for the government’s policies for distributing these social benefits. In _Wygant_, however, the Court considered harm to individuals as a potentially dispositive constitutional evil. That individuals might lose their jobs is enough to require extraordinary justification for the government’s policies for distributing these social benefits. Thus, if one accepts Justice Powell’s proposition that “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,” one might view the disparity between the treatment of harm to a group in _Davis_ and the treatment of harm to individuals in _Wygant_ as entirely consistent.

Though effective rhetoric, the notion that people should be treated as individuals, and not simply as members of a group, is of little analytical significance. All statutes operate through classification. Thus, statutes always treat people as members of groups and, in general, legislatures are free to classify so long as they pursue their permissible objectives rationally. If, however, one means to say that the government potentially violates individual rights by treating people as membranes.

27. Justice Powell stated: “[T]he petitioners before us today are not ‘the white teachers as a group.’ They are Wendy Wygant and other individuals . . . .” _Wygant_, 476 U.S. at 281 n.8.

28. Justice Powell said: “Even a temporary layoff may have adverse financial as well as psychological effects.” Id. at 283.


30. See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3028 (1990) (O’Connor, J., dissenting) (“At the heart of the Constitution’s guarantee of equal protection lies the simple command that the government must treat citizens ‘as individuals, not simply “as components of racial, religious, sexual, or national class,”’”) (quoting Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083 (1983) (quoting Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 708 (1978))); see also id. at 3032 (“The right to equal protection is a personal right, . . . securing to each individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group.”).

31. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483, 489–90 (1955) (individuals treated as optometrists); Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (individuals treated as advertisers); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938) (individuals treated as manufacturers of filled milk). In each of these cases, the Court permitted regulation of individuals who claimed that they could be left unregulated without threatening the government’s valid regulatory objective. Under “rationality review,” the Court accords wide latitude for legislative discretion to serve any permissible objective—and any grouping of permissible objectives—by whatever means the government considers expedient. See _Lee Optical_, 348 U.S. at 489; see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 516, 420–21 (1819) (Congress may employ any means, not independently prohibited, to serve permissible ends, subject only to political check).
bers of certain kinds of groups—such as racial groups—one still must specify what individual right—what relevant constitutional value—is violated by the classification.

One might view governmental classification of individuals by race or otherwise—indeed, any government policy—as constitutionally significant for its purposes, the factual premises on which it relies, or its effects. The proposition that the government may not act because of racial animus or favoritism prescribes certain motives. The proposition that the government may not act because of racial stereotype prescribes reliance on certain factual premises. No Justice denies that equal protection encompasses these proscriptions—each of which can be stated as an individual right: the right not to be regulated because of racial animus, favoritism, or stereotype.

Furthermore, individuals felt the harmful effect deemed without intrinsic constitutional significance in *Davis* no less than individuals felt the impact considered in *Wygant*. Mr. Davis is an individual. He was denied a job because of the government’s selection criteria. Someone else got that job because of the government’s selection criteria. Similarly, if the government had not adopted a policy to insulate black teachers from being disproportionately laid off, the harm that Wendy Wygant suffered in losing her job would have been felt by someone else—a black teacher. Yet under *Davis*, the harm that this individual black jobholder would have suffered from a traditional last-hired, first-fired principle is constitutionally irrelevant. Under *Wygant*, the harm that the white job holder did suffer from a nontraditional policy of compensating for effects of past racial discrimination provides a basis for invalidation.

Thus, the distinction is not in whether the harm suffered is characterized as “group” or “individual,” but rather, which individual suffered the harm. One person got a job; another did not. One person was fired; another was not. Who suffered the harm in *Davis* and *Wygant* was a function of the policies underlying the government’s distribution of public benefits and burdens. The issue for judicial conservatives, therefore, must be whether there is a constitutionally supportable distinction between the policies that caused the harm individuals felt in each case.

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32. Justice Marshall recognized this in his dissent in *Wygant*: “[S]omeone will lose a job under any layoff plan and, whoever it is, that person will not deserve it.” 476 U.S. at 307 (Marshall, J., dissenting).

33. See supra note 26 and accompanying text.

34. Cf. Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 542 (1982) (proposition that “people who are alike should be treated alike” has meaning only through application of external substantive values).
II. PURPOSE, IMPACT, AND THE CONSTITUTIONAL SIGNIFICANCE OF RACIAL CLASSIFICATION

This Part considers, from the perspective of a judicial conservative, whether the presence of a racial classification provides a constitutionally supportable distinction between the policies challenged in Wygant and Davis that can justify the different treatment of harmful impact in the two cases. Part A examines the relationship between racial classifications and two types of constitutionally problematic purpose: impermissible purposes to discriminate because of racial prejudice and disfavored, but permissible, purposes to discriminate based on race. Part B considers whether a judicial conservative should be concerned with the equities of harmful impact caused by racial classifications found not to have been adopted because of impermissible racial prejudice.

A. Interpreting Davis: Impermissible Purposes and Disfavored, but Permissible, Purposes

Davis and Wygant might be distinguishable on the ground that public benefits were distributed without a racial classification in the former, but with a racial classification in the latter. But why should the harm from being denied a job or being laid off be constitutionally significant when the government’s selection criteria in pursuit of permissible purposes includes a racial classification, while the same harm is considered constitutionally irrelevant when the government’s selection criteria (also used in pursuit of permissible purposes) are traditional and, on their face, racially neutral?

Consider, again, Justice White’s point of departure in Davis: “But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially discriminatory impact. . . . ‘A purpose to discriminate must be present . . . .’”35 One might read Davis as suggesting that certain racially-oriented purposes are impermissible per se. These impermissible purposes would be both necessary and sufficient to establish unconstitutionality. While harmful impact disproportionately suffered by blacks might serve as evidence that the government acted with an impermissible purpose,36 it has no intrinsic or normative constitutional significance. This interpretation of Davis is inconsistent with Wygant’s assertion that harmful impact can have intrinsic constitutional significance when the government pursues


36. Justice White suggested that “an invidious discriminatory purpose may often be inferred from the totality of relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.” Davis, 426 U.S. at 242.
constitutionally permissible purposes and, therefore, it cannot serve to reconcile the two cases.

Alternatively, one might read *Davis* as suggesting that certain racially-oriented purposes are not impermissible per se, but are constitutionally disfavored. These disfavored but permissible purposes would be necessary, but not sufficient, to establish unconstitutionality. If the government acts with a disfavored, but permissible, purpose, harmful impact might become significant as a constitutional evil that can be justified only by a sufficiently weighty—or "compelling"—state interest. Without a constitutionally disfavored purpose, however, harmful impact disproportionately suffered by one race or another has no independent constitutional significance.

This reading could provide a basis for reconciling *Davis* and *Wygant* if two conditions are satisfied: first, a constitutionally disfavored, but permissible, purpose must be found in *Wygant* but not in *Davis*; and, second, the rationale for viewing that purpose as disfavored, but permissible, must be related to the equities of harmful impact.

All racial classifications reflect a purpose to discriminate based on race—a purpose to use race as a sorting tool. Furthermore, all racial classifications are subject to special judicial scrutiny. But because the Court has held that not all racial classifications are unconstitutional, a purpose to discriminate based on race is not itself constitutionally impermissible. Thus, the purpose to discriminate based on race is con-

37. Justice Scalia has come close to asserting that all racial classifications are unconstitutional. In *Croson*, he cited the slogan that "[o]ur Constitution is color-blind," *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 735 (1989) (concursing opinion) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)), and indicated that this principle could be violated in "only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates." *Id.* But because the equal protection clause originally permitted racial segregation and policies of race-conscious animus, a principle of complete "colorblindness" is no more rooted in original intent than is a principle that all governmental actions motivated by racial prejudice are unconstitutional. See infra note 146. Indeed, *Plessy v. Ferguson* likely enforced original intent. See *Chung*, *Conflict, Coherence, and Constitutional Intent*, 72 Iowa L. Rev. 753, 836–38, 846–50 (1987). Furthermore, it has been suggested that the framers of the fourteenth amendment intended to permit not only racial classifications that served racism, but also racial classifications that ameliorated the plight of blacks:

From the closing days of the Civil War until the end of civilian Reconstruction ..., Congress adopted a series of social welfare programs whose benefits were expressly limited to blacks. These programs were generally open to all blacks, not only to recently freed slaves, and were adopted over repeatedly expressed objections that such racially exclusive measures were unfair to whites. The race-conscious ... programs were enacted concurrently with the fourteenth amendment and were supported by the same legislators who favored the constitutional guarantee of equal protection.

*Schnapper*, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 Va. L. Rev. 753, 754 (1985) (footnote omitted). Thus, one who advocates a nonoriginalist, constitutionally mandated color-blindness must explain why legislatures
stitutionally disfavored, but permissible, and can provide the basis for a determination of unconstitutionality in conjunction with other findings.

In contrast, the Court has determined that governmental purposes reflecting racial prejudice are impermissible per se. Impermissible racial prejudice includes both value judgments about race (animus or favoritism) and unexamined factual premises based on race (stereotype). Justice O'Connor described the constitutional concern with both prescriptive and descriptive racial prejudice in City of Richmond v. J.A. Croson Co., as she explained and justified subjecting racial classifications to "strict scrutiny":

Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Thus, Justice O'Connor suggests that strict scrutiny is a mechanism by which a court determines whether the government has pursued impermissible purposes reflecting racial prejudice. From this perspective, because racial classifications are presumptively unconstitutional, the (permissible but disfavored) purpose to discriminate based on race is disfavored because it suggests a likelihood that the government has pursued impermissible purposes reflecting racial prejudice.

should be prohibited from pursuing permissible, nonracist purposes by means of a racial classification. Any relevant explanation is likely to reflect some idea about the evils of racial classification discussed infra: the impact on human dignity or the promotion of racial hostility. My discussion of why these potential evils of racial classifications do not justly an independent concern with the equities of harmful impact felt by "innocent white victims" of affirmative action, see infra text at notes 42-59, applies as well to constitutionally mandated color-blindness, from the perspective of the nonoriginalist judicial conservative.

39. Id. at 721 (emphasis added).
40. See id.; see also Brest, The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7 (1976) ("race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference"); Simon, supra note 9, at 1067 ("The fact that racial classifications are suspect means only that . . . a court should very carefully assess whether the rules would have been enacted or maintained but for racial prejudice, with the burden of credibly disproving such motivation upon the government.").
41. Thus, "[u]nder strict scrutiny the means chosen to accomplish the State's asserted [permissible] purpose must be specifically and narrowly framed to accomplish
This rationale for viewing the purpose of discriminating based on race as constitutionally disfavored is rebutted when a court determines that a racial classification was not adopted because of racial prejudice. Furthermore, if a court determines that the government has acted because of impermissible racial prejudice, it need not consider the "weightiness" of the challenged policy toward justifying other putative constitutional evils such as the inequities of harmful impact. The impermissible purpose alone is sufficient to establish unconstitutionality. Thus, under the view that the purpose to discriminate based on race—the use of a racial classification—is constitutionally permissible, but disfavored because it suggests a likelihood of impermissible racial prejudice, the equities of harmful impact should have been deemed irrelevant in both Davis and Wygant.

B. Racial Classifications Not Employed Because of Impermissible Racial Prejudice: Should the Equities of Harmful Impact Be Deemed Constitutionally Significant?

To distinguish Wygant from Davis based on the presence of a racial classification, therefore, one must go beyond the proposition that the government may not act because of racial prejudice. One must identify some other constitutional value that is both compromised by the disfavored but permissible intent to discriminate based on race, and related to the equities of harmful impact suffered by "innocent" whites from otherwise valid affirmative action programs.

Justice Scalia and his conservative colleagues have suggested that racial classifications, because of their obvious intent to discriminate that purpose." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality opinion); accord Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727 & n.26 (1974). Conversely, because the Court views facially neutral actions as presumptively valid, and to the extent that constitutional invalidity turns on whether the government has acted because of racial prejudice, judicial review presumes that when the government acts in a facially neutral way, it likely has not acted because of impermissible racial prejudice. See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.15 (1977) ("to recognize the limited probative value of disproportionate impact [in proving impermissible purpose] is merely to acknowledge the 'heterogeneity' of the Nation's population"). Under Arlington Heights, the plaintiff bears the burden of proving that "invidious discriminatory purpose" was "a motivating factor" underlying a facially neutral policy. Id. at 266. "Proof that the decision ... was motivated in part by a racially discriminatory purpose would ... shift[] to the [government] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." Id. at 270-71 n.21. For further discussion of the implications of Arlington Heights, see infra note 45; see also Note, Discriminatory Purpose and Disproportionate Impact: An Assessment After Fee­ney, 79 Colum. L. Rev. 1376, 1384 (1979) (facially neutral policies warrant no presumption that government "relied on forbidden considerations; in fact, an opposite presumption is warranted").
based on race, can violate notions of human dignity and foment racial prejudice. This section will consider, from the perspective of the principled judicial conservative, whether these putative evils of racial classifications should trigger constitutional concern with the equities of harmful impact.

42. Justice Scalia has suggested that the intent to discriminate based on race itself can justify concern with discriminatory impact that is constitutionally irrelevant when the government acts with facially neutral means. “A State . . . may adopt a preference for small businesses, or even for new businesses. . . . Such programs may well have racially disproportionate impact, but they are not based on race.”

43. See infra note 46 and accompanying text.

44. See infra note 52 and accompanying text.

45. Despite the effort that follows to reconcile the treatment of harmful impact in Davis and Wygant, the majority’s elaboration on Davis in Arlington Heights strongly suggests that the “racially discriminatory purpose” required in Davis to establish unconstitutionality was an impermissible purpose to discriminate because of race rather than the disfavored but permissible purpose to discriminate based on race. In specifying the burden of proving unconstitutional racial discrimination by a facially neutral law, Justice Powell, joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist, declared that the challenger must prove that “invidious discriminatory purpose was a motivating factor” in the government’s decision. Arlington Heights, 429 U.S. at 266 (emphasis added). Meeting this burden would “shift[] to the [State] the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered.” Id. at 270-71 n.21 (emphasis added). Reference to “invidious,” “motivating,” and “impermissible purpose” strongly suggests that the Court is concerned not with the permissible but disfavored intent to discriminate based on race, but with impermissible purposes motivated by racism. The Court’s continuing lack of concern for “fairness” or “equity” beyond the issue of impermissible purpose is suggested by Justice Powell’s declaration that if the state proves that the same decision would have been made absent impermissible considerations, “the complaining party . . . no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose. . . . [T]here would be no justification for judicial interference with the challenged decision.” Id. Indeed, earlier in his opinion, Justice Powell emphasized that legislatures have discretion to accommodate competing, permissible objectives as they wish: “In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration.” Id. at 265. If by “racial consideration” Powell means impermissible racist purpose, as he did when using the words “invidious,” “motivating,” and “impermissible,” the inconsistency between Davis and Wygant is confirmed.

Further confirmation that the “purpose to discriminate” required by the Court in Davis to invalidate a facially neutral policy was an impermissible racist purpose, rather than the disfavored, but permissible, purpose to discriminate based on race, is provided
1. Human Dignity. — Being categorized according to one's race can be offensive. Yet most people seem comfortable labelling themselves, and others, by race and ethnicity. The government routinely collects demographic statistics in which race and ethnicity are important categories. Thus, at least for certain purposes, classification by race is accepted.

When a racial classification is employed to serve a racist motive or perspective, however, those classified are dehumanized by the underlying racism. In this context, suggesting that racial classifications can offend notions of human dignity simply restates the proposition that racial classifications might have been employed because of racial prejudice, and policies reflecting racial prejudice offend human dignity. This concern for human dignity would be satisfied by a finding that the government had met its burden of proving that its challenged racial classification had been employed for permissible, nonracist purposes.

When a court finds that an affirmative action program employing racial classifications is intended to compensate for the effects of past racial discrimination, and does not rest on racial animus, favoritism, or stereotype, it holds that the program serves a purpose that does not itself reflect racial prejudice. When disadvantaged by an affirmative

by the Court's expansion on the meaning of "discriminatory purpose" in Personnel Adm'r v. Feeney:

"Discriminatory purpose," however, 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. 442 U.S. 256, 279 (1979). The disfavored, but permissible purpose to discriminate based on race might well have been pursued "in spite of" an adverse impact on an identifiable group. This is not so with actions motivated by an impermissible purpose to discriminate because of racial animus or favoritism. Thus, the cases on invalid racial discrimination achieved through facially neutral means fairly well establish that the Court viewed the essence of unconstitutionality in Davis as impermissible racist purposes—necessary and sufficient to establish unconstitutionality.

46. Justice Scalia expressed this view in Croson. "[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice." 109 S. Ct. at 739 (Scalia, J., concurring in the judgment) (quoting A. Bickel, The Morality of Consent 133 (1975)).

47. See, e.g., 1980 Census of Population and Housing, U.S. Dept. of Commerce, Bureau of the Census, Advance Estimates of Social, Economic and Housing Characteristics: Part 34, New York (Suppl. Rpt.), at 34.75–34.116 (categorizing people as "white, black, American Indian, Eskimo or Aleut, Asia and Pacific Islander, Spanish origin") (March 1983).

48. Cf. Brest, supra note 40, at 16–17 (arguing that it is unlikely that affirmative action programs are "premised on assumptions that blacks are superior to whites or on the selective indifference of white decisionmakers to the humanity or aspirations of whites compared to blacks"). The absence of selective indifference might be less clear, however, in a locality governed by a black majority. See Ely, supra note 41, at 739 n.58 ("a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature"); see also Croson, 109 S. Ct. at 722 (because five of the nine seats on the City Council were held by blacks, "[t]he concern that a political majority will
action program designed to remedy the lingering effects of past racial discrimination, therefore, an "innocent white victim" is passed over not because he is white, but because there is little or no reason to believe—based on his being white—that he suffers from the effects of past racial discrimination.49

Thus, once a court determines that an affirmative action program was not adopted because of racial animus, favoritism, or stereotype, the "innocent white victim" is offended, if at all, not by racist insult, but by disagreement with the legislative judgment that the public benefit he otherwise would receive under traditional policies should be transferred to someone else to help redress the effects of past racial discrimination.50 So viewed, the concerns of "innocent" whites are less matters

more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case"). The absence of racist stereotyping in such a locality is similarly unlikely. As Justice Stevens has suggested:

The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. . . .

When Congress creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative.


49. Justice Powell implicitly acknowledged this distinction in Bakke. He noted that preferring people "because of" race is "facially invalid," Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion), while racial classifications (i.e., discrimination based on race) used to achieve the "legitimate and substantial interest" of rectifying effects of past discrimination could be permissible. Id. at 307–10; see also Rosenfeld, supra note 8, at 1788–89 (distinguishing discrimination "because of" race and racial discrimination toward permissible ends). Even so, one might still argue that the dignity of "innocent white victims" is offended because the racial classification imposes disabilities disproportionately on whites, and grants benefits disproportionately to blacks, without an underlying certainty that those harmed do not—and that those benefitted do—suffer from the effects of past racial discrimination. Cf. Brest, supra note 40, at 10 ("Although all of us recognize that institutional decisions must depend on generalizations based on objective characteristics of persons and things rather than on individualized judgments, we nonetheless tend to feel unfairly treated when disadvantaged by a generalization that is not true as applied to us."). The extent of underinclusiveness or overinclusiveness might well preclude a finding that the classification was not adopted because of impermissible racial animus, favoritism, or stereotype. See infra text at notes 172–175. If so, the basis for invalidation would not be that the government has "unfairly" balanced competing equities, but that its action was based on racism—impermissible per se. This finding would invalidate the program consistently with Davis—based not on evaluating the inequities of impact, but on proof of impermissible purpose.

50. Paul Brest argues that "an individual's moral claim to compensation loses force as the nature, extent, and consequences of the wrongs inflicted become harder to identify and the wrongs recede into the past." See Brest, supra note 40, at 42. Thus, unlike a judicial remedy to compensate one individual for a specific harm inflicted by another, a legislative remedy to benefit one black individual, ignore a white individual (in his
of "dignity" compromised by racial classification than issues of putative entitlement to social benefits based on traditional selection criteria—for example, seniority, low bid, or high scores. The constitutional status, if any, of these criteria of putative entitlement should be ascertained on their own terms, rather than under the guise of "dignity" interests triggered by racial classifications. 51

2. Promoting Racial Prejudice. — Justices Scalia and O'Connor have expressed concern that efforts to redress the effects of past racial discrimination might foment racism among people who feel that their ambitions have been thwarted by affirmative action programs and, thereby, foster political divisions and social tensions along racial lines. 52 Assuming its validity, 53 this rationale for viewing harmful im-

words, the "nonpreferred"), and harm yet another white individual (the "dispreferred"), "premised on a greater probability that the minority's situation is the result of past injury" is more difficult to justify. Id. at 42–43. Yet Brest concedes that his argument is about proper policy rather than constitutionality:

Judicial supervision of other agencies' efforts to remedy racial injustices should be rather limited. ... Under the approach proposed in this essay, all or most preferential employment and admissions programs would survive constitutional scrutiny. It is a truism—only because it is true—that a practice may be unwise or even unfair and yet not be unconstitutional.

Id. at 53–54.

51. See infra text at notes 60–90.

52. See, e.g., Croson, 109 S. Ct. at 721 (racial classifications can promote notions of racial inferiority and promote the "politics of racial hostility"); id. at 735, 739 (Scalia, J., concurring in the judgment) ("The difficulty of overcoming the effects of past racial discrimination is as nothing compared with the difficulty of eradicating from our society the source of those effects . . ."); id. at 739 (lamenting divisive societal effects of "racial quotas"); Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3029 (1990) (O'Connor, J., dissenting) (racial classifications "contribute to an escalation of racial hostility and conflict"); see also Greenawalt, Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions, 75 Colum. L. Rev. 559, 571–72 (1975) (racial classification can promote prejudice).

53. A constitutional principle invalidating remedial legislation on the grounds that it can unleash latent racism would be inconsistent with the Court's suggestion in Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984), that the government may not make policy that accommodates racism in the name of protecting the victims of racism. In Palmore, the Court reversed a trial court decree that had terminated a white mother's custody of her child after she had married a black man. The basis for the custody decree was not the trial judge's own racist judgment about the morality of interracial marriage, but a realistic appraisal of problems the child would face from racist hostility among members of the community. Although Chief Justice Burger, writing for the majority, acknowledged that the trial judge intended to serve "the best interests of the child," id. at 433, he stated that the decree was founded on impermissible considerations:

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty
pact as constitutionally significant would require examining the extent to which harmful impact causes racism throughout society at large, rather than its significance from the perspective of the individual "innocent white victim." Indeed, the Court would have to examine the intensity of racist sentiments likely to be engendered (an empirical question), the number of people likely to have such sentiments (an empirical question), and the relative importance of both triggering this latent racism and leaving the effects of past racial discrimination intact (a normative question).

Whether affirmative action programs actually promote or mitigate racism—in the short term and in the more distant future—is a debatable matter that courts are not especially well equipped to resolve. Indeed, in another context, Justice O'Connor cautioned that while "[p]olitical divisiveness is admittedly an evil addressed by the Establishment Clause," "[g]uessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise." Thus, she concluded that "political divisiveness along religious lines should not be an independent test of constitutionality." A Justice has no principled reason for feeling better equipped to predict potential political divisiveness resulting from affirmative action programs than to predict potential political divisiveness resulting from state associations with religion.

Furthermore, judicial conservatives should see a similar incapacity to resolve the normative question. Whether it is worse to leave the effects of past racism intact, or to risk unleashing latent racism, is a ques-

concluding that they are not. The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. The proposition that a state is constitutionally prohibited from considering the "reality of private biases" in making child custody determinations, but is constitutionally required to consider this racism in creating affirmative action policies, is itself inconsistent, and in no way helps to reconcile Davis and Wygant.

55. Id. Rather, "the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself." Id.

56. It hardly could be contended that the equal protection clause was originally intended to prohibit or disfavor governmental policies that foster divisiveness along racial lines. The clause itself was a product of war between factions of a nation deeply divided about racial issues. The North's vision of racial justice prevailed; political division was an accepted cost of attaining that vision. See, e.g., M. Konvitz & T. Leskes, A Century of Civil Rights 51-52 (1961) (North imposed fourteenth amendment on unwilling white Southern electorate); Call, The Fourteenth Amendment and Its Skeptical Background, 13 Baylor L. Rev. 1, 14 (1961); Chang, supra note 37, 828-30; Suthon, The Dubious Origin of the Fourteenth Amendment, 28 Tul. L. Rev. 22, 44 (1953). Indeed, if any legal decision promoted political division and racism, it was the Court's own interpretation of the equal protection clause in Brown v. Board of Educ., 347 U.S. 483 (1954).
tion demanding political judgment.\textsuperscript{57} Indeed, a similar judicial incapacity to choose among competing permissible public concerns was a primary reason for the Court's rejection of harmful impact as constitutionally irrelevant in \textit{Washington v. Davis}.\textsuperscript{58} It is more than ironic that Justice Scalia—perhaps the Court's strongest proponent of judicial conservatism in other contexts—is the Court's strongest proponent of invalidating racial classifications designed to redress effects of past racial discrimination on the ground that they might promote racial prejudice.\textsuperscript{59}

\section*{III. Traditional Equity and Conservative Justices}

The analysis developed in Part II suggests that the Court's different treatment of harmful impact in \textit{Wygant} and \textit{Davis} cannot be justified by the presence or absence of a racial classification. Neither the intent to discriminate based on race, the intent to discriminate because of race, the threat to human dignity, nor the prospect of promoting racism justifies an independent concern with the specific losses that individuals might suffer because a legislature has chosen to redress the effects of past racial discrimination.\textsuperscript{60} Another distinction between \textit{Davis} and Wy-
gant remains: the interests of blacks were harmed by traditional policies in the former case, while the interests of whites were harmed by evolving policies in the latter. This Part will suggest that the Justices responsible for the dichotomy between Wygant and Davis have, indeed, accorded special constitutional status to the interests of whites against affirmative action and, in so doing, have strayed far from their protestations of disinterested judicial conservatism to the antithetical practice of instrumental political conservatism.

A. Wygant and Conservative Activism

Conservative Justices essentially have created a conditional "fundamental right" to the distribution of benefits according to traditional criteria—a right triggered by a legislative policy to redress effects of past racial discrimination through racial classification. Justice Powell's proposition in Wygant that "innocent persons may be called upon to bear some of the burden" of curing the effects of past racial discrimination, but only if that burden is not "too intrusive"\(^61\) reflects an unstated premise that the displaced "innocent white victims" have a constitutional claim to receive benefits denied them by affirmative action policies. With seniority comes special constitutional entitlement to keep a job.\(^62\) With a high grade point average comes special constitutional entitlement to a place in medical school.\(^63\) With a low bid comes special constitutional entitlement to a government contract.\(^64\) By trying to

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\(^{62}\) See id.

\(^{63}\) See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (plurality opinion) (denying opportunity to attend medical school to applicant with higher grades to benefit another with lower grades, based on race, presents "serious problems of justice.")

\(^{64}\) See City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 730 (1989) (plurality opinion). When the Court held that "disproportionately harmful impact" lacks intrinsic constitutional significance, minority litigants pursued a litigation strategy of carving out special substantive rights—e.g., housing, welfare, education—to which the Court responded unsympathetically. See Schwemm, From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation, 1977 U. Ill. L.F. 961, 965 (1977). Advocates of judicial conservatism have criticized this quest for "due sub-
balance the measure of entitlement against the competing state interest in ameliorating the effects of past racial discrimination, the Wygant majority decided whether the burden imposed by the affirmative action program on "innocent white victims" is constitutionally excessive.\textsuperscript{65}

As a matter of tradition, society has valued seniority more than inexperience, higher grade point averages more than lower, and low bids more than high. Because legislatures and juries reflect community sentiment, these values traditionally have been bases for statutory and common-law entitlements. More recently, by adopting affirmative action programs to redress the effects of past racial discrimination, legislatures have signalled an evolution in prevailing public values. While seniority remains politically important, the people's representatives sometimes wish it displaced somewhat toward eradicating the legacy of past racial discrimination from American society;\textsuperscript{66} so with high grade point averages,\textsuperscript{67} low bids,\textsuperscript{68} and other traditional criteria for distributing public goods.

Thus, affirmative action programs designed to redress the effects of past societal discrimination create new statutory rights based on new social values that displace traditional statutory rights (or common law rights effective through legislative sufferance) based on traditional social values. The foundation for these new legal rights is the same as the foundation underlying displaced traditional legal rights: majoritarian values as reflected in legislative choice. No one would argue that legislatures are, as a general matter, constitutionally prohibited from repealing, modifying, or displacing old statutory or common law rules simply because those rules are traditional. But if tradition is not constitutionally mandated as a general matter, then one must either pick and choose which traditional rules are to be deemed constitutionally mandated, and which are not, or one must reject tradition per se as a basis for creating constitutional meaning. Without a constitutionally rooted or presently uncontroversial basis by which to choose among traditional policies to be preserved in the face of evolving social values, and those to be sacrificed, the true judicial conservative must leave issues for legislatures—and, ultimately, for voters—to decide.\textsuperscript{69} Neither the

\textsuperscript{65} Justice Marshall recognized this point with respect to seniority. See \textit{Wygant}, 476 U.S. at 307-08 (Marshall, J., dissenting). Rather than argue that these questions of social equity should not be resolved by Justices, however, Justice Marshall argued the definition of equity. See infra note 94 and accompanying text.

\textsuperscript{66} See, e.g., \textit{Wygant}, 476 U.S. at 272.

\textsuperscript{67} See, e.g., \textit{Bakke}, 438 U.S. at 316-19.


\textsuperscript{69} Indeed, judicial conservatives have rejected as beyond the judicial role the constitutionalization in \textit{Lochner v. New York}, 198 U.S. 45 (1905), of a then-traditional freedom to pursue then-traditional practices between employers and employees. See, e.g.,
original understanding of the equal protection clause about racial classifications and principles of racial justice, nor contemporary political consensus, provides the necessary basis for the judicial conservative

Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 784 (1976) (Rehnquist, J., dissenting). In striking down a law that set a maximum number of hours on the workday of certain workers, the Lochner Court created a constitutionally “right of free contract” specially protected from legislative intrusion. Lochner, 198 U.S. at 64. The Court later retreated from this position, saying that “a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.” Nebbia v. New York, 291 U.S. 502, 537 (1934). The Court retreated in part because the Lochner doctrine was rejected by prevailing public values—Congress itself adopted policies like those invalidated in Lochner—and also because its interpretive methodology was rejected by prevailing standards of scholarship. See, e.g., Bicklé, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 Harv. L. Rev. 6, 8–13 (1924) (criticizing Lochner for invalidating legislation based on factual premises not supported by evidence in the record); id. at 17 (criticizing Supreme Court invalidation of statutes because “its ideas of public policy differ from those of the legislature”); Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 151 (1893) (advocating judicial deference to legislative judgment unless challenged policy is “beyond a reasonable doubt” unconstitutional); see also Ferguson v. Skrupa, 372 U.S. 726, 730 (1963) (“[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment[s] of legislative bodies”). One might view today’s conditional “fundamental” right to traditional selection criteria as an unacknowledged resurrection of economic rights in the Constitution. True, these economic rights are not triggered unless the state pursues permissible objectives through racial means, but they are economic rights nonetheless. As Justice Powell stated in Wygant: “The Constitution does not require layoffs to be based on strict seniority. But it does require the State to meet a heavy burden of justification when it implements a layoff plan based on race.” 476 U.S. at 282 n.10.

Some even reject Griswold’s constitutionalization of the freedom to pursue traditional conjugal practices between husband and wife. See, e.g., Griswold v. Connecticut, 381 U.S. 479, 522–23 (Black, J., dissenting) (critically equating Griswold with Lochner); R. Bork, supra note 1, at 95 (calling Griswold a “Constitutional Time Bomb”); id. at 120 n.* (“the right of privacy cases rest upon no constitutional principle, but are . . . mere judicial ukases”); id. at 169 (Griswold created a new constitutional principle by “tour de force”); Bork, At Last, an End to Supreme Court Activism, N.Y. Times, Aug. 29, 1990, at A21, col. 5 (“The ‘right to privacy’ . . . was invented in Griswold” through judicial “legislating”). But at least from the perspective of judicial conservatism based on “conventional morality,” see supra note 6, Griswold is more supportable than is either Lochner or Wygant. The norm enforced in Griswold reflected not only tradition, but also a contemporary national consensus about marital morality. See Chang, supra note 37, at 819–23. The norms enforced in Lochner and Wygant contravened contemporary national morality as reflected in congressional and state legislative choices. See infra note 71 and accompanying text.

70. See supra notes 37, 56; infra note 146.

71. A judicial conservative who refers to “conventional morality” as a source for constitutional values, see supra note 6, would find difficulty in thwarting legislative discretion to balance competing equities in the context of affirmative action. A “conventional morality” basis for invalidating state policies as unconstitutional requires a national consensus that those local policies are “wrong.” There is no such consensus in the United States about affirmative action. To the contrary, the prevalence of affirmative action programs suggests consensus that there is, in fact, some measure of moral responsibility to redress effects of past racial discrimination. Furthermore, even if there
to determine that one or another permissibly motivated effort to reallocate the effects of past racial discrimination is constitutionally prohibited. It is revealing that neither Justice Rehnquist, nor Justice O'Connor, nor Justice Scalia, nor Justice Kennedy has ever attempted to justify a concern with discriminatory impact on "innocent" whites as derived from originalism, "conventional morality," or any other philosophy of constitutional interpretation.

Yet like the white police officer with whom this Article began, some might argue that when the quest to ameliorate the effects of society's past racial discrimination displaces traditional rights based on seniority, high grade point averages, and low bids, the government's policy "unfairly" frustrates the settled expectations of "innocent white victims"—and is unconstitutional because "unfair." But settled expectations do not constitutionally prohibit states from laying off workers because of economic need—or from boosting income tax rates, eliminating tax deductions for interest payments, or closing or moving elementary schools—despite the critical personal decisions that individuals might have made in reliance on those established policies. From the perspective of a judicial conservative, why should settled expectations be treated differently when the government pursues permissible ends by nonracial means than when it pursues permissible ends by racial means?

Furthermore, against this notion of "fairness" others can claim that settled expectations rest upon an unjust foundation. For black applicants whose accomplishments—in attaining grade point averages, getting jobs, earning seniority—have been stunted by the effects of past racial discrimination, persistent use of these selection criteria serves settled expectations of unfairness and, perhaps, a settled psychology of despair. Thus, like the black police applicant with whom this Article began, many might argue that traditional criteria for distributing public goods are unfair—and unconstitutional because unfair.

Most importantly, making constitutional law based on ungrounded and deeply contestable claims about fairness is antithetical to the judi-

were a national consensus that affirmative action is morally problematic because of effects suffered by "innocent white victims," "conventional morality" requires additional consensus that states and localities should be precluded from pursuing their own preferences. Such a consensus does not exist. Indeed, Congress (the best available indicator of national political consensus) created the pattern from which Richmond borrowed in the Croson case. See infra text at notes 120-121, 146. For further analysis of "conventional morality" as a basis for constitutional adjudication, see Chang, supra note 37, at 799-805, 819-23.

72. As Justice Powell stated in Wygant, "[a] worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. . . . Layoffs disrupt these settled expectations. . . ." Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (plurality opinion).

73. See supra text at notes 52-59 (promoting racial prejudice is inadequate justification for distinguishing different treatment of harmful impact in Davis and Wygant).
cial conservative's professed philosophy. Indeed, it was precisely because the Davis Court was unwilling to make these ad hoc judgments of fairness when blacks were disproportionately harmed by traditional policies pursuing permissible state purposes that it refused to second guess the legislature's equitable balance. Again, Justice White noted:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. . . .

...[l]n our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription. Thus, under Davis, Congress could permit or require seniority rights against layoff as a matter of statutory law, despite the disproportionately harmful effect of this policy on blacks. The Davis Court would have refused to intervene because the relevant questions of equity involved political rather than judicial judgment.

Although Justice White did not devote detailed attention to the factors that should inform this political judgment, Professor Michael Perry has. Arguing that the Davis Court should have held that harmful impact disproportionately suffered by blacks should be deemed to have intrinsic constitutional significance, Perry notes, first, the significance of disproportion. Given centuries of public and private racial discrimination, Perry concludes that "[t]he underlying cause of disproportionate racial impact, the especially disadvantaged social position of black Americans, is one for which American society and government bear a heavy moral responsibility."
JUDICIAL CONSERVATISM?

Next, Perry lists four factors relevant for determining how society should discharge its "moral responsibility" for ameliorating the effects of past injustice:

In determining whether a disproportionate disadvantage is justified, a court would weigh several factors: (1) the degree of disproportion in the impact; (2) the private interest disadvantaged; (3) the efficiency of the challenged law in achieving its objective and the availability of alternative means having a less disproportionate impact; and (4) the government objective sought to be advanced. 79

In the context of public employment, Perry finds these factors roughly balanced unless a challenged employment policy does not bear "a demonstrable relation to job performance." 80 He claims that while his approach to discriminatory impact is flexible, "a claim based on disproportionate racial impact, as a practical matter, can exist in only a limited number of contexts and can succeed in even fewer." 81 Thus, in Perry's view, Justice White was wrong to fear that recognizing Davis's claim "would raise serious questions about, and perhaps invalidate" 82 a broad range of statutes. 83

Yet Perry's dissection of a putative constitutional concern with harmful impact caused by traditional, and otherwise permissible, criteria for distributing public goods cannot dispel Justice White's concern, rooted in judicial conservatism, about the limits of judicial capacity and the prerogatives of legislative discretion. While the amount of disproportionate impact might well be quantifiable, its moral significance—the force of society's "moral responsibility" to rectify84 the harm done—is not. Similarly, assessing the importance of the "private interest disadvantaged" requires the exercise of personally idiosyncratic judgment that a judicial conservative would rather not impose on contrary legislative choices. Searching for "alternative means having less disproportionate impact" involves relatively quantifiable judgment that a judicial conservative might comfortably make, but evaluating any loss of "efficiency of the challenged law in achieving its objective" does not. 85 Finally, evaluating the merits of "the government interest

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79. See Perry, supra note 77, at 560 (footnotes omitted).
80. Id. at 572.
81. Id. at 563.
84. Perry, supra note 77, at 558.
85. While a requirement of "job-relatedness" might seem obvious to Perry, id. at 571–73, it is less clear to me that this inevitably is the proper place to strike the balance between the "moral obligation" to redress effects of past racial discrimination and permissible competing policies that might compound those effects. If, for example, the
sought to be advanced" is not a question that a judicial conservative would pose.86

Thus, although he did not analyze Davis's claim as closely as did Professor Perry, Justice White was quite correct—at least from the perspective of judicial conservatism—that concern with harmful impact disproportionately suffered by blacks should be resolved not by courts, but by "legislative prescription."87 Indeed, the factors that Perry identified—the factors that Justice White in Davis implicitly held to be matters for legislative judgment—are precisely the factors that legislatures do balance when designing affirmative action programs that inevitably harm the interests of "innocent white victims": the importance of "our moral obligation" to redress effects of past racial discrimination, the extent to which such effects are felt in different contexts, the importance of competing private interests that would be disadvantaged, how well traditional criteria for distributing public goods serve competing public ends, and the importance of those competing public ends.88

definition of "job-relatedness" for a police officer is catching criminals, some might argue that it is worth forgoing the capture of one (or two, or three, or even more) criminals in order to help discharge society's moral obligation to redress the effects of past racial discrimination. Furthermore, the definition of "required job performance" itself requires contestable judgments. One community might want all of its police officers to have enough educational background and achievement to rival the learned critical capacity of Sherlock Holmes. Another community might want its police force simply to patrol the streets as a deterrent presence. These two ways of defining the "job" each relate differently to effects of past racial discrimination and, therefore, likely would have different disproportionate impacts. Thus, without being able to control the definition of a "job," the criterion of "job-relatedness" must be toothless. But in order to control the definition of a "job," a judge must make precisely the sort of policy judgment that Justice White in Davis deems appropriate not for courts, but for "legislative prescription." Davis, 426 U.S. at 248.

86. See supra note 85. Similar problems are evident in the context of educational segregation, for which Perry counsels judicial invalidation of policies serving permissible purposes, if they have the effect of perpetuating segregation, in favor of "action conducive to racial balance . . . if practical under the circumstances." Perry, supra note 77, at 575–76. Clearly, determining what is "practical under the circumstances" requires judgments about expenditures, funding, alternatives, and priorities—again, matters that the judicial conservative would view as properly being within legislative purview. See also id. at 584 n.192 (advocating invalidation of land use policies disproportionately harming blacks unless doing so would "intrude seriously on [government's] fiscal or environmental interests").


88. See id. at 248. In determining that his "flexible" approach would not apply to regressive measures such as sales taxes or fees for public goods, Perry notes that "[t]he public fisc is not inexhaustible. An individual's interest in receiving, for nothing or at reduced cost, goods or services that carry a price tag . . . is not substantial." Perry, supra note 77, at 564. Yet surely such measures also disproportionately harm blacks because of past racial discrimination. Why does the "moral obligation" to redress those effects not extend to requiring lower (if not zero) fees for blacks? Cf. B. Bittker, The Case for Black Reparations 8–29 (1973) (arguing for a legislative policy of black reparations). Why does the obligation extend to invalidate land use policies that have a disproportionate impact on blacks, if the invalidation does not "intrude seriously" on government's
A true judicial conservative does not displace one legislature's choices by acting as if her court were another legislature with different priorities. Yet the Supreme Court's treatment of harmful impact in Wygant displaces present legislative preferences with values derived not from constitutional text or history, but from the personal values of justices who prefer traditional legislative judgments and business practices.\(^{89}\) Consistent distrust of judicial policymaking should counsel judges not to second guess a legislature's equitable balance not only when it pursues permissible objectives that disproportionately harm blacks, but also when it pursues permissible objectives that disproportionately harm whites.\(^ {90}\) From the perspective of a true judicial conservative, Wygant should have disclaimed an independent constitutional concern with discriminatory impact just as Davis did.

**B. Why Do Liberal Dissenters Play the Conservatives' Game?**

Rather than argue that traditional values such as seniority, low bids, or high scores should have no special protection against displacement by competing permissible state interests, Justice Marshall, joined

"fiscal or environmental interests?" Perry, supra note 77, at 584 n.192. Determining that the public fisc is more important when dealing with fees and taxes than with zoning, and that the individual interest in obtaining goods that require fees is less important than in obtaining goods that require zoning, is not a matter of inexorable logic. Cf. infra text at notes 112–115 (discussing Justice Stevens's argument that state has more discretion to tax and spend than to reallocate jobs toward redressing effects of past racial discrimination). These determinations require the exercise of practical and moral judgment, which depends on each individual's personal values. For the judicial conservative, these determinations are for legislatures, not courts.

89. Indeed, one might question the extent to which legal enforcement of "merit" criteria is traditional. An employee's legal rights against the employer's whim is a relatively recent development; at common law, the "employment at will" doctrine gave employees virtually no rights and employers virtually full discretion. See, e.g., Leonard, A New Common Law of Employment Termination, 66 N.C.L. Rev. 631, 632 (1988).

90. To the extent that constitutionalism seeks to ensure that public policy reflects well considered judgments about competing social concerns, see, e.g., A. Bickel, The Least Dangerous Branch 111–98 (1962) (advocating "passive virtues" in judicial review); Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013 (1984); Chang, supra note 37, at 766–74 (constitutionalism as aspiration for political self-constraint); Sunstein, Beyond the Republican Revival, 97 Yale L.J. 1539 (1988), there is reason to be more concerned about a Davis-type policy that disproportionately harms blacks than a Wygant-type policy that disproportionately harms whites. Davis-type policies are legion, while Wygant-type policies are selected for specific contexts. Davis-type policies govern by default, while Wygant-type policies require political energy toward making affirmative decisions against both inertia and the grain of tradition. Thus, if the Court wishes to ensure that legislatures pay adequate attention to the interests of those victimized by permissible policies that disproportionately harm the interests of different racial groups, there is more reason to interfere with a facially neutral policy that disproportionately harms blacks than with a racial classification that disproportionately harms whites. In short, at least toward ensuring considered judgment, there was more reason for the Court to intervene in Davis than in Wygant in an attempt to ensure "justice" for "innocent victims" of programs serving permissible state purposes.
by Justices Brennan and Blackmun, has argued that the goal of redressing the effects of past racial discrimination "is of sufficient importance to justify" displacing such traditional policies and the settled expectations of white employees.91 Thus, in concluding that the layoff provision in Wygant was permissible, Justice Marshall balanced interests and equities:

Article XII is a narrow provision because it allocates the impact of an unavoidable burden proportionately between two racial groups. It places no absolute burden or benefit on one race, and, within the confines of constant minority proportions, it preserves the hierarchy of seniority in the selection of individuals for layoff. . . . Moreover, Article XII does not use layoff protection as a tool for increasing minority representation; achievement of that goal is entrusted to the less severe hiring process. . . . In all of these important ways, Article XII metes out the hardship of layoffs in a manner that achieves its purpose with the smallest possible deviation from established norms.92

Justice Marshall implicitly acknowledged here that an affirmative action program could be invalid if, in his view, hardships are not equitably distributed.93 Thus, the liberal dissenters endorse the proposition that it is legitimate for members of the Court to make judgments about whether the effects of past racial discrimination have been "fairly" allocated.94

In one sense, this should hardly be surprising. These liberal Jus-

92. Id. at 309-10 (footnote omitted).
93. Justice Brennan pursued a similar course in the Metro Broadcasting challenge to a Federal Communications Commission policy preferring minority applicants for broadcasting licensing rights. He held that the burden on "innocent" nonminorities was "slight" and, therefore, constitutionally permissible. See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3026 (1990).
94. Indeed, Justice Marshall noted in Wygant that "[a]ny per se prohibition against layoff protection . . . must rest upon a premise that the tradition of basing layoff decisions on seniority is so fundamental that its modification can never be permitted." 476 U.S. at 307-08 (Marshall, J., dissenting). Rather than argue that there should be no special constitutional entitlement to the distribution of public goods based on these traditional criteria, however, he argued that "protection from layoff is not altogether unavailable as a tool for achieving legitimate societal goals." Id. at 309. Thus, in upholding a racial classification in the distribution of FCC broadcast licenses, the Court's liberal wing (Justices Brennan, Marshall, and Blackmun) along with two swing voters (Justices White and Stevens) explicitly stated that "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." Metro Broadcasting, 110 S. Ct. at 3026. In Metro Broadcasting, the Court found that "the burden on nonminorities is slight." Id. Thus, even for the liberals, harmful impact on "innocent white victims" is constitutionally relevant, apart from whether the government has acted because of impermissible purpose.
tices have never claimed to be judicial conservatives. They habitually make constitutional law by balancing social equities. Thus, it is not so much that the liberal dissenters are playing the conservatives' game as that the conservatives have, in the context of affirmative action, degenerated from judicial conservatives into conservative judicial activists.

While the conservatives' approach itself reflects ad hoc, personal rejections of majoritarian choices, the liberals simply have sought to uphold legislative determinations about how to allocate the effects of past racial discrimination among innocent parties. Thus, given the Court's determination in Davis that these questions of social equity are for legislators, not judges, the liberal wing of the Court need not have relied on their own assertions about racial equity to validate an affirmative action program. Rather than debate about "fairness," the liberal dissenters should have confronted the self-proclaimed "judicial conservatives" with the premises of judicial conservatism: Legislative discretion is the most fundamental of all constitutional values and should not be limited by a judge's personal preferences.

95. Liberal academics often follow a similar course. See, e.g., Rosenfeld, supra note 8, at 1770 (arguing equities of distributing harm among different innocent victims without distinguishing constitutional from philosophical argument); id. at 1790 (arguing that affirmative action designed to redress effects of past discrimination imposes acceptable burden on "innocent white victims").

96. Further evidence of this conservative judicial activism is provided by Professor Ortiz's examination of how the Court has allocated burdens of proof in resolving different claims of unconstitutional discrimination when the government acts through facially-neutral means. Ortiz asserts a pattern in which the Court has made it more difficult to prove unconstitutional motivation when the effect of the discrimination—the interest denied—involves "ordinary" social and economic goods, like jobs and housing," and easier to prove impermissible intent when the interest denied "consists of political, criminal, and educational rights." See Ortiz, supra note 9, at 1141. He explains the pattern:

In prescribing the burdens borne by the parties, the intent doctrine thus reflects both of the core features of liberalism: the aggressive protection of those rights and liberties that enable the individual to pursue her own vision of the good and the permissive supervision of government intervention in traditional economic and social markets.

Id. at 1142. The principle of legislative discretion when the private interests involved are economic—a principle evident in Davis itself—is clearly contravened in Wygant. Although the same economic interests are involved, and although the Court is especially deferential to legislative discretion when the equitable challenge is from the traditionally dispossessed, the Court's conservative Justices willingly intervene, based on their own views, when the equitable challenge is from those favored by the displaced economic criteria.


98. Ironically, Justice O'Connor faults Justice Brennan and the liberals for making subjective determinations about whether or not a racial classification imposes permissible burdens on "innocent white victims":

Untethered to narrowly confined remedial notions, "benign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens
As a frequent swing vote, Justice Stevens personifies a Court that easily displaces legislative policy with ad hoc judgments by each and every Justice. In *Wygant*, he gave his version of the relevant judicial question:

I believe that we should first ask whether the [government's] action advances the public interest . . . . If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disad-advantaged group.99

Clearly, this is not a judicial conservative's question.100 Identifying the "public interest" is a question not of constitutional interpretation, but of debatable social policy. Similarly, whether any permissibly motivated vision of the public interest justifies its adverse effects on groups is not a question for judicial conservatives—and not a question for Justices who adhere consistently to *Davis*—but for the electorate.101

The liberal Justices cannot change the instinctive values and policy preferences of their conservative colleagues. Debate about racial equity within the Court, therefore, cannot be productive.102 Calling for

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100. Justice Stevens's departure from *Davis* is even more clear in the following statement: "Even if there is a valid purpose to the race consciousness, however, the question that remains is whether that public purpose transcends the harm to the white teachers who are disadvantaged by the special preference the Board has given to its most recently hired minority teachers." Id. at 317.
101. That Justice Stevens—as well as every other member of the Court—is making precisely these political judgments in the name of "constitutional law" is highlighted by the pattern of his decisions. In his *Wygant* dissent, he described the burden on "innocent white victims" as being outweighed by the "public interest" served in insulating minority teachers with less seniority from layoffs. *Wygant*, 476 U.S. at 317–19 (Stevens, J., dissenting). In *Croson*, a goal of redressing the effects of past racial discrimination did not justify burdening white contractors with the loss of business to which their lower bids otherwise entitled them. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 733 (1989) (Stevens, J., concurring). And in *Metro Broadcasting*, he implicitly found that any adverse impact on whites who otherwise might have received broadcast licenses from the FCC was outweighed by "[t]he public interest in broadcast diversity." Indeed, Stevens did not even mention harmful impact as a potential counterweight to the "unquestionably legitimate" interest in broadcast diversity. *Metro Broadcasting*, 110 S. Ct. at 3028 (Stevens, J., concurring). These judgments are in no way guided by any notion of constitutional interpretation other than reference to a judge's personal values.
102. In *Metro Broadcasting*, for example, Justices Brennan, White, Marshall, Blackmun, and Stevens concluded that the burden on "nonminorities" was "slight." 110 S. Ct. at 3026. Justices O'Connor, Scalia, and Kennedy, however, determined that the challenged racial preferences imposed a "particularly significant burden" on "individu-
a consistent posture of judicial conservatism from those who claim to be judicial conservatives, however, might well be more effective. It is also the right thing to do.

IV. Toward a Judicial Conservative's Approach to Racial Classifications

This Part considers from the perspective of a judicial conservative methods for determining whether the government has adopted an affirmative action program because of impermissible racial animus, favoritism, or stereotype. Part A examines doctrines for identifying impermissible purposes developed in City of Richmond v. J.A. Croson Co. Part B proposes an alternative approach employing five principles that can serve the judicial conservative's dual goals of enforcing firmly established constitutional values while not intruding on valid democratic discretion.

A. Croson and Conservative Justices

In City of Richmond v. J.A. Croson Co.,¹⁰³ the Court's self-proclaimed judicial conservatives voted to invalidate a municipal policy requiring prime construction contractors to subcontract at least thirty percent of their contract dollars to "Minority Business Enterprises."¹⁰⁴ The primary basis for invalidation was a finding that Richmond had not pursued a constitutionally permissible purpose. Rather than holding that Richmond had acted because of impermissible racism, however, Justices Scalia, Kennedy, Stevens, and O'Connor each restrictively defined the circumstances under which the purpose of redressing the effects of past racial discrimination would be deemed permissible.

A search for impermissible purpose is consistent with Davis and its underlying judicial conservatism. The Croson Court's restrictive determination of when redressing the effects of past racial discrimination would be deemed a permissible purpose, however, is inconsistent with judicial conservatism. Indeed, as the following sections will suggest, the attitude underlying the Court's inconsistent treatment of harmful impact in Davis and Wygant also drives Croson's restrictive definition of when a purpose to redress the effects of past racial discrimination is permissible.

1. Justices Scalia, Kennedy, and Stevens: Racial Classifications May Be Used to Remedy Only Judicially Provable Incidents of Illegal State Action. — Justice Scalia recognized "only one circumstance in which the states may act by race to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful ra-

¹⁰⁴. Id. at 713–14.
cial classification." He elaborated:

[A] State may "undo the effects of past racial discrimination" in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment. In such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled. That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race.

In Justice Kennedy's view, putatively restating Justice Scalia's, "all preferences which are not necessary remedies to victims of unlawful discrimination" are impermissible.

A generalized goal of compensating for the effects of past racial discrimination does not necessarily reflect racial prejudice and, therefore, is not impermissible per se. Indeed, when a legislature employs a racial classification to redress broadly-spread effects of broadly-based racial discrimination by society-at-large, it chooses to award a public benefit to a black person not because of his race, but because of a certain probability that doing so can help to correct these continuing effects. Thus, to paraphrase Justice Scalia's statement above, the white job holder is being selected for disadvantage not because of his race, but because doing so, better than not doing so, can help redress the broadly-based and broadly-spread effects of past racial discrimination.

105. Id. at 737 (Scalia, J., concurring) (emphasis added).
106. Id. at 738 (Scalia, J., concurring).
107. Id. at 734 (Kennedy, J., concurring).
108. Based on statistics and history, communities might make empirical judgments about the likelihood that pervasive societal discrimination is responsible for the gross underrepresentation of blacks as builders, teachers, doctors, or lawyers. While these judgments might not rest on incontrovertible proof, they are based on credible evidence rather than unexamined stereotypes. Indeed, given inevitably limited knowledge, a general statistical and historical study might be the best that a policymaker realistically can do to identify the effects of past racial discrimination. See infra text at notes 133–138, 166–171.

Furthermore, communities might make a normative judgment that allowing the probable effects of past injustice to persist would be such a present injustice that traditional criteria for distributing social goods should be displaced. This judgment is not based on racial animus or favoritism. There is no sense that one race is better than another. Rather, one principle of social justice (a certain probability that by giving a public good to one individual rather than another, the effects of past racial discrimination will be ameliorated) displaces another principle of social justice (a certain probability that by giving that same public good to one individual rather than another, a building will be constructed more cheaply or a job will be done more effectively). Indeed, Justices Rehnquist, Scalia, O'Connor, White, and Stevens impose upon Richmond their own notion that the community's values are not sufficiently important either to displace traditional criteria for distributing public goods or to justify the disadvantage felt by white jobholders. See supra text at notes 61–90.
Under the Scalia-Kennedy position, however, legislatures are constitutionally prohibited from determining that redressing the broadly-spread effects of past racial discrimination by society-at-large is sufficiently important to justify displacing seniority, high scores, and low bids—themselves only imperfect predictors of job performance—with affirmative action programs. Only the specific effects of specific past illegal discrimination committed by a particular governmental jurisdiction are, for Justices Scalia and Kennedy, sufficiently important to warrant that jurisdiction's choice to adopt affirmative action programs to transfer benefits that "innocent white victims" would otherwise have received.

By so disabling legislatures from balancing equitable concerns as they see fit, the Scalia-Kennedy position imposes as governing law a judge's personal views about the fairness of individual benefits gained from otherwise permissible competing public objectives. A Justice who weighs the equities of harmful impact underlying otherwise permissible legislative goals does precisely what the Court refused to do in Davis: "judicial legislation" antithetical to judicial conservatism. Thus, the

109. Indeed, to the extent that the Scalia-Kennedy position views racial classifications as valid only when used to provide remedies for victims of illegal discrimination, it holds that seniority, high scores, and low bids may never be displaced as criteria for distributing public goods. Only when the white job holder would not have gotten or retained her job but for illegal racial discrimination—and, therefore, probably was not the most senior employee, the high test scorer, or low price bidder—may she be disadvantaged for the sake of the state's remedial policies. Otherwise, the white job holder attained her position "fairly," under traditional selection criteria, and may not be harmed by a less particularized effort to redress the effects of past racial discrimination.

110. See supra text at notes 61-90. Indeed, in another context, Justice Scalia recently expressed the judicial conservative's discomfort with balancing the importance of permissible state objectives against a harmful impact on religious practice in Employment Div., Dep't of Hum. Res. v. Smith, 110 S. Ct. 1595 (1990). He speculated that this balancing could unleash a "parade of horribles" similar to those feared by Justice White in Davis. See supra notes 23-25 and accompanying text. Scalia said:

the purpose of our parade ... is not to suggest that courts would necessarily permit harmful exemptions from these laws [burdening religious practice] (though they might), but to suggest that courts would constantly be in the business of determining whether the 'severe impact' of various laws on religious practice ... suffices to permit us to confer an exemption. It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

Smith, 110 S. Ct. at 1606 n.5. Thus, Scalia concluded that a free exercise claim is established only if a claimant can prove an impermissible discriminatory motive. See id. at 1600; cf. Sherwin, Rhetorical Pluralism and the Discourse Ideal: Countering Division of Employment v. Smith, A Parable of Pagans, Politics, and Majoritarian Rule, 85 Nw. U.L. Rev. 388, 417-39 (discussing implications of Court's refusal to balance in Smith). Thus, for a well-established textual right to religious free exercise, Justice Scalia would ignore impact. For a controversial, nontextual right to jobs and other public goods based on traditional selection criteria, Justice Scalia views impact as potentially dispositive, and would balance his perception of the competing equities.
Scalia-Kennedy position in *Croson* reflects the same attitude of conservative judicial activism underlying the Court's inconsistent treatment of harmful impact in *Davis* and *Wygant*—an impulse to protect traditional criteria for the distribution of public goods.

Furthermore, while the Scalia-Kennedy position is appropriate for limiting federal judicial authority—a federal court may redistribute public goods only upon a finding of illegality—considerations circumscribing judicial authority have no bearing on legislative discretion to define criteria for entitlement to public goods. Indeed, because principles limiting the remedial authority of federal courts have been designed to preserve legislative discretion, their application to limit legislative discretion could hardly be more perverse.111

Justice Stevens's view of when governments may use racial classifications to distribute public goods is only somewhat broader. In his view, while a state may freely "appropriate funds to compensate victims of past governmental misconduct for which there is no judicial remedy . . . [, s]uch a voluntary decision by a public body is . . . quite different from a decision to require one private party to compensate another for an unproven injury."112 Thus, the state may tax individuals "to provide direct monetary compensation to any minority-business enterprise that the city might have injured in the past,"113 even when there is not sufficient proof of injury from past racial discrimination to support a judicial remedy. The state may not, however, award a job to which another is "entitled" under traditional selection criteria, unless there is sufficient proof of injury from past racial discrimination to support a judicial remedy.114

Justice Stevens apparently believes that losing money from taxation is less harmful than losing the benefits of traditional criteria for distributing public goods such as jobs or public contracts, and that the Court should evaluate whether the state's permissible objectives in redressing the effects of past racial discrimination are sufficiently important to justify whatever burdens it imposes. Thus, Stevens would have the Court do precisely what it refused to do in *Davis*: measure the significance of harm to individuals caused by otherwise permissible objectives. By concluding that states have more discretion to redefine the criteria for entitlement to tax money than to redefine the criteria for entitlement to jobs, Stevens presumably believes that states have more discretion to redefine the criteria for distribution of public goods than to do so in other areas.

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111. See infra notes 129-130 and accompanying text.
112. *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706, 731 n.3 (1989) (Stevens, J., concurring). This is a marked change from his position in *Wygant*:

The fact that the issue arises in a layoff context, rather than a hiring context, has no bearing on the equal protection question. . . . [It is] wholly unpersuasive . . . that a teacher who has been working for a few years suffers greater harm when he is laid off than the harm suffered by an unemployed teacher who is refused a job for which he is qualified.

113. *Croson*, 109 S. Ct. at 731 n.3 (Stevens, J., concurring).
114. Id.
entitlement to other public goods, Justice Stevens becomes a conservative judicial activist, according special constitutional protection to traditional notions of equity and "merit." 115

2. Justice O'Connor: While States Are Not Restricted to Redressing Judicially Provable Illegal Incidents, They May Seek to Redress Only the Proven Effects of Identified Discrimination Within Their Own Jurisdictions. — Unlike Justices Scalia and Kennedy, Justice O'Connor believes that a state may seek to redress the effects of public and private discrimination. Nevertheless, she erects two particularly significant restrictions: a governmental body may seek to redress the effects of past racial discrimination, first, only if the discrimination occurred "within its own legislative jurisdiction," 116 and, second, only if it "identifies" both the past "discrimination with the particularity required by the Fourteenth Amendment," 117 and the continuing effects of that discrimination. 118 Reliance on statistical disparities between the proportion of blacks in the jurisdiction's general population and the proportion of blacks in a given industry in that jurisdiction does not satisfy these requirements of particularity. 119

In Fullilove v. Klutznick, 120 the Court upheld a congressional statute almost identical to that struck down in Croson without reference to any such restrictions on Congress's discretion. Based on Fullilove, Richmond argued in Croson that "[i]t would be a perversion of federalism to hold that the federal government has a compelling interest in remedy-

115. In Wygant, Justice Stevens also explicitly formulated an inquiry requiring Justices to make precisely the policy judgments that Davis held should not be made by courts: "[W]e should first ask whether the Board's action advances the public interest. . . . If so, I believe we should consider whether that public interest, and the manner in which it is pursued, justifies any adverse effects on the disadvantaged group." 476 U.S. at 313 (Stevens, J., concurring).

116. Croson, 109 S. Ct. at 720. For another arbitrary restriction, see id. at 722–23 (states may redress only effects of past discrimination within the specific business context addressed by the program); see also Wygant, 476 U.S. at 288 ("governmental agency's interest in remedying 'societal' discrimination . . . not traceable to its own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny"). It is not unreasonable, however, to suppose that past racial discrimination in, for example, public education has continuing effects in many specific employment contexts. Indeed, it is reasonable to suppose that blacks disproportionately failed "Test 21" in Washington, D.C. because they had been educated in segregated schools declared unconstitutional just twenty-two years before Davis was decided. See Bolling v. Sharpe, 347 U.S. 497, 498 (1954). Because the District of Columbia police department did not run the city's public schools, however, Justice O'Connor would prohibit any consideration of educational discrimination and its effects in determining the permissibility of affirmative action in police hiring.

117. Croson, 109 S. Ct. at 720.

118. Id. at 724 (suggesting that speculation about effects of even identified past racial discrimination is inadequate to support a racial classification adopted to redress effects of past racial discrimination).

119. Id.

120. 448 U.S. 448 (1980).
ing the effects of racial discrimination in its own public works program, but a city government does not.”

Justice O'Connor responded that under section five of the fourteenth amendment, “Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment.” Furthermore, “[s]ection 1 of the Fourteenth Amendment is an explicit constraint on state power.”

But no Supreme Court Justice has argued that Congress has more discretion to violate section one prohibitions than do the states. Indeed, the Court long has held that section one limitations on state discretion are applicable to the federal government through the fifth amendment’s due process clause. Furthermore, it would be difficult to argue that section five of the fourteenth amendment was intended to give Congress broader discretion than the states have to act consistently with section one. Section five originally was adopted because of doubts rooted in principles of federalism about whether Congress

122. Croson, 109 S. Ct. at 719.
123. Id. Justice Scalia made a similar point in his concurring opinion: “[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by [section five of the Fourteenth Amendment]—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed.” Id. at 736 (Scalia, J., concurring). Although one could devote an entire article to the implications of § 1 for federal power or the implications of § 5 for state power, a brief discussion should be sufficient to suggest that Justice O'Connor's view of the matter is actually based on disagreement with the policy of affirmative action rather than on interpretive premises consistent with judicial conservatism.

124. See Katzenbach v. Morgan, 384 U.S. 641 (1966). There Justice Brennan, for the Court, insisted that “§ 5 does not grant Congress . . . discretion ' . . . to dilute equal protection and due process decisions of this Court.' We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.” Id. at 651 n.10. Indeed, in Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997 (1990), Justice O'Connor herself asserted in dissent that the “Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications.” Id. at 3030 (O'Connor, J., dissenting). Her aim in Metro Broadcasting, however, was to narrow Congress's § 5 discretion to coincide with the states' discretion found by the Court in Wygant and Croson. See infra notes 139-143 and accompanying text.
126. Justice Marshall insisted in Croson that § 5 of the fourteenth amendment has never been interpreted “to pre-empt or limit state police power to undertake race-conscious remedial measures.” Croson, 109 S. Ct. at 755 (Marshall, J., dissenting). Justice Brennan made a similar point in Bakke: “[T]here is] no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 368 (1978) (Brennan, J., concurring in part and dissenting in part).
had authority to enact the Civil Rights Act of 1866, a statute designed to protect blacks from racist discrimination. No one suggested that state provisions similar to the Civil Rights Act would violate section one. Thus, if neither Congress nor any state can violate section one prohibitions, and if section five was adopted to ease doubts about Congress's authority to address civil rights issues consistently with section one—when states always possessed such discretion under their general police powers—why should Congress be free to redress the effects of racial discrimination whether caused in Virginia, Alabama, or Arkansas, while Virginia is not free to redress such effects, felt in Virginia, unless they were (provably) caused in Virginia?

The answer cannot be that if Virginia seeks to redress effects of past racial discrimination felt in Virginia, but caused, in part, by Alabama and Arkansas, Virginia necessarily must be acting because of impermissible racial prejudice. One locality might feel the effects of another's wrongdoing—for example, pollution—determine that it cannot live with those effects, and choose in good faith to deal with them. While a federal court may order Virginia to redress only those effects of its own past wrongdoing, this limit on federal judicial authority rests on concerns for federalism and legislative discretion. The idea that one state has no legitimate concern about the effects of racial discrimination within its borders if caused by other states—that a federal court, in the name of the Constitution, may order a state not to redress a condition felt within that state, but caused in part by other states—stands these premises of federalism and legislative discretion on their heads.

In her second significant restriction on state discretion, Justice


128. One might justifiably impose a different burden of proof on localities, states, or Congress, if one believes that there are differing degrees of likelihood that each acted because of impermissible racial animus, favoritism, or stereotype. Justice O'Connor touched upon this approach in 


130. The convergence—more precisely, confusion—of principles appropriate for circumscribing federal judicial discretion in erroneously limiting local legislative discre-
O'Connor prohibits states and localities from relying on a statistical disparity between the proportion of blacks in a given profession and the proportion of blacks in the general population as a basis for inferring the effects of identified past racial discrimination. She characterizes reliance on such statistical disparity to prove the effects of identified past racial discrimination as "sheer speculation" that does not sufficiently mitigate the chance that "a racial classification is merely the product of unthinking stereotypes or a form of racial politics."

Yet given real limits on information available to prove a causal connection between past discrimination—even identified past discrimination—and present effects, one inevitably must speculate. Even if one identifies long standing public and private policies of racial discrimination against blacks, and traces the socio-economic condition of blacks...
through time, one still cannot prove causation. Given a substantial predicate of identified past discrimination, however, it is not unreasonable to examine the proportion of society-at-large that chooses to become builders, teachers, doctors, or lawyers, and to suppose that but for past racial discrimination, blacks would choose to enter these fields in similar numbers.

Furthermore, positing the absence of causation is speculative. Justice O'Connor herself speculates that perhaps blacks simply do not want to be doctors, teachers, builders, or broadcasters, and that, rather than past racial discrimination, explains their disproportionate absence from these fields. This speculation seems far less supportable than supposing a causal connection between present disadvantage and identified past discrimination. Indeed, one might question whether Justice O'Connor's speculation that "blacks may be disproportionately attracted to industries other than construction" (or law, medicine, education, or broadcasting) is more likely tainted by constitutionally impermissible racism than is a legislature's speculation that blacks would choose to become doctors, lawyers, teachers, builders, and broadcasters to the same extent that others do, but for identified past racial discrimination.

Thus, in distinguishing Croson from Fullilove, Justice O'Connor apparently believes that reliance on statistical disparities as a basis for identifying the effects of past racial discrimination is "sheer speculation" (and unconstitutional) when done by states, but sufficiently informed judgment (and permissible) when done by the federal government. The basis for her restrictive view of state discretion is

134. See id.
135. See infra note 137.
136. See Croson, 109 S. Ct. at 726 ("Blacks may be disproportionately attracted to industries other than construction.").
137. Justice O'Connor suggests that "[b]lacks may be disproportionately attracted to industries" other than those in which they are underrepresented, id., as a possible explanation that would necessarily supplant a supposed causal connection between present underrepresentation and past discrimination. Properly viewed, however, her suggestion merely begs the questions: (i) what does it mean to say that blacks are "disproportionately attracted" to other fields, and (ii) if they are, why might blacks be "disproportionately attracted" to fields other than those that society most esteems and best rewards? The "choice" to enter other fields might be in response to tangible impediments caused by past racial discrimination and, therefore, is not choice—at least not meaningful choice—at all. Furthermore, "choice" might be constrained by an individual's perception of limited personal options—a perception conditioned by the historical absence of blacks in a given field. See, e.g., Brown v. Board of Educ., 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."). Either way, the notion that blacks might be "disproportionately attracted to other industries" reflects, rather than repudiates, the effects of past racial discrimination.
138. Croson, 109 S. Ct. at 726.
139. See infra note 162.
suggested by the following statement: "Defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."\(^{140}\) In other words, states would be too free to displace traditional (and nonracist) with nontraditional (yet nonracist) criteria for distributing public goods. Perhaps, in Justice O'Connor's view, Congress may make such judgments, but to allow states to do so as well would be simply too much.

Indeed, O'Connor has since intimated that allowing Congress to make these judgments is also simply too much. In \textit{Metro Broadcasting}, she suggested that Congress's discretion under section five of the fourteenth amendment might be just as restricted as state discretion has been deemed to be under section one. Although Justice O'Connor repeated the \textit{Croson} proposition that "Congress has considerable latitude, presenting special concerns for judicial review, when it exercises its 'unique remedial powers . . . under § 5 of the fourteenth amendment,'"\(^{141}\) she also stated that "[t]he Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of racial classifications."\(^{142}\) Thus, her judgment restricting state—and now, perhaps, federal—discretion seems to be informed by the same preference for traditional distributional criteria underlying the inconsistent treatment of harmful impact in \textit{Davis} and \textit{Wygant}.\(^{143}\)

\(^{140}\) \textit{Croson}, 109 S. Ct. at 724 (emphasis added). In \textit{Metro Broadcasting}, however, Justice O'Connor acknowledged that the "shortfall" between the "demographic representation" of blacks and their control of broadcast concerns "may be traced in part to the discrimination and the patterns of exclusion that have widely affected our society." \textit{Metro Broadcasting, Inc. v. FCC}, 110 S. Ct. 2997, 3033 (1990) (O'Connor, J., dissenting). Because the program challenged there was justified not as a remedial measure, but as a device to promote broadcast "diversity," she did not need to indicate whether reliance on such general disparity would have constituted "identified" discrimination and, therefore, a permissible subject of congressional concern.

\(^{141}\) \textit{Metro Broadcasting}, 110 S. Ct. at 3030 (O'Connor, J., dissenting).

\(^{142}\) Id.

\(^{143}\) At the core of Justice O'Connor's plurality opinion in \textit{Croson} was the following statement:

\textit{[T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.} \textit{Croson}, 109 S. Ct. at 721. This statement contains two distinct ideas: First, disfavored, but permissible, evils inherent in racial classifications may be outweighed by sufficiently important state interests. To the extent that part of what makes a racial classification "suspect" is its impact on "innocent white victims," as she indicates in \textit{Metro Broadcasting}, 110 S. Ct. at 3043 (O'Connor, J., dissenting), Justice O'Connor has embraced an approach to racial classifications inconsistent with \textit{Washington v. Davis}. The true judicial conservative would reject this balancing inquiry. Second, since the state may not act because of racial prejudice, the Court's task is to determine whether the government has, in fact, acted because of racial prejudice. This is entirely consistent
Concern for the "innocent white victims" of affirmative action addressed explicitly in *Wygant* as a basis for invalidating an affirmative action program is implicitly reflected in the conditions that Justices Scalia, Kennedy, Stevens, and O'Connor develop in *Croson* for restrictively defining when the purpose of redressing the effects of past racial discrimination is permissible. These conditions have nothing to do with determining whether the government acted because of impermissible racial animus, favoritism, or stereotype. They have everything to do with whether individual Justices view the state's redefinition of policies allocating public goods as wise or "fair." Political conservatism, rather than judicial conservatism, pervades the Court's restrictions on legislative discretion to redress the effects of past racial discrimination.

**B. Focusing on a Search for Racial Animus, Favoritism, and Stereotype**

I do not suggest that states and localities should be free to use racial classifications that benefit traditional victims of racial prejudice, however, and to whatever extent, they wish. Thus, I suggest neither that each program the Court has invalidated should have been upheld, nor, indeed, that each program the Court has upheld should have been upheld.\(^{144}\) I do suggest, however, that localities, states, and the federal government should be free to enact affirmative action programs only if—and whenever—their policies were not adopted because of racial animus, favoritism, or stereotype.\(^{145}\)

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\(^{144}\) See infra notes 158-165 and accompanying text.

\(^{145}\) Given this substantive constitutional principle, strict scrutiny, middle tier scrutiny, rationality review, or any other judicial "test" would involve a search for impermissible racial prejudice. Justice O'Connor was surely right when she said: "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 109 S. Ct. at 725. This is not to say, however, that a court should mechanically examine all racial classifications as if they were indistinguishable. Classifications that disadvantage traditional victims of prejudice, see, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (Murphy, J., dissenting), are more likely to have been motivated by racial animus than are classifications that benefit these traditional victims—which are more likely to have been motivated by impermissible racial favoritism, or stereotype. See also Ely, supra note 41, at 734-36 (discussing the situation in which a majority takes steps to benefit the minority). Whatever label the Court gives to its "test," its analysis should focus on the search for impermissible prejudice, and be sensitive to the implications of context.

Employing different standards of review—or burdens of proof—depending on context (e.g., whether whites or blacks are disadvantaged by a racial classification) does not violate Justice Stevens's notion that "[t]here is only one equal protection clause." *Craig v. Boren*, 429 U.S. 190, 211 (1976) (Stevens, J., concurring). Different standards of review do not necessarily provide one person or group with more protection than others. Rather, if there is a different likelihood in different contexts that the government has
This principle is entirely consistent with a true judicial conservative's respect for legislative discretion and requirement of a firm basis for finding constitutionally mandated values. A constitutional prohibition of any governmental policy motivated by racial animus or favoritism—value judgments about race per se—not only is rooted in the original understanding of the equal protection clause, but reflects a present consensus in national public discourse, between Congress acted because of impermissible racial prejudice, a different burden of proof might well be warranted in those contexts. Indeed, Justice Stevens would not suggest that facially neutral actions, see, e.g., Washington v. Davis, 426 U.S. 229, 246 (1976), should be subject to the same presumption of impermissible prejudice as a racial classification, see, e.g., Korematsu, 323 U.S. at 216; see infra note 153. Despite different burdens of proving unconstitutionality in these two contexts, the same constitutional value is at issue: the government may not pursue impermissible purposes reflecting racism.

146. Cf. Bickel, supra note 127, at 56-65 (fourteenth amendment originally was intended to proscribe state mandated racial discrimination only in certain contexts, and left states free to use racial classifications for certain racist purposes). A principle that the equal protection clause prohibits all governmental action motivated by racial prejudice, rather than just those actions envisioned by the original understanding of the equal protection clause, far better reflects political morality today. See Chang, supra note 37, at 841-55. Thus, only the most committed originalist would insist on interpreting the fourteenth amendment today as permitting, for example, racial segregation mandated by states and localities. See, e.g., R. Berger, supra note 6, at 166-92.

But one need not be a rigid originalist to be a judicial conservative. The essence of judicial conservatism—as indicated in President Bush's assertion that judges must not "legislate," but "interpret"—is judicial refusal to intrude on legislative choices except to enforce public values established to a point approaching national consensus. Judicial conservatives might choose to find this consensus by referring to original intent, or other evidence of prevailing public values. See supra note 6. Depending on just how willing they are to risk intruding erroneously on legislative discretion, see infra text at notes 176-180, judicial conservatives who go beyond originalism might view public values established to a point approaching national consensus—or "conventional morality," see supra note 71—as a necessary, but not sufficient, basis for judicial action. Thus, one might require particularly strong evidence of consensus, and one might also view even a proven consensus as judicially irrelevant unless related to values underlying specific constitutional provisions. See supra note 69. For further analysis of this version of constitutional law, see Chang, supra note 37, at 799-805, 819-23.

There is surely consensus today that at least the original understanding of the equal protection clause should be enforced. Beyond this, there is today a national consensus, indicated by congressional and state legislation prohibiting racial discrimination, see infra notes 155-156 and accompanying text, that much more than this original understanding should be enforced in prohibiting policies motivated by racism. Thus, judicial conservatives today can be comfortable with a doctrine that the equal protection clause prohibits all state action undertaken because of racial prejudice. Only judicial conservatives who believe that there is a similar national consensus against affirmative action—as well as an antifederalism consensus that dissenting localities should be prohibited from pursuing their own preferences for affirmative action—can hope to justify restricting legislative discretion to determine whether and how to redress effects of past racial discrimination. See supra note 71. The prevalence of affirmative action programs adopted by states and localities throughout the nation, however, belies this proposition. For discussion of the relationship between originalism and "color-blindness," see supra note 37.

147. The Republican National Committee's repudiation of former Klansman David
and the Executive,\textsuperscript{148} and within the Supreme Court itself.\textsuperscript{149} The normative proposition is clear and persuasive: no person should be viewed as better or worse than another, no person should be viewed as unfit for one life plan or another, simply because of her race.

A constitutional prohibition of governmental policy devised because of racial stereotype also should not be problematic for the judicial conservative. This constitutional principle merely would prohibit a legislature from acting based on unexamined factual premises that race correlates with certain characteristics relevant to achieving its permissible objectives—that is, objectives that do not reflect racial animus or favoritism. Thus, a proscription against racial stereotype can be viewed as promajoritarian. By requiring legislatures to examine their factual premises more carefully than they otherwise might, this proscription can help legislatures pursue their own permissible objectives more effectively than they otherwise might.\textsuperscript{150}

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\item Duke is but one example. Indeed, even “hardliner” conservative Republicans reject Duke. “[T]hey fear that if one of their own does not challenge Bush [in 1992], former Klansman David Duke will try to become the right-wing standard-bearer.” Ellis, Watch Your Back, George, Time, Dec. 10, 1990, at 23.
\item Congress and the executive branch have joined to create numerous civil rights statutes designed to prohibit racist choices by both public decision makers, see, e.g., Katzenbach v. Morgan, 384 U.S. 641, 652-53 (1966) (upholding § 4(e) of the Voting Rights Act of 1965 and its application in preempting state restriction on voting rights apparently motivated by racial animus), and private decision makers, see, e.g., Katzenbach v. McClung, 379 U.S. 294, 303-04 (1964) (upholding Title II of Civil Rights Act of 1964 and its application to prohibit racist exclusion of patrons from restaurants engaged in interstate commerce).
\item Justice O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, has suggested that motivation by racial animus or favoritism is unconstitutional. See Metro Broadcasting, Inc. v. FCC, 110 S. Ct. 2997, 3032 (1990) (O'Connor, J., dissenting) (quoting City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 722 (1989)) (“absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”). Justice Powell has declared that “[p]referring members of any one group for no reason other than race or ethnic origin” is “invalid.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978) (plurality opinion). In Bakke, Justice Brennan, joined by Justices White, Marshall, and Blackmun, declared that racial classifications “drawn on the presumption that one race is inferior to another or . . . [that] put the weight of government behind racial hatred and separatism . . . are invalid without more.” Id. at 357-58 (Brennan, J., concurring in the judgment in part and dissenting in part).
\item See Linde, Due Process of Lawmaking, 55 Neb. L. Rev. 197, 222–24 (1976) (advocating ‘reconception of “rationality review” as judicial scrutiny of lawmaking processes toward promoting better legislative accountability). This suggests another benefit for judicial conservatives from a purpose-oriented definition of unconstitutionality: A judicial finding that a given program was adopted because of impermissible prejudice allows a legislature to reenact the program if motivated by permissible considerations. See J. Ely, supra note 9, at 138–39 (“sometimes an action invalidated because it was taken for unconstitutional reasons will be able to be retaken, this time putatively on legitimate grounds the courts will have to credit”—but “only where there
Assuming that a proscription of governmental policies motivated by racial animus, favoritism, or stereotype properly describes the substantive essence of unconstitutional racial discrimination for a judicial conservative, the task remains to define methods of judicial inquiry—essentially, proof rules—by which a court should determine whether a challenged policy was so motivated. In the following sections, I suggest five principles for judicial inquiry that not only are tailored to determining whether a challenged affirmative action program employing racial classification was enacted because of impermissible racism, but also are consistent with a judicial conservative's healthy respect for legislative judgment.

1. The Government Bears the Burden of Proof. — In applying "strict scrutiny" to racial classifications, the Court places the burden of proof on the state to rebut a presumption of unconstitutionality.151 What the state must prove depends on what constitutional proscription presumptively has been violated.152 When that relevant proscription concerns

exists a plausible legitimate explanation") (relying upon Palmer v. Thompson, 403 U.S. 217, 224-25 (1971)). Thus, after determining that the affirmative action program in Metro Broadcasting was adopted because of impermissible stereotype toward a goal of broadcast diversity, Justice O'Connor noted that "[t]he FCC or Congress may yet conclude after suitable examination that narrowly tailored race-conscious measures are required to remedy discrimination that may be identified in the allocation of broadcasting licenses. Such measures are clearly within the Government's power." Metro Broadcasting, 110 S. Ct. at 3033 (O'Connor, J., dissenting). In contrast, an approach that balances interests of "innocent white victims" of affirmative action against the interests of "innocent black victims" of the effects of past racial discrimination as a judicial question leaves legislatures precluded from making certain value judgments in accommodating permissible competing considerations.

151. Members of the Court have argued at length about whether affirmative action programs should be subjected to "strict scrutiny" or "middle tier scrutiny." See, e.g., Bakke, 438 U.S. at 287-305 (urging "strict scrutiny"); id. at 356-62 (Brennan, J., concurring in the judgment in part and dissenting in part) (urging "middle-tier scrutiny"). But these labels are meaningless if one does not clearly identify, and focus on, relevant substantive constitutional values—the norms at issue that warrant protection. "Strict scrutiny" that searches for impermissible prejudice requires quite a different analysis from "strict scrutiny" that seeks to protect the interests of "innocent white victims." The former seeks interpretive fact, such as legislative intent, while the latter seeks judgments of "fairness" through ad hoc balancing. See infra note 152. Indeed, by failing to tailor his analysis precisely even to the values he deemed constitutionally relevant, Justice Powell seemed to apply different standards in his scrutiny of the challenged program in Bakke when examining different asserted state interests. See infra note 163. Justice Powell also claimed to apply "strict scrutiny" in Fullilove v. Klutznick, 448 U.S. 448, 498 (1980) (Powell, J., concurring), but was far more deferential to the legislature in that case than he was in Bakke. See infra note 163.

152. When the Court's conservative Justices have expressed concern about "fairness" to "innocent white victims," they have placed the burden on the states to rebut a presumption of "unfairness." Thus, true judicial conservatism is twice offended because the problems of "judicial legislation" inherent in a Justice's balancing of competing permissible equities, see supra text accompanying notes 74-76, 109-110, are compounded by a doctrine that gives presumptively greater credence to that Justice's personal balance.
public policy motivated by racial animus, favoritism, or stereotype, strict scrutiny should mean that the government must rebut a presumption that it acted because of racial animus, favoritism, or stereotype.153

2. The State Must Assert a Purpose that Does Not Reflect Racial Animus, Favoritism, or Stereotype. — In order to rebut a presumption that it has employed a racial classification because of racial animus, favoritism, or stereotype, the state must, at a minimum, assert purposes that do not themselves reflect racist values.154 In Bakke, for example, the California Board of Regents asserted that one of its purposes was to ensure a certain proportion of racial and ethnic groups in the medical school. Justice Powell rejected this purpose as itself reflecting impermissible valuations of race per se:

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.155

153. Justices Stevens and O'Connor have expressed this rationale for viewing racial classifications as presumptively unconstitutional: "Because racial characteristics so seldom provide a relevant basis for disparate treatment, ... it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate." Metro Broadcasting, 110 S. Ct. at 3029-30 (O'Connor, J., dissenting) (quoting Fullilove, 448 U.S. at 533-35 (Stevens, J., dissenting) (footnotes omitted).

It makes sense to view racial classifications as presumptively unconstitutional for several reasons. First, as a matter of history, at least before affirmative action became politically viable, racial classifications have been instruments of racial animus. See, e.g., Plessy v. Ferguson, 163 U.S. 537, 543-45 (1896); Brown v. Board of Educ., 347 U.S. 483, 493-94 (1954). Second, as a matter of logic, there are few purposes to which race bears a reasonable relationship that do not reflect racial animus or favoritism. See Fullilove, 448 U.S. at 533-35 (Stevens, J., dissenting). Third, when thinking in explicitly racial terms, people tend to make sloppy generalizations—in other words, they stereotype. See G. Allport, The Nature of Prejudice 187-99 (1958); Ely, supra note 41, at 732-33. Thus, assuming that it is equally problematic to intrude erroneously on valid legislative discretion as it is to uphold erroneously an impermissible policy motivated by racial prejudice, see infra text at notes 176-178, the burden of proof for this question of fact (legislative motivation) should rest on a judgment about probability—that is, the question should be whether, when using a racial classification, a government more likely than not has acted because of racial prejudice.

154. Justice O'Connor has made a similar point with respect to gender discrimination. "Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 725 (1982).

155. Bakke, 438 U.S. at 307 (emphasis added). Similarly, in a challenge to its antimiscegenation law, Virginia asserted a goal of "preserv[ing] 'racial integrity.'" Loving v. Virginia, 388 U.S. 1, 11 n.11 (1967) (Stewart, J., concurring). Justice Stewart, concurring, noted that this goal reflected a purpose "to maintain White Supremacy" that was not permissible, but "invidious." Id. at 11.
Governments frequently assert two other purposes served by their affirmative action programs: to redress the effects of past racial discrimination and to promote diversity.\(^{156}\) Asserting a desire to redress the effects of past racial discrimination does not on its face reflect a view that one race is better or worse than another; rather, it suggests a judgment that past social practices were wrong, and that the effects of past wrongs should not be allowed to persist. Similarly, asserting a desire to ensure a diversity of viewpoints in an educational or political setting does not on its face suggest impermissible racial animus or favoritism. Thus, as asserted, these are permissible purposes.\(^{157}\) Given a presumption of unconstitutionality, however, mere assertion should not be enough. A court should go further to determine that the asserted permissible purpose truly underlies the challenged racial classification, and that the legislature did not choose racial means to achieve its permissible ends because of racial stereotype.

3. **Before Having Enacted Its Challenged Program, the Federal or State Policymaker Must Have Examined and Articulated the Relationship Between its Non-Racist Purpose and its Racially Specific Selection Criteria.** — Requiring the state to identify the past discrimination whose effects it seeks to redress is a sensible way of mitigating the possibility that impermissible racial stereotype tainted a racial classification that was intended to serve permissible purposes. Indeed, Justice Stevens has suggested that judicial review of racial classifications "should include a consideration of the procedural character of the [legislature's] decisionmaking process."\(^{158}\) Specifically, "[w]hen Congress creates a special preference, or a special disability, for a class of persons, it should identify the characteristic that justifies the special treatment. When the classification is defined in racial terms, I believe that such particular identification is imperative."\(^{159}\) Underlying his desire for legislative findings is concern about stereotype. He elaborated:

The risk that habitual attitudes toward classes of persons, rather than analysis of the relevant characteristics of the class, will serve as a basis for a legislative classification is present when benefits are distributed as well as when burdens are imposed. In the past, traditional attitudes too often provided the

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\(^{156}\) See *Metro Broadcasting*, 110 S. Ct. at 3004; *Bakke*, 438 U.S. at 306.

\(^{157}\) In *Metro Broadcasting*, Justice O'Connor again displays a balancing mentality by arguing that the goal of redressing past racial discrimination is the only "compelling" interest that can justify the use of racial classifications. *Metro Broadcasting*, 110 S. Ct. at 3034 (O'Connor, J., dissenting). While promoting broadcast diversity is permissible, and perhaps even "important," it is "insufficiently weighty" and, therefore, not "compelling." Id.; see also id. at 3036 ("Even if an interest is determined to be legitimate in one context, it does not suddenly become important enough to justify distinctions based on race."). This is yet another example of a conservative judicial activism that is willing to strike arbitrary balances among competing permissible considerations different from those struck by legislatures. See supra text at notes 89–90.


\(^{159}\) Id. at 553.
only explanation for discrimination against women, aliens, illegitimates, and black citizens. Today there is a danger that awareness of past injustice will lead to automatic acceptance of new classifications that are not in fact justified by attributes characteristic of the class as a whole.\textsuperscript{160}

Indeed, if legislative decision makers were required to make formal findings of fact about past racial discrimination—e.g., which groups have suffered, the generations during which each group has suffered, the contexts and manner in which each group has suffered—they would generate a relatively firm foundation for drawing reasonable conclusions about the continuing consequences of that past racial discrimination. Thus, in \textit{Bakke}, for example, if California had made findings of fact about past racial discrimination, it might have decided not to prefer “Blacks,” “Chicanos,” “Asians,” and “American Indians” as it did,\textsuperscript{161} but perhaps, to exclude some, to include others, to refine the criteria for inclusion, or to identify priorities for categories of inclusion. Similarly, in \textit{Fullilove}, had Congress made meaningful findings of fact relevant to its asserted permissible remedial purposes, it might have decided to define criteria of inclusion other than “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”\textsuperscript{162}

\textsuperscript{160} Id. at 552-53.

Although he has not suggested that governments make findings of fact before adopting an affirmative action program, Justice Marshall would require that the “government adduce evidence that, taken as a whole, is sufficient to support its claimed interest and to dispel the natural concern that it acted out of mere ‘paternalistic stereotyping, not on a careful consideration of modern social conditions.’” City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 745 (1989) (Marshall, J., dissenting). Yet Justice Marshall was satisfied with Richmond’s fact finding method—even though it amounted to little more than reliance on the congressional “fact finding” that had preceded passage of the affirmative action program challenged in \textit{Fullilove}. See infra note 163.

\textsuperscript{161} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 274 (1978) (plurality opinion).

\textsuperscript{162} \textit{Fullilove}, 448 U.S. at 454. The factual “findings” implicitly held adequate in \textit{Fullilove} were little more than conclusory assertions that, properly viewed, could not help to rebut a presumption that Congress acted because of unexamined racial stereotype. A House Committee reported in 1975 that “[t]he effects of past inequities stemming from racial prejudice have not remained in the past.” \textit{Fullilove}, 448 U.S. at 465 (emphasis omitted). The Report then noted statistical disparities in the representation of different racial groups in business and professional contexts, and concluded that “[t]he statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities.” Id.; accord Minority Enterprise and Allied Problems of Small Business: Hearings Before the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business, 94th Cong., 1st Sess. 1-2 (1975). These “findings” reveal no effort to identify the sources of discrimination, the different contexts of discrimination, or the duration of discrimination, with respect to any of the specific groups covered in the challenged congressional plan. Much more relevant information was readily available than was employed. On this basis, even if Congress had formally adopted the 1975 House Committee Report, a judicial conservative would have been justified in determining that the government had not met its burden to rebut the presumption that it has employed a racial classification because of impermissible animus, favoritism, or stereotype. Thus,
This point has similar force when a racial classification is employed as a means for effectuating the permissible purpose of fostering diversity. If being "Black" or "Chicano" corresponds to some characteristic that will contribute to educational diversity, for example, what characteristic is it? In Bakke, had the university made findings of fact about the relationship between race and educational diversity, it might have constructed its programs differently by concluding, perhaps, that race is a necessary, but not sufficient, proxy for the sort of diversity it sought.\textsuperscript{163} In Metro Broadcasting, had the FCC made findings of fact about the relationship between race and viewpoint toward achieving broadcast diversity, it might have made similar adjustments.\textsuperscript{164}

Under the approach that I suggest here, formal findings of relevant fact would be part of the government's burden in rebutting the presumption that it employed a racial classification because of impermissible racial animus, favoritism, or stereotype. Without formal findings of relevant fact preceding the enactment of an affirmative action program, the program would be struck down. Thus, under this approach, the programs challenged in Bakke, Fullilove, Croson, and Metro Broadcasting all would have been invalidated.

Despite this apparent judicial intrusiveness, the premises of judi-
cial conservatism would be served in several ways. First, judges would not decide questions of constitutionality based on personal value judgments; the basis for invalidation would be a legislative's failure to comply with a clear procedural requirement. Second, the procedural requirement is tailored to the relatively uncontroversial notion that the government should not act because of racial stereotype. Third, if the Court ever did impose this procedural requirement, it would be relatively easy for legislatures to comply. Indeed, if Bakke, for example, had been decided under this approach, the programs challenged in Fullilove, Croson, and Metro Broadcasting all might well have been supported by formal findings of relevant fact made before their enactment. Finally, and perhaps most significantly, the programs might have looked quite different—better tailored to their stated permissible objectives—if based on findings of fact. Thus, this procedural requirement could make legislatures themselves better able to avoid violating the proscription against racial animus, favoritism, and stereotype in public policy, and thereby could reduce the need for otherwise intrusive judicial review.

4. The State Should Not Be Precluded From Making Judgments About the Effects of Past Racial Discrimination Informed by Imperfect Findings of Fact if the Findings Are Based on the Best Information Reasonably Available. — Even if a legislature makes findings of historical fact about, for example, which groups have suffered past racial discrimination, the generations during which each group has suffered, and the contexts and manner in which each group has suffered, it cannot have identified the effects of that history with either particularity or certainty. Thus, statistical disparities between the proportion of blacks in a given field and the proportion of whites in that same field might reflect the effects of identified past racial discrimination. Of course, such disparities might be otherwise explainable, as Justice O'Connor has suggested.

Yet much significant public policy is based on unproven and unprovable factual premises. For example, some believe that the death

165. By identifying the foundation for its policy, the legislature also will have developed a basis for mitigating resentment against the policy and, thereby, address concerns—politically significant but constitutionally irrelevant—that affirmative action might promote racial prejudice. See supra text at notes 52–59.

166. See supra text at notes 131–135. But even though one cannot do much more than speculate about the effects of past racial discrimination, Justice O'Connor has chosen to resolve the significance of doubt in favor of the status quo, by disabling governments from acting at all. See supra text at notes 139–143. Without substantial evidence of past racial discrimination that could have caused present statistical disparities, there is little basis for finding that present disparities represent the effects of past racial discrimination. Thus, it might be more difficult to make the case that present statistical disparities between whites and groups other than blacks and Native Americans reflect the results of past racial discrimination than it would be to make the case with respect to blacks and Native Americans, who have been the victims of racial discrimination longer and more pervasively than has any other group in America.
penalty deters crime;\textsuperscript{167} others believe that it does not.\textsuperscript{168} Some believe that lowering tax rates can increase tax revenues; others disagree.\textsuperscript{169} What legislatures choose to do with these unprovable factual premises depends upon how they balance relevant public values. If people view the goal of deterring crime to be relatively important, they are willing to accept more uncertainty in the factual premise that the death penalty deters crime. Similarly, the more that people value redressing the effects of past racial discrimination, the more uncertainty they are willing to accept about the factual premise that present statistical disparities reflect the effects of past racial discrimination.\textsuperscript{170}

It would be contrary to a judicial conservative's respect for political discretion to hold, as does Justice O'Connor in \textit{Croson}, that unless present disparities are \textit{provably} related to identified past racial discrimination, legislatures are constitutionally prohibited from determining that their remedial goals are sufficiently important to justify affirmative action programs that can help attain those goals. More specifically, it would be contrary to \textit{Davis}'s proscription only of impermissible racist purposes to hold that a legislature may not seek to redress the effects of past racial discrimination (that is, a permissible, nonracist goal) when the perceived need for legislative action is supported by a study yielding the best available information (that is, a factual premise that does not reflect unexamined racial stereotype).\textsuperscript{171}


\textsuperscript{168} Cf. C. Black, \textit{Capital Punishment: The Inevitability of Caprice and Mistake} (1974) (arguing that no affirmative case can be made that capital punishment deters).

\textsuperscript{169} After Jack Kemp and Art Laffer first suggested to Ronald Reagan that lowering tax rates could increase tax revenues, "[i]t set off a symphony in his ears. He knew instantly that it was true and would never doubt it a moment thereafter." D. Stockman, \textit{The Triumph of Politics} 10 (1986). Paul Samuelson relies on empirical results rather than faith in rejecting "supply-side" tax policy. "The Laffer-curve prediction that revenues would rise following . . . tax cuts has proven false; indeed, federal revenues shrank and the federal budget consequently moved from approximate balance in 1979 to a gaping $200 billion deficit after 1983." P. Samuelson \& W. Nordhaus, \textit{Economics} 796–97 (13th ed. 1989).

\textsuperscript{170} See supra note 108.

\textsuperscript{171} I do not suggest that a vague assertion of past "societal discrimination" should be sufficient. Cf. \textit{Metro Broadcasting, Inc. v. FCC}, 110 S. Ct. 2997, 3035 (1990) (O'Connor, J., dissenting) ("'generalized assertion’ of past ‘[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy’"). Governments surely have the resources to employ historians, for example, to establish a factual predicate of past racial discrimination. Yet Justice O'Connor still might assert that allowing legislatures to engage in reasonable speculation about the effects of past identified discrimination would have "'no logical stopping point' and would support unconstrained uses of racial classifications.” Id. Not so. The "logical stopping point" is that found by the political process; the "constraint" on remedial measures is placed by competing social pressures. So long as the competition is among competing permissible ends, the judicial conservative should allow the political process
5. The Relationships Among the Asserted Permissible Purpose, the Identified Factual Predicate, and the Means Selected Must Provide a Plausible Basis for Finding that the Government Was Not Impermissibly Motivated by Racial Animus, Favoritism, or Stereotype. — Even with the best findings of past racial discrimination, and the most reasonable speculation about continuing effects, a poor fit between the means selected and the asserted permissible, nonracist purpose might preclude a finding that the classification was not adopted because of racial animus, favoritism, or stereotype.172 If, for example, the state asserts the permissible goal of redressing the effects of past racial discrimination, makes findings of historical fact about past racial discrimination, and makes speculative findings about the present effects of that identified discrimination, it might well reveal criteria in addition to race that will better identify those who suffer the effects of past racial discrimination—for example, poverty, geographical origin, or educational background. Similarly, a program allegedly intended to promote viewpoint diversity might be less effective if race is used as the sole proxy for viewpoint, rather than in conjunction with other factors relevant to viewpoint. Toward rebutting the presumption of unconstitutionality, the government should be required to provide a plausible explanation of why it chose not to employ additional factors for identifying those who suffer the effects of past racial discrimination, or those who would promote diversity.173

The program challenged in Croson provides another example of a poor fit between an asserted permissible purpose and the chosen means that could render the state unable to rebut a presumption that it acted because of racial animus, favoritism, or stereotype. Richmond claimed that it sought to redress the effects of past racial discrimination. The past discrimination at issue and its supposed consequences were broadly based and widely dispersed. Yet the Richmond program required that thirty percent of all subcontracting dollars go to minority businesses, while only five percent of subcontractors nationally were minority businesses.174 Thus, relatively few minority businesses stood to work its will, unconstrained by ad hoc judicial findings of “unfair” racial discrimination.

172. Justice O'Connor has made this point with particular clarity: “Strict scrutiny is designed to ‘ensur[e] that the means chosen ‘fit’ [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.’ ” Metro Broadcasting, 110 S. Ct. at 3037 (O'Connor, J., dissenting) (quoting City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989)); see also J. Ely, supra note 9, at 145 (“The goal the classification in issue is likely to fit most closely . . . is the goal the legislators actually had in mind.”).

173. See, e.g., Metro Broadcasting, 110 S. Ct. at 3039 (O'Connor, J., dissenting) (“The interest the FCC asserts is in programming diversity, yet in adopting the challenged policies, the FCC expressly disclaimed having attempted any direct efforts to achieve its asserted goal.”). For consideration of my suggested standard of a “plausible explanation,” see infra note 180.

174. See Croson, 109 S. Ct. at 713, 714. The percentage of minority contractors based in Richmond was “almost zero.” Id. at 751 (Marshall, J., dissenting).
to benefit—and they would have benefitted greatly. One might ques-
tion the extent to which these pinpointed windfalls help to redress the
widely dispersed effects of past racial discrimination by society-at-
large.175 Given a presumption that the government has acted with im-
permissible racial animus, favoritism, or stereotype in using a racial
classification, there is a basis for invalidation in the government’s fail-
ure to provide a plausible explanation of why it has apparently pro-
vided such a large benefit to so few who potentially suffer from the
broadly spread effects of broadly based past racial discrimination.

* * *

Judicial conservatives are concerned about both enforcing firmly es-
established constitutional values and not erroneously intruding on valid
democratic discretion.176 Courts might erroneously refrain from en-
forcing firmly established constitutional values by using proof rules that
give the government an unwarranted benefit of the doubt. Courts
might erroneously intrude on the authority of the people’s elected rep-
resentatives either by imposing substantive values that are not constitu-
tionally warranted (for example, by invalidating affirmative action
programs based on personal judgments that “innocent white victims”
are “unfairly” affected),177 or, in determining whether firmly estab-
lished constitutional norms (for example, the proscription of actions
motivated by racial animus, favoritism, or stereotype) have been vi-
olated, by applying proof rules that are too easily satisfied.178

The foregoing five propositions provide meaningful content for
the state’s burden of proof under “strict scrutiny” with, essentially, a
procedural roadmap that governments must follow if they wish to per-
suade a court that they have employed a racial classification to achieve
policies untainted by racial animus, favoritism, or stereotype. Their
design is derived exclusively from this firmly established substantive
constitutional value. Yet some judicial conservatives, concerned more
about the erroneous intrusion on valid legislative choices, might argne
that these five propositions place an excessive burden on the govern-

175. Justice Marshall did not view the 30% requirement as warranting invalidation
because in Fullilove, where the Court upheld a similar program, “Congress’ 10% figure
fell roughly halfway between the present percentage of minority contractors and the
percentage of minority group members in the Nation.... The Richmond City Council’s
30% figure falls roughly halfway between the present percentage of Richmond-based
minority contractors (almost zero) and the percentage of minorities in Richmond
(50%).” Croson, 109 S. Ct. at 751 (Marshall, J., dissenting) (citation omitted). Splitting
the difference, however, is not always a rational way to pursue one’s goals.
176. See supra notes 146–150.
177. See supra note 69 (discussion of judicial conservatives’ rejection of constitu-
tional privacy).
266–68, 270 (1977), the Court, reflecting judicial conservatives’ desire to avoid the sec-
ond error, rejected doctrines facilitating proof that facially neutral policies were adopted
because of impermissible racism.
ment to disprove impermissible motivation. 179 Others, concerned more about erroneous refusals to enforce the firmly established constitutional proscription against governmental policies adopted because of racial animus, favoritism, or stereotype, might argue that the five principles give the government an unwarranted benefit of the doubt. 180

For any true judicial conservative, however, at least one point

179. It is not likely that former Justice Powell and Chief Justice Rehnquist would object to my five propositions on the grounds that they unduly presume impermissible motive and thereby facilitate the invalidation of affirmative action programs. Yet in Rodgers v. Lodge, 458 U.S. 613 (1982), they dissented from the Court's determination that a city had maintained an at-large voting system "for invidious purposes," id. at 616, and stated:

The Court's decision today relies heavily on the capacity of the federal district courts—essentially free from any standards propounded by this Court—to determine whether at-large voting systems are "being maintained for the invidious purpose of diluting the voting strength of the black population." Federal courts thus are invited to engage in deeply subjective inquiries into the motivations of local officials in structuring local governments. Inquiries of this kind not only can be "unseemly," they intrude the federal courts—with only the vaguest constitutional direction—into an area of intensely local and political concern.

Id. at 629 (Powell, J., dissenting) (citation omitted). While Justice Powell does not deny that the Constitution prohibits policies reflecting "invidious purposes" (i.e., racial prejudice), he is concerned about erroneous judicial determinations that policies do reflect these impermissible purposes. But Powell and Rehnquist are quite willing to thwart local legislative choices, based on their own subjective, standardless notions of "fairness," when reviewing the harmful impact of affirmative action programs on "innocent white victims." Thus, once again, it seems easier for some conservative Justices to find that ill-founded putative constitutional values have been violated when the interests of whites are adversely affected than to find that firmly established constitutional norms have been violated when the interests of blacks are adversely affected.

180. One might object that this approach does not eliminate the possibility that an affirmative action program was adopted because of impermissible racism. But when the government has met the burden of identifying past racial discrimination and has provided a plausible causal connection between that history and present social disparities, the likelihood that the challenged racial classification was adopted because of impermissible animus, favoritism, or stereotype is substantially diminished. It becomes far more plausible that the legislature has deemed its permissible remedial purpose sufficiently important to warrant sacrificing other concerns for a program that has some real chance of abating the effects of past racial discrimination. Indeed, when a facially neutral governmental action is challenged as having been impermissibly motivated, the Court's judicial conservatives have chosen to place the burden of proof on the challenger, give the government the benefit of the doubt, and thereby increase the risk of erroneously upholding governmental actions that were, in fact, impermissibly motivated. Judicial conservatives have accepted this risk because it is plausible that a government will have acted for permissible, nonracial purposes when acting through facially neutral means—even when blacks are disproportionately harmed. See supra notes 41, 178. A consistent judicial conservative should give the benefit of the doubt to legislative discretion not only when it is plausible that a facially neutral policy has not been impermissibly motivated (despite disproportionately harming blacks and other traditional victims of racism), but also when, after satisfying demanding procedural requirements to find facts and consider alternatives, it is plausible that an affirmative action program was not impermissibly motivated (despite employing a racial classification).
should be clear: the equities of harm caused by policies adopted for permissible purposes do not implicate values warranting judicial protection in the name of the equal protection clause. Thus, whatever deviations from the foregoing five propositions one might advocate, tests and barriers such as those in Croson, erected in the name of finding impermissible purpose, but motivated by concerns for "innocent white victims," must be rejected in favor of tests and barriers designed exclusively to smoke out impermissible racism. Whatever the difficulties, a search for impermissible purpose is the only constitutional question implied by the Court's refusal to address the equities of harmful impact felt by blacks in Davis. And, toward finding unconstitutional racial discrimination, it is the only question that a true judicial conservative would ask.

CONCLUSION

For judicial conservatives, Washington v. Davis was correctly decided not because Test 21 provided the best way to select police officers, but because judges, in the name of the equal protection clause, should not impose a particular personal balance among competing permissible considerations on policymakers accountable to the electorate. Davis reflected a skeletal view of constitutional law and judicial review: courts should restrict legislative discretion only on the basis of public values clearly rooted in the electorate's past constitutional choices. This view of constitutional law vests in political majorities, local and national, primary responsibility for choosing good policy—for remaining satisfied with the status quo, or for pushing toward something better.

It is, at best, a sad irony that this view of constitutional law has been rejected by the Supreme Court's ascendant conservative wing when reviewing programs that benefit traditional victims of racism. When reviewing affirmative action programs, conservative Justices have ignored principles of federalism that are so important to judicial conservatives in other contexts. When reviewing affirmative action programs, conservative Justices have ignored the impropriety of judicially-mandated resolutions of political controversies based only on their personal values—an impropriety that paralyzes judicial conservatives in other contexts. Conservative Justices have prevailed, using judicial conservatism merely as their slogan. There is a message here, about not only the proper constitutional law of affirmative action, but also the possibilities for consistently principled judicial behavior. 182

181. See supra text at notes 143-44.
182. See generally Chang, A Critique of Judicial Supremacy (forthcoming in Villanova Law Review, 1991) (arguing from perspective of contemporary national electorate that traditional faith in capacity of federal judges to perform tasks of judicial review is misplaced and may warrant curtailing conventional notions of judicial supremacy).