

The Outmoded Debate Over Affirmative Action

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The academic debate over affirmative action has become a bitter stalemate.¹ Opponents consider affirmative action to be reverse discrimination, charging that racial discrimination is equally wrong regardless of the race of the victim. Supporters retort that the relationship between African Americans² and whites is hardly symmetrical, and that racial preferences

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1. See, e.g., LOUIS FISHER & NEAL DEVINS, *POLITICAL DYNAMICS OF CONSTITUTIONAL LAW* 283 (1992) (describing the affirmative action debate as “intractable”); Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1707, 1766-77 (1993) (describing affirmative action as a “wellspring” of bitter debate); Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 252 (1992) (stating that the affirmative action debate is “caustic and draining”).

2. Many discussions of racial issues in the legal literature focus on African Americans, implicitly assuming either that there are no other minority groups or that other groups pose identical problems. For criticisms of this approach, see Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007, 2034 n.112 (1991) [hereinafter Johnson, *New Voice*]; see also Jerome M. Culp, Jr., *Posner on Duncan Kennedy and Racial Difference: White Authority in the Legal Academy*, 41 DUKE L.J. 1095, 1109 (1993) (recognizing that focusing on a model of black participation in affirmative action “illuminates and obscures important issues in this debate about race and the law”); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043, 1072-73 [hereinafter Johnson, *Quotas*] (observing that the historical experience of African Americans is unique among minority groups). This Article will be guilty of the same failing, with one exception. See *infra* text accompanying notes 183-185.

In my view, the failure to focus sufficiently upon alternative minority groups is the single most serious weakness in the race literature. It not only distorts our views of other minority groups but also deprives us of comparisons that might help us better understand black-white relations, relations between other minority groups and whites, and relations among minority groups.

It is worth noting that at present, twelve percent of the U.S. population is African American; three percent is Asian, and nine percent is Hispanic. Among the college population, Asians and Hispanics together slightly outnumber African Americans. See Stephen Buckley, *The Challenge to Black Dominance*, WASH. POST NAT'L WKLY EDITION, July 26-Aug. 1, 1993, at 25. The “black model” of affirmative action thus fails to account for at least half of the minorities typically targeted by such programs.

Since this is the first reference to racial groups in the Article, a few words about terminology are in order. I originally attempted to alternate between terms such as “black” and “African American,” or “minorities” and “people of color.” None of these terms is entirely satisfactory—for example, the distinction between “whites” and “people of color” ignores the fact that about half of Mexican Americans consider themselves “white.” See *infra* text accompanying note 183. Because the editors

are necessary to remedy discrimination, to provide role models for the disadvantaged, and to increase diversity. Opponents, in turn, attack these arguments as normatively wrong or empirically false. Although little new can be said about these arguments, the dispute continues with no sign of resolution.³

The sterility of this debate suggests that it is time for a fresh perspective. This Article will reconsider affirmative action in light of an emerging body of scholarship, Critical Race Theory (CRT).⁴ CRT prompts a recognition of the urgency of America's racial problems and an uncompromising search for real solutions rather than comforting stop-gaps. If we are to move beyond the stale debate over affirmative action, we must heed this insistent call for a changed intellectual focus. One of CRT's tenets is that conventional civil rights scholarship has limited application to current racial problems. With respect to affirmative action, I believe CRT is correct about the decreasing relevance of contemporary scholarship. I will argue that major changes in the level of affirmative action are unlikely, and that in any event, affirmative action has reached the limit of its ability to address our racial problems.

Part I begins by reviewing the political and legal history of affirmative action. Although the evolution of the judicial doctrine is well-known, the political and economic aspects of affirmative action have received less attention from legal scholars—one of several shortcomings in the existing literature. The focus then shifts to Critical Race Theory. After a short introduction to CRT, I will discuss the views of CRT and non-CRT scholars pertaining to affirmative action. Although CRT scholars generally favor affirmative action, the degree of enthusiasm varies greatly. CRT scholars are united, however, in the view that African Americans could achieve proportional representation in the economic and the academic worlds were it not for discriminatory selection criteria. Thus, they question the “standards” that now limit African Americans’ access to desirable jobs and aca-

persuaded me that frequent alternations in terminology sometimes lead to confusion, I have now generally avoided the term “black” in favor of “African American.”

3. Some of the leading articles and a useful bibliography of works through 1991 can be found in JOHN GARVEY & T. ALEXANDER ALEINIKOFF, *MODERN CONSTITUTIONAL THEORY: A READER* 422-81 (2d ed. 1991). For a few of the recent additions to the literature, see T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060 (1991) [hereinafter Aleinikoff, *Race-Consciousness*]; Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105; Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993 (1993). My impression is that a broad consensus exists about the desirability of increasing the academic, economic, and political status of African Americans; the debate centers on whether these goals justify race-conscious means.

4. This Article will not consider affirmative action programs based on gender, sexual orientation, or other characteristics. For the purposes of this Article, affirmative action encompasses any race-conscious selection system designed to increase minority representation. Thus, it includes college admissions programs, hiring or promotion preferences by employers, and, somewhat more broadly, the use of race-conscious districting in order to facilitate the election of minority politicians. It does not include recruiting or retention programs.

demic programs. If the current standards of merit are invalid, employers and schools easily could find many qualified African Americans to participate in affirmative action programs. Consequently, the number of qualified individuals taking advantage of affirmative action programs could be greatly expanded. Alternatively, and perhaps preferably, the current discriminatory qualifications could be scrapped and replaced with inclusionary ones, eliminating the need for affirmative action programs. The goal, in any event, is roughly proportional representation.

Part II argues that affirmative action has reached its capacity to promote proportional representation. For both political and legal reasons, significant changes in the extent of affirmative action are unlikely. Contrary to the CRT view that existing standards are merely artificial barriers to entry, the educational system has simply failed to give many African Americans the grounding needed for economic success. In addition, affirmative action cannot address emerging structural problems, such as the rapid erosion of employment in the manufacturing sector.⁵ Because of the practical and political limits on affirmative action, disputes about its legitimacy are likely to fade as attention shifts to other problems and remedies. Part III thus sketches a few tentative thoughts about the future direction of race scholarship.

It may be best to begin with some disclaimers about the scope of this Article. First, I will not contribute to, or even discuss, the conventional arguments over the proper level of judicial scrutiny, the legitimacy of various justifications for affirmative action, or the legal or moral rights of whites or African Americans. My thesis is that these arguments have already received ample attention; both sides of the debate have evoked first-class scholarship, and I have little to add.

Second, although I will discuss the views of critical race scholars on issues relating to affirmative action, it is not my purpose to evaluate the quality of their scholarship either collectively or individually.⁶ The reader will have to form his or her own views on that score. Although evaluating the quality of scholarship is important,⁷ it is less crucial than addressing the nation's racial problems.

5. See James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 *YALE L. & POL'Y REV.* 276, 284-86 (1990) (discussing impact of decreased manufacturing employment opportunities on African American wages).

6. Nor will I perform such an evaluation of the work of the major critics of CRT, although their substantive views will be discussed where relevant.

7. For some thoughts about this issue, see generally Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 *STAN. L. REV.* 807 (1993).

I
POLITICAL, LEGAL, AND CRITICAL PERSPECTIVES ON
AFFIRMATIVE ACTION

This Part will explore the views of CRT scholars regarding affirmative action. As noted earlier, CRT scholars are somewhat divided in their views on affirmative action, but are uniformly skeptical of “white” definitions of merit. To understand their views, it is first necessary to understand the historical context in which CRT emerged. The formation of CRT was sparked in part by frustration with political and judicial developments linked to the issue of affirmative action. I will begin by reviewing the history of affirmative action as a national political issue, and will then briefly sketch the evolution of affirmative action legal doctrine.

A. *Affirmative Action as a Political Issue*

The federal government’s involvement with affirmative action began in 1967 with the “Philadelphia Plan,” which was intended to remedy blatant segregation in the construction industry.⁸ To foster integration, the Plan made the racial composition of the work force a factor in awarding federal contracts.⁹ The original version of the Plan was highly controversial, and it was rescinded in the final days of the Johnson Administration.¹⁰

Surprisingly, the Nixon Administration resurrected the Philadelphia Plan.¹¹ A revised version required that construction bid invitations include target ranges, rather than quotas.¹² Even with this modification, however, the Comptroller General ruled that the Plan was illegal.¹³ The Senate passed an appropriations rider mandating compliance with the Comptroller General’s rulings,¹⁴ but President Nixon campaigned hard in the House against the rider.¹⁵ Ultimately, the House and the Senate (the latter upon

8. For an extensive discussion of the Plan and its history, see Robert P. Schuwerk, Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723 (1972).

9. HUGH D. GRAHAM, *THE CIVIL RIGHTS ERA: ORIGINS AND DEVELOPMENT OF NATIONAL POLICY 1960-1972*, at 284-97 (1990). As initially implemented, the Plan required the low bidder to negotiate over hiring goals with the federal agency awarding the contract. *Id.* at 289.

10. *Id.* at 296.

11. *See id.* at 322.

12. *Id.* at 327.

13. *Id.* at 331. Attorney General Mitchell, aided by Labor Solicitor Laurence H. Silberman (later a Reagan judicial appointee), defended the legality of the Plan. *Id.* at 330, 333. The Plan was ultimately upheld in *Contractors Ass’n v. Secretary of Labor*, 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

14. GRAHAM, *supra* note 9, at 339-40. Senator Everett Dirksen argued that the Plan violated Title VII, but died before he could do anything about it. Senator Sam Ervin initiated a vociferous campaign against the Plan, and the AFL-CIO attacked it. *Id.* at 335-37. The Comptroller General continued to insist on the Plan’s illegality. *Id.* at 338-39.

15. *Id.* at 340. Nixon threatened to veto the appropriations bill if it contained the rider. Schuwerk, *supra* note 8, at 749. Then, on the day of the vote, Secretary of Labor Shultz held a news conference urging the House to defeat it, calling the vote on the rider “the most important civil rights vote in a long, long time.” *Id.* at 749 n.141.

reconsideration) rejected the rider, with the crucial votes coming from Republicans.¹⁶ Thus, Nixon succeeded in saving the Philadelphia Plan.

Although other factors also played a role in his decision,¹⁷ Nixon saw affirmative action as a wedge with which to split organized labor away from the civil rights movement.¹⁸ The Republican strategy of using racial issues to separate the white working class from the Democratic Party proved highly successful. As later studies show, it exploited a massive schism between white and African American opinion regarding affirmative action:

[A]ffirmative action pits a strong majority of blacks in favor of preferences . . . against overwhelming majorities of whites deeply opposed to such programs. In public opinion polls, whites are opposed to black preferences in hiring and job promotion by a margin of 81 to 11, and are against reserving openings for blacks at colleges by a margin of 69 to 22. . . . For a Republican party seeking to divide the electorate along lines giving the GOP a huge advantage, few issues are as attractive as affirmative action.¹⁹

This issue was crucial to gaining the support of the so-called Reagan Democrats.²⁰ By 1984, "the defection of white, working-class northern Democrats turned into a hemorrhage."²¹

A dramatic illustration can be found in Macomb County, a white working-class Detroit suburb. In 1960, John F. Kennedy carried the county with sixty-three percent of the vote; as late as 1968, Hubert Humphrey

16. GRAHAM, *supra* note 9, at 340; Schuwerk, *supra* note 8, at 749 & nn.145-46. The Philadelphia Plan became the model for the executive order mandating affirmative action nationwide in federal contracting. See GRAHAM, *supra* note 9, at 341-45.

17. Republican senators facing close elections may have wanted to appeal to African American voters. See GRAHAM, *supra* note 9, at 336 (noting that Senator Hugh Scott supported the Plan because he was courting "civil rights forces" during the 1970 re-election campaign). Nixon also needed to maintain the support of the liberal wing of his party; he likely hoped to recapture the substantial African American support he had received in 1960. See *id.* at 302-03, 322.

18. See *id.* at 325, 340.

19. THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS, AND TAXES ON AMERICAN POLITICS 186 (1991) (using 1980 survey data); see also DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 131 (1991) (surveying evidence on white attitudes). For a further discussion of African American attitudes, see Lee Sigelman & James S. Todd, *Clarence Thomas, Black Pluralism, and Civil Rights Policy*, 107 POL. SCI. Q. 231, 242-45 (1992) (reporting that African Americans are split as to whether preferences should be given to offset past discrimination, but are strongly supportive of quotas to ensure fairness).

Despite the negative attitudes of whites toward affirmative action, white attitudes toward African Americans have shown a long-term favorable shift. A decline in several forms of discrimination over the past few decades reflects this shift. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1001-03 (1991). But see DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 5 (1992) (claiming that virulence of discrimination has not changed).

20. See EDSALL & EDSALL, *supra* note 19, at 163-65 (noting that a large percentage of Democrats who voted for Ronald Reagan were seeking to reverse a perceived "federal government tilt in favor of blacks and other minorities").

21. *Id.* at 170.

received a comfortable fifty-five percent.²² Despite the local impact of the recession, however, Ronald Reagan carried the county in 1984 by a two-to-one margin.²³ Dismayed by this reversal, the Michigan Democratic Party sponsored a study of the county's Reagan Democrats. The study found these voters bitter about affirmative action. They saw affirmative action as a "serious obstacle to their personal advancement"; "discrimination against whites ha[d] become a well-assimilated and ready explanation for their status, vulnerability and failures."²⁴ A similar pattern of white defection from the Democratic Party continued throughout the country in the 1988 election.²⁵

Political resistance to affirmative action was also evident during the passage of the 1991 Civil Rights Act.²⁶ Supporters of the Act avoided any endorsement of racial preferences or "quotas."²⁷ Indeed, the 1991 Act specifically bans the use of race-norming in employment tests, whereby scores are reported only relative to particular groups, so that the top individuals in each group receive the same overall score even if their test performances are quite different.²⁸

More recently, President Clinton, in an effort to bring Reagan Democrats back into the fold, went to some lengths in the 1992 presidential campaign to avoid being perceived as a "captive" of African American constituencies.²⁹ This practice continued in the first year of his administration when he withdrew the nomination of Lani Guinier as Assistant Attorney General for Civil Rights because of her perceived support for race-conscious remedies to increase the political power of blacks. Guinier, who was otherwise eminently well-qualified, evoked strong opposition because of her CRT-related writings on voting rights.³⁰ Although she pressed for the

22. *Id.* at 181.

23. *Id.* at 181-82.

24. *Id.* at 182 (quoting Stanley B. Greenberg, *Report on Democratic Defection* (The Analysis Group, Wash., D.C.), Apr. 15, 1985, at 13-18, 28).

25. *Id.* at 225-26.

26. Civil Rights Act of 1991, Pub. L. No. 102-166, § 106, 105 Stat. 1071 (codified in scattered sections of 42 U.S.C. (Supp. IV 1992)).

27. For discussion of the quota issue, see Ronald D. Rotunda, *The Civil Rights Act of 1991: A Brief Introductory Analysis of the Congressional Response to Judicial Interpretation*, 68 NOTRE DAME L. REV. 923, 924-26 (1993).

28. See 42 U.S.C. § 2000e-2(l) (Supp. IV 1992). For an extensive discussion of this issue, see Mark Kelman, *Concepts of Discrimination in "General Ability" Job Testing*, 104 HARV. L. REV. 1158 (1991).

29. See, e.g., Monte Piliawsky, *Blacks & Clinton: Taken For Granted Again*, 2:2 RECONSTRUCTION 41, 41-42 (1993).

30. Guinier earned her B.A. from Radcliffe College (Harvard University) in 1971, her J.D. from Yale Law School in 1974, and is currently a Professor of Law at the University of Pennsylvania Law School. Her two more contentious voting rights articles were published in 1991. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) [hereinafter Guinier, *No Two Seats*]; Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077 (1991) [hereinafter Guinier, *Triumph of Tokenism*]; see also *infra* text accompanying notes 186 and 189-90 (discussing portions of these two writings). For a more

opportunity to explain her views before the Senate Judiciary Committee, Clinton withdrew her nomination before she had the chance to do so. As a press account explained:

Democratic senators and White House officials had been deeply reluctant to go forward with a hearing in which the prospects of her winning confirmation were always dim. Moreover, such a hearing would have focused on affirmative action and race-based quotas, two notions Democrats in the Senate and the White House would like to avoid.³¹

Indeed, President Clinton's concerns about the political consequences of affirmative action may be well-founded. A recent study of public opinion found that affirmative action was so unpopular with many whites that merely mentioning the issue resulted in markedly less favorable responses to other questions involving African Americans.³²

B. *The Evolution of Legal Doctrine*

Just as affirmative action has been a divisive political issue, it also has proved difficult for the federal judiciary. The Supreme Court's struggle with the issue of affirmative action is a frequently told story, one which I will only summarize here.

The first major affirmative action cases came before the Burger Court. *Regents of the University of California v. Bakke*³³ involved a set-aside program for minority medical students.³⁴ Bakke, a rejected white applicant

recent article on the same subject, see Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1589 (1993) (noting that the author wished to "thank all those who read this article and encouraged me to pursue my ideas, despite the apparent political costs").

Guinier was one of the original organizers of this Symposium. Her work is cited in Delgado's bibliography as having several CRT themes, Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461, 492-93 (1993), and press reports discuss her work in connection with CRT, see, e.g., Stephanie B. Goldberg, *The Law, A New Theory Holds, Has A White Voice*, N.Y. TIMES, July 17, 1992, at A23; see also Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 40 n.2 (identifying Guinier as a CRT scholar).

31. Neil A. Lewis, *Clinton Abandons His Nominee for Rights Post Amid Opposition*, N.Y. TIMES, June 4, 1993, at A1, A18. In view of its unpopularity, one might wonder why affirmative action has not been drastically curtailed. For further discussion of this question, see *infra* text accompanying notes 144-148.

32. This result was obtained by asking some randomly selected respondents about affirmative action prior to raising other racial issues. PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 102-03 (1993).

33. 438 U.S. 265 (1978). For a more extensive discussion of *Bakke* and later cases, see generally JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* § 14.10 (4th ed. 1991).

34. In 1973, applications indicating that the applicant was "economically and/or educationally disadvantaged," and in 1974 those indicating that the applicant was a member of a "minority group," were forwarded to a special admissions committee. These "special candidates" did not have to meet the 2.5 grade point average cutoff applied to general applicants. The special committee evaluated these candidates and presented its top choices to the general admissions committee until a number prescribed by faculty vote were admitted. *Bakke*, 438 U.S. at 274-75.

with better "paper credentials" than some minority admittees, challenged the set-aside program as a violation of the Equal Protection Clause. Four Justices ruled in Bakke's favor on statutory grounds,³⁵ and four voted in favor of the constitutionality of the program.³⁶ Justice Powell cast the decisive vote in favor of Mr. Bakke. While Powell rejected most of the rationales supporting affirmative action programs, he found two acceptable justifications: remedying the disabling effects of identified past discrimination and creating diversity in the student body.³⁷ Powell concluded, however, that the set-aside program in this case was not properly grounded in either justification.³⁸

The next affirmative action case, *Fullilove v. Klutznick*,³⁹ involved a set-aside program as part of a federal appropriation for construction projects.⁴⁰ Chief Justice Burger's opinion upheld the program on the ground that Congress, unlike the states, has broad power to remedy past societal discrimination.⁴¹ Thus, *Fullilove* presented an easier case. The boundaries of affirmative action by the federal government were relatively clear.⁴²

During the decade after *Bakke*, however, the Court made some inconclusive efforts to define the boundaries of affirmative action by state governments.⁴³ The Court finally crystallized the constitutional standard for state programs in *City of Richmond v. J.A. Croson Co.*⁴⁴ by applying strict

35. *Id.* at 408, 418-19 (Stevens, J., concurring in the judgment in part and dissenting in part) (joined by Burger, C.J. and Stewart & Rehnquist, JJ.).

36. *Id.* at 325 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

37. *Id.* at 307, 311-13.

38. *Id.* at 319-20.

39. 448 U.S. 448 (1980).

40. The statute at issue provided federal funds for state and local construction projects and required that at least 10% of the money be spent on goods or services from minority business enterprises, unless an administrative waiver was granted. *Id.* at 456-63.

41. *Id.* at 483-84. For commentary by the Assistant Attorney General for Civil Rights (and current Solicitor General) who argued the case for the United States, see Drew S. Days, III, *Fullilove*, 96 YALE L.J. 453 (1987).

42. 448 U.S. at 519 (Marshall, J., concurring in the judgment) (joined by Brennan & Blackmun, JJ.) (stating that "the question is not even a close one").

43. See *United States v. Paradise*, 480 U.S. 149 (1987) (upholding a court order that remedied blatant discrimination by requiring half of subsequent promotions to be awarded to African Americans); *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (upholding a race-conscious remedy against a union that had been found guilty of race discrimination in violation of Title VII); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (striking down a collective bargaining agreement that attempted to protect recently hired African American teachers against layoffs).

44. 488 U.S. 469 (1989). The case produced a confusing array of opinions. Chief Justice Rehnquist, Justice White, Justice Stevens, and Justice Kennedy joined Justice O'Connor's opinion as to Parts I, III.B, and IV. Chief Justice Rehnquist and Justice White joined Justice O'Connor's opinion as to Part II. Chief Justice Rehnquist, Justice White, and Justice Kennedy joined her opinion as to Parts III.A and V. Justices Stevens and Kennedy each filed their own opinions concurring in part and concurring in the judgment. Justice Scalia filed an opinion concurring in the judgment. Justices Brennan and Blackmun joined Justice Marshall's dissenting opinion. In addition, Justice Blackmun filed a separate dissent, joined by Justice Brennan. Despite this confusion, Justice O'Connor actually

scrutiny to the City's program. It is worth noting that *Croson* had "bad facts": the plaintiff construction firm had been required to subcontract to a minority firm, which charged a seven percent fee for doing little more than paperwork.⁴⁵ Justice O'Connor's controlling opinion held that remedying past discrimination in connection with the City's construction programs could have been a compelling government interest. In her view, however, the record contained insufficient evidence of such past discrimination.⁴⁶ Moreover, Justice O'Connor concluded, even if there had been a better showing of past discrimination in City construction projects, the City's affirmative action plan was poorly tailored to remedying such discrimination.⁴⁷

Two cases since *Croson* also deserve mention. Many observers were surprised when a sharply divided Court upheld FCC regulations designed to increase the number of minority-owned broadcast stations in *Metro Broadcasting, Inc. v. FCC*.⁴⁸ Justice Brennan's majority opinion accepted diversity as a justification for federal affirmative action,⁴⁹ and stressed the greater power of Congress in this area as compared to state legislatures.⁵⁰ More recently, in *Shaw v. Reno*,⁵¹ a bare 5-4 majority found potential merit in a challenge to the creation of a majority African American congressional district.⁵² As in *Croson*, the facts of *Shaw* were unappealing: one of the districts at issue was, to put it mildly, "unusually shaped,"⁵³ winding through the state for 160 miles along the path of I-85, in some places being no wider than the highway itself.⁵⁴ Stressing that the district was obviously created solely as a means to segregate voters on the basis of race,⁵⁵ the Court remanded for a determination of whether the districting plan was narrowly tailored to serve a compelling state interest.⁵⁶

had at least five votes on behalf of the positions taken in all parts of her opinion, because she represented the "swing" voters in the case.

45. *Id.* 488 U.S. at 482-83. This background may explain the Court's concern that set-aside programs might be abused as a form of favoritism for groups with strong local political power.

46. *Id.* at 492, 498-506.

47. *Id.* at 507-08. Press reports on *Croson* have tended to exaggerate its impact. See Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 356-59 (1989).

48. 497 U.S. 547 (1990).

49. Because the Court applied a lower standard of scrutiny to federal programs, it is unclear whether diversity would also be considered a sufficiently compelling interest to justify state affirmative action.

50. *Croson*, 497 U.S. at 563-66 (discussing the need to defer to Congress).

51. 113 S. Ct. 2816 (1993).

52. *Id.* at 2824.

53. *Id.* at 2820.

54. *Id.* at 2820-21. Given these unappealing facts, it is noteworthy that such a bare majority joined Justice O'Connor's narrow opinion. Interestingly, in *Voinovich v. Quilter*, 113 S. Ct. 1149 (1993), the Court unanimously rejected an attack on an Ohio redistricting plan that contained majority-minority districts.

55. *Shaw*, 113 S. Ct. at 2827-28.

56. *Id.* at 2832.

To complete the picture, we also need to consider the Court's interpretation of Title VII.⁵⁷ Although the language and legislative history of Title VII are more suggestive of a colorblind standard,⁵⁸ the Court upheld voluntary affirmative action plans in *United Steelworkers v. Weber*⁵⁹ and *Johnson v. Transportation Agency*.⁶⁰ Under Title VII, employers may now use affirmative action to remedy a "manifest imbalance" in their work forces so long as the plan meets some general standards of reasonableness.⁶¹ Because private employers are not state actors and therefore are not subject to equal protection standards, they need only meet this looser standard under Title VII.

In a nutshell, then, the Court has adopted an intermediate position between colorblindness and complete acceptance of affirmative action. More specifically, the Court has given the federal government and private employers fairly broad discretion to implement affirmative action plans, but has subjected state affirmative action programs to strict scrutiny. As we have seen, affirmative action has also been a weighty and troubling issue for the American political system. These legal and political developments are linked to one another: political resistance to affirmative action helped cement Republican control of the Presidency for nearly two decades, which in turn led to the appointment of judges who were skeptical of affirmative action. Due to this progression, it was obvious by the end of the 1980s that a major expansion of affirmative action was not a realistic prospect.

C. *The CRT Perspective*

1. *What is Critical Race Theory?*

As we have just seen, in the past twenty-five years, both national politics and the federal judiciary have been inhospitable to efforts to promote African American interests through remedies such as affirmative action. Frustrated by the unfavorable political and legal climate, some legal scholars of color began to rethink conventional civil rights strategies.⁶² As more and more minority lawyers became disenchanted with the results of "filing amicus briefs, coining new litigation strategies," and writing conventional

57. 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. IV 1992).

58. See Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CALIF. L. REV. 685, 709-11, 718 (1991).

59. 443 U.S. 193 (1979).

60. 480 U.S. 616 (1987).

61. *Id.* at 631-40. The Agency's plan in *Johnson* was characterized by the Court as "a moderate, flexible, case-by-case approach . . . effecting a gradual improvement in the representation of minorities and women in the Agency's work force." *Id.* at 642. The Court noted the plan contained "reasonable aspirations," not "mere blind hiring by the numbers," and was subjected to annual short-term goal reformation. *Id.* at 635-36.

62. Richard Delgado, *Brewer's Plea: Critical Thoughts on Common Cause*, 44 VAND. L. REV. 1, 6-8 (1991).

law review articles,⁶³ CRT began to coalesce through a series of conferences.⁶⁴ Despite some sympathy with Critical Legal Studies, CRT scholars rejected the CLS “rights critique” because it ignored the importance of legal rights to racial minorities.⁶⁵ They also began to experiment with new scholarly methodologies such as storytelling.⁶⁶

As of yet, no clear consensus exists about the defining characteristics of CRT. According to Kimberlé Crenshaw, “[w]hile no determinative definition of [CRT] is yet possible, one can generally say that the literature focuses on the relationship between law and racial subordination in American society.”⁶⁷ John Calmore believes that the defining characteristic of CRT is its rejection of white experience and perspectives as standards to be applied to people of color.⁶⁸ Richard Delgado has denied that a single defining feature exists and instead has identified eight themes characterizing CRT:

- (1) an insistence on “naming our own reality”;
- (2) the belief that knowledge and ideas are powerful;
- (3) a readiness to question basic premises of moderate/incremental civil rights law;
- (4) the borrowing of insights from social science on race and racism;
- (5) critical examination of the myths and stories powerful groups use to justify racial subordination;
- (6) a more contextualized treatment of doctrine;
- (7) criticism of liberal legalisms; and
- (8) an interest in structural deter-

63. Delgado, *supra* note 62, at 6. One of CRT’s most important aspects is said to be its “emphatic declarations of dissent from dominant norms.” John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2135 (1992).

64. The first workshop was held at the University of Wisconsin at Madison in July 1989, the second at SUNY Buffalo School of Law in June 1990, the third at the University of Colorado School of Law in Boulder in June 1991, and the fourth at Yale Law School in June 1992. There was also a public conference at the University of Wisconsin in November of 1990 entitled “Conference on Critical Race Theory: A Dialogue on the Role of Law in the Maintenance and Elimination of Racial Subordination.” Calmore, *supra* note 63, at 2162 n.107.

65. Briefly, the “rights critique” questioned whether the concept of legal rights assisted oppressed groups, or instead served to mask their oppression by offering the illusion of fair treatment. One catalyst responsible for the formation of the CRT movement was the dissatisfaction of some CRT scholars with critical legal scholars’ (and traditional Marxist) positions on race. See Richard Delgado, *Enormous Anomaly? Left-Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1548 (1991) (book review) (finding that CRT scholars “raised objections from the left and have called for a wholly new approach to racial justice”); Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 750 n.4 (1992) (“It is instructive to recall as well that elements of feminist and critical race theory emerged as explicit critiques of perceived shortcomings in CLS.”).

66. I have discussed this methodology at length in a previous article. See Farber & Sherry, *supra* note 7.

67. Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 195, 213 n.7 (David Kairys ed., rev. ed. 1990).

68. Calmore, *supra* note 63, at 2160.

minism—the ways in which legal tools and thought-structures can impede law reform.⁶⁹

As an outsider, it would be presumptuous of me to attempt to define CRT. Nevertheless, from my own point of view, the clearest unifying theme of CRT is a call for a change of perspective, specifically, a demand that racial problems be viewed from the perspective of minority groups, rather than from a white perspective. This means that arguments about racial issues should not be subsumed under broader debates about matters such as the role of the federal judiciary, but should be approached on their own terms. Even the form in which issues are posed is subject to reevaluation. It will not do, for example, to speak of a tradeoff between merit and affirmative action, because this phrasing of the problem assumes the validity of current standards of merit. Groups that are disadvantaged by those standards are unlikely to embrace the assumption of their validity.⁷⁰

Thus, CRT encourages a useful change of perspective. One barrier to converting this change of perspective into a crisp definition of CRT, however, is that terms such as “minority groups” and “perspective” are not self-defining. Fleshing out such terms is one of the major tasks of CRT. In this sense, CRT cannot be defined in the absence of a completed critical theory of race.

Fortunately, a clear-cut definition of CRT is unnecessary for present purposes. Even without such a definition, it is easy to identify a group of scholars who clearly belong to the movement. This group includes Robin Barnes, Derrick Bell, Kimberlé Crenshaw, Richard Delgado, Charles Lawrence, Mari Matsuda, and Patricia Williams.⁷¹ The views of this group and its critics are the central focus of this Article. Because the focus will be on CRT ideas rather than on individual scholars, it is unnecessary to decide on the status of scholars (such as Lani Guinier) who share similar ideas but whose affiliation with CRT is less clear.⁷² Among this borderline group are also some white scholars sympathetic to CRT,⁷³ as well as scholars

69. Richard Delgado, *When a Story is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 n.1 (1990).

70. For this reason, in Part II.C I will attempt to show that many existing standards are in fact relevant to the ability to perform occupational tasks, rather than simply assuming the standards are valid.

71. See, e.g., Calmore, *supra* note 63, at 2150. All of these scholars, except Delgado himself, are listed by Delgado as part of the CRT movement. Delgado, *supra* note 65, at 1548 n.5.

72. On Guinier's connection with CRT, see *supra* note 30.

73. Richard Delgado states that CRT “is a loose knit coalition of scholars, most of color, who explore new approaches to problems of race.” Delgado, *supra* note 65, at 1548 n.5. Other writers seem to imply that CRT is limited to minority scholars. Robin Barnes states that “the personal and political experiences of Critical Race scholars force them to contend with the complex intersection of race and other characteristics that form the basis for oppression.” Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1868 (1990); see also Crenshaw, *supra* note 67, at 214 n.7 (identifying various scholars of color who are influential to the CRT tradition). On the other hand, Alex Johnson believes that whites like Professor Gary Peller can contribute to CRT scholarship, though Johnson declined to address “whether whites can be critical race theorists.” Johnson, *New Voice*, *supra* note 2, at 2030 n.99.

of color whose works attack white "mindsets" or advocate a "voice of color."⁷⁴

Ironically, some CRT ideas are shared by its sharpest critics. For example, the sharp debate between Randall Kennedy and CRT scholars over the intellectual standards applying to scholarship⁷⁵ masks some important areas of agreement. Citing a study showing that " 'blacks and whites are 'worlds apart' in their perception of race relations,' " Kennedy apparently agreed with his CRT counterparts that "appreciable differences exist in the prevailing opinions and sensibilities of various racial groups."⁷⁶ Similarly, Stephen Carter, also an ardent critic of CRT views regarding scholarship, agrees that "people of color are marked and tied together by a shared history and, to a lesser extent, by a shared presence of racial oppression."⁷⁷ As we will see in the next Section, views concerning affirmative action also correlate imperfectly with CRT affiliation.

2. CRT Positions on Affirmative Action

The relationships between CRT, its critics, and affirmative action are quite complex. As one might expect, some CRT scholars strongly favor affirmative action programs. Other CRT scholars have serious misgivings. A similar divergence exists among minority scholars who criticize CRT. Thus, scholars of color generally and CRT scholars in particular hold differing views about affirmative action. This Section first discusses the views of CRT scholars who support affirmative action and then discusses the concerns of CRT scholars who are less enthusiastic.

Patricia Williams is representative of CRT scholars who favor affirmative action.⁷⁸ She "strongly believe[s] not just in programs like affirmative

74. See, e.g., Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, and Morality*, 22 CONN. L. REV. 323, 351-69 (1990); Johnson, *New Voice*, *supra* note 2.

75. Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). In the following issue of the *Harvard Law Review*, three Critical Race scholars and "a white male sympathizer" responded to Kennedy. Delgado, *supra* note 63, at 2 n.7 (citing Colloquy: *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990) (the Colloquy contained articles by Milner S. Ball, Robin D. Barnes, Leslie G. Espinoza, and Richard Delgado)). These articles, in addition to others such as Calmore, *supra* note 63, at 2172-78, provided a unified attack on Professor Kennedy's article. See *infra* note 220 (noting that many Critical Race scholars viewed Kennedy's criticisms as a "betrayal").

76. Kennedy, *supra* note 75, at 1816 & n.299 (quoting Johnson, *Poll Finds Blacks and Whites "Worlds Apart,"* N.Y. TIMES, Jan. 12, 1989, at 18).

77. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 195, 197 (1991) [hereinafter CARTER, REFLECTIONS]; see also Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2070, 2078 (1991) [hereinafter Carter, *Academic Tenure*] (clarifying his views further). For a discussion of Carter's views, see Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631, 1635-37 (1992) (reviewing CARTER, REFLECTIONS, *supra*, and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991)). Barnes notes that although Carter recognizes the influence of racism in shaping consciousness, he also criticizes individuals who respond to it. *Id.* at 1655.

78. Barnes, *supra* note 77, at 1647 (characterizing Williams as a "strong proponent of affirmative action").

action, but in affirmative action as a socially and professionally pervasive concept."⁷⁹ Her writing reflects this enthusiasm:

[A]ffirmative action is an affirmation; the affirmative act of hiring—or hearing—blacks is a recognition of individuality that replaces blacks as a social statistic In this sense, affirmative action is as mystical and beyond-the-self as an initiation ceremony. It is an act of verification and of vision. It is an act of social as well as professional responsibility.⁸⁰

Robin Barnes similarly supports affirmative action. She believes the benefits of affirmative action "clearly outweigh" its costs.⁸¹ In her view, these benefits include: "a measure of reparation (albeit small) for past injustice; greater economic efficiency by providing poor, working poor, middle class, and upper middle class Blacks educational, employment, and business opportunities; and improved opportunities for integration and diversity."⁸² Barnes asserts that affirmative action might even be "absolutely necessary,"⁸³ because women, people of color, and the disabled "are entitled to the preferences not only to remedy past discrimination and abate the effects of today's exclusionary practices, but also to stem the tide of perpetual domination that has been the prerogative of the 'normal' white male for all too long."⁸⁴

Enthusiasm about affirmative action is not limited to CRT scholars. Randall Kennedy, who clearly is not a member of this group, has argued in favor of affirmative action,⁸⁵ as have other civil rights scholars.⁸⁶ Kennedy argues, for example, that affirmative action has "strikingly benefited blacks as a group and the nation as a whole" by enabling blacks to attain much better economic and educational positions.⁸⁷ This improved status, he concludes, has produced permanent gains: "the accumulation of valuable experience, the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations, the eradication of debilitating stereotypes, and the inclusion of black participants in the making of consequential decisions affecting black interests."⁸⁸

79. WILLIAMS, *supra* note 77, at 121.

80. *Id.* at 50.

81. Barnes, *supra* note 77, at 1638.

82. *Id.* at 1647. The reparation rationale for affirmative action is more prominent in CRT than in mainstream scholarship.

83. *Id.* at 1649.

84. *Id.* (emphasis added).

85. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329-34 (1986).

86. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22 (2d ed. 1988).

87. Kennedy, *supra* note 85, at 1329.

88. *Id.*

In contrast, Derrick Bell, although seemingly supportive of affirmative action, is skeptical of its motives and effectiveness.⁸⁹ He expresses some of his concerns through a dialogue between himself and an extra-terrestrial named Xerces, who is studying America's race problem.⁹⁰ "There is no mystical attraction to affirmative action," he tells Xerces, "only a commitment to try to alleviate racial disadvantage through means that are legal and in keeping with deeply moral standards."⁹¹ Bell believes that affirmative action has been instituted "to give blacks the sense of equality while withholding its substance."⁹² In Bell's view, affirmative action programs serve white interests far more than their supposed beneficiaries.⁹³ Thus, although he supports affirmative action, it is with little enthusiasm. "For now [affirmative action programs] must be defended; but as we defend them, we should not forget that the relief these programs provide is far from ideal."⁹⁴

Richard Delgado is also ambivalent toward affirmative action.⁹⁵ Like Bell, he feels that "[a]t best . . . affirmative action serves as a homeostatic device, assuring that only a small number of women and people of color are hired or promoted."⁹⁶ He also criticizes the diversity argument for affirmative action:

89. See Derrick Bell, *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1595-96, (1989) [hereinafter Bell, *Xerces*]; Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 7 (1979) [hereinafter Bell, *Minority Admissions*]. Although his *Bakke* article was written over a decade ago, Bell's views of the case do not seem to have changed in the meantime. See BELL, *supra* note 19, at 102-03.

90. Bell, *Xerces*, *supra* note 89, at 1598.

91. *Id.* at 1607.

92. *Id.* at 1598.

93. Indeed, affirmative-action remedies have flourished because they offer more benefit to the institutions that adopt them than they do to the minorities whom they're nominally intended to serve. Initially, at least in higher education, affirmative-action policies represented the response of school officials to the considerable pressures placed on them to hire minority faculty members and to enroll minority students.

DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 154 (1987). Bell thinks the true purpose of affirmative action plans is to pacify minorities:

The nation is structured to support the powerful and suppress the powerless. The law will seldom deviate from this pattern. On occasion, it may anticipate societal reform and seem even to lead or to command change. But it remains a representation, and will not change because it cannot stray too far from the pattern set by the societal reality that racial equality for African-Americans is at best an empty promise that cannot be fulfilled until the masses of whites realize that their investment in whiteness has brought them only the semblance of superiority in their subordinate status.

Bell, *Xerces*, *supra* note 89, at 1613.

94. Bell, *Minority Admissions*, *supra* note 89, at 19. For a similar view of the limited role of affirmative action, see CORNEL WEST, RACE MATTERS 64-65 (1993).

95. Illustrative of his sometimes more favorable attitude is Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (reviewing DINESH D'SOUZA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991)). Delgado suggests that preferential hiring may be warranted because people of color, due to multiple perspectives, have an advantage in discerning and comprehending post-modern thought. *Id.* at 1365-68.

96. Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222, 1224 (1991). Delgado states that "[n]ot too many

In law school admissions, for example, majority persons may be admitted as a matter of right, while minorities are admitted because their presence will contribute to "diversity." . . . The assumption is that such diversity is educationally valuable to the majority. But such an admissions program may well be perceived as treating the minority admittee as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students.⁹⁷

The "role model" justification for affirmative action is also problematic for Delgado because of the strain it creates for scholars of color.⁹⁸ As he puts it, "[b]eing a role model is a tough job, with long hours and much heavy lifting."⁹⁹

In short, Delgado believes that affirmative action "is at best a mixed blessing for communities of color."¹⁰⁰ He seems even less approving than Bell, proclaiming at one point that "[a]ffirmative action . . . is something no self-respecting attorney of color ought to support."¹⁰¹ Delgado advises people of color to "demystify, interrogate, and destabilize affirmative action" as a program "designed by others to promote their purposes, not ours."¹⁰²

Concerns similar to those of Bell and Delgado are shared by some non-CRT scholars having serious reservations about affirmative action. For example, Stephen Carter has argued that affirmative action stigmatizes African Americans, whom whites believe have attained their positions without meeting the usual standards of merit. Carter refers to this as the "best black" syndrome and links it with affirmative action:

This dichotomy between "best" and "best black" is not merely something manufactured by racists to denigrate the abilities of professionals who are not white. On the contrary, the durable and demeaning stereotype of black people as unable to compete with

[minorities will be selected], for that would be terrifying, nor too few, for that would be destabilizing." *Id.*

97. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 570 n.46 (1984).

98. The role model argument, in simplest form, holds that affirmative action is justified in order to provide communities of color with exemplars of success, without which they might conclude that certain social roles and professional opportunities are closed to them. Role models are expected to communicate to their communities that opportunities are indeed available and that hard work and perseverance will be rewarded.

Delgado, *supra* note 96, at 1223 n.5. Delgado questions whether this message is accurate: "I am expected to tell the kids that if they study hard and stay out of trouble, they can become a law professor like me. That, however, is a very big lie: a whopper." *Id.* at 1228 (footnote omitted).

99. *Id.* at 1226.

100. *Id.* at 1230. The good role model also must "be an assimilationist, never a cultural or economic nationalist, separatist, radical reformer, or anything remotely resembling any of these." *Id.* at 1227 (footnote omitted).

101. *Id.* at 1225-26.

102. *Id.* at 1226.

white ones is reinforced by advocates of certain forms of affirmative action. It is reinforced, for example, every time employers are urged to set aside test scores (even, in some cases, on tests that are good predictors of job performance) and to hire from separate lists, one of the best white scorers, the other of the best black ones.¹⁰³

Robin Barnes rejects this suggestion that "racial preferences have caused a rise in anti-Black sentiment in the country and feelings of stigmatization and insecurity among Black professionals."¹⁰⁴ Prejudice against African Americans, Barnes argues, has no link to affirmative action.¹⁰⁵ In contrast, Bell contends that affirmative action programs do contribute to anti-African American sentiment. Such programs, he asserts, "further the interests of a relative few at the cost of growing hostility borne by many."¹⁰⁶

Clearly, CRT scholars do not share a "party line" of enthusiasm toward affirmative action. Indeed, Bell and Delgado's misgivings about affirmative action are akin to Stephen Carter's¹⁰⁷ and diverge sharply from the enthusiasm expressed by Patricia Williams and Robin Barnes. In some respects, this division among CRT scholars is itself a notable intellectual event. Outside of CRT circles, the debate over affirmative action has been ideologically polarized, with the Right opposed and the Left in favor. CRT writers may help us transcend that polarity. As we will see, they also have a somewhat distinctive view on one aspect of the debate—the extent to which affirmative action conflicts with conceptions of merit.

3. *The Critique of Standards of Merit*

Mainstream scholars typically view problems such as affirmative action or acceptance of minority scholarship in terms of "merit."¹⁰⁸ In contrast, CRT scholars question the standards used in determining merit.¹⁰⁹

103. CARTER, REFLECTIONS, *supra* note 77, at 49-50.

104. Barnes, *supra* note 77, at 1638.

105. "Opponents argue that advocating affirmative action as a social necessity sends the message that Blacks cannot compete with whites on a level playing field." *Id.* at 1641. Barnes argues that, while "some will presume that Black professionals have advanced because of affirmative action, . . . it is doubtful that affirmative action has augmented the degree to which they are scrutinized and unclear that it weakens their chances of being named among the best." *Id.* Rather, Barnes believes, the "nation's longstanding ideology of white supremacy, and not affirmative action" explains any such stigmatization. *Id.* at 1638. To the same effect, see Aleinikoff, *Race-Consciousness*, *supra* note 3, at 1091-92 (questioning extent to which affirmative action increases white racism or stigmatizes African Americans).

106. Bell, *Xerxes*, *supra* note 89, at 1601; *see also* Bell, *Minority Admissions*, *supra* note 89, at 18 ("[T]he cost in exacerbating the fears of lower- and middle-class whites negates the benefits of retaining a system that, regardless of its constitutionality, remains seriously suspect in society."). As we saw in Part I.A, *supra*, Bell is correct about the white response to affirmative action.

107. *See, e.g.*, CARTER, REFLECTIONS, *supra* note 77, at 1-8.

108. *See, e.g.*, Kennedy, *supra* note 75, at 1772 (discussing the "meritocratic" model, under which "all that is relevant is the relative merits of the works competing for recognition").

109. Delgado, *supra* note 62, at 8-9; *see also* Johnson, *Quotas*, *supra* note 2, at 1068-71. For similar views by white scholars, *see* Aleinikoff, *Race-Consciousness*, *supra* note 3, at 1067-68

CRT scholars generally reject the argument that affirmative action involves a lowering of standards, primarily on the ground that the standards themselves are implicitly geared to whites. As Delgado says, "[Critical Race Studies] scholars envision racial justice quite differently. In their vision, persons of color would not need to resemble successful whites to fit in, but would achieve success without sacrificing what is distinctive about themselves."¹¹⁰ Thus, instead of minorities changing to fit "the system," CRT envisions the system changing to better accommodate people of color.¹¹¹

For example, Derrick Bell questions the standards used to evaluate minority candidates and disputes those who claim that there are a very limited number of qualified minority candidates.¹¹² He complains that "whites in the leadership classes" pretend to support affirmative action, but then claim to be unable to find enough qualified minorities, even knowing that "the qualifications they insist on are precisely the credentials and skills that have been long denied to people of color."¹¹³ Those credentials, Bell contends, "are often irrelevant or of little importance and therefore serve mainly as barriers to most minorities and a great many whites as well."¹¹⁴ He also believes that whites at the lower end of the socioeconomic scale are acting against their own best interests in opposing affirmative action, since "those plans remove artificial qualification barriers and thus further their interests as well as those of blacks."¹¹⁵

Despite their somewhat different attitudes toward affirmative action, Richard Delgado and Patricia Williams share similar doubts about current standards of merit. Delgado contends that societal standards are skewed.¹¹⁶

(implying that I.Q. tests may be invalid because of the failure of test designers to ensure equal scores for African Americans and whites); Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 324, 381-85 (1988) (arguing that merit has been defined and used as a vehicle to rationalize class-based hierarchies); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 778, 803, 806-07 (arguing that supposedly objective standards are created by white culture); see also Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 732-34 (arguing that distribution of scholarly opportunity in law schools is grounded in power, not merit).

110. Delgado, *supra* note 62, at 12 n.58.

111. *Id.*

112. Bell, *Minority Admissions*, *supra* note 89, at 8 ("Although the debate over the validity of traditional admissions criteria continues, there is impressive evidence that grades and test scores cannot predict success in the practice of law or medicine."); see also *id.* at 17. In Bell's view, "the chosen solution—simply recognizing minority exceptions to traditional admissions standards based on grades and test scores—has served to validate and reinforce traditional policies while enveloping minority applicants in a cloud of suspected incompetency." *Id.* at 8.

113. Bell, *Xerces*, *supra* note 89, at 1605.

114. *Id.*; see also BELL, *supra* note 19, at 6 (continuing the attack on "standards").

115. Bell, *Xerces*, *supra* note 89, at 1605; see also Bell, *Minority Admissions*, *supra* note 89, at 14 (noting that white opposition to affirmative action often is self-defeating).

116. Affirmative action enables members of the dominant group to ask, "Is it fair to hire a less-qualified Chicano or black over a more-qualified white?" This is a curious way of framing the question, as I will argue in a moment, in part because those who ask it are themselves the beneficiaries of history's largest affirmative action program. . . .

He sees affirmative action as a tool to divert attention from the invalidity of merit standards,¹¹⁷ and argues that “fundamental fairness requires [a] reallocation of power.”¹¹⁸ Instead of affirmative action, Delgado favors “an overhaul of the admissions process and a rethinking of the criteria that make a person a deserving law student and future lawyer.”¹¹⁹ Delgado believes such a retooling will lead to “a proportionate number of minorities, whites, and women gaining admission.”¹²⁰

Patricia Williams also rejects contemporary merit standards. In her view, “[s]tandards are nothing more than structured preferences.”¹²¹ She favors restructured merit standards that are

for rather than against—to like rather than dislike—the participation of black people. Thus affirmative action is very different from numerical quotas that actively structure society so that certain classes of people remain unpreferred. “Quotas,” “preference,” “reverse discrimination,” “experienced,” and “qualified” are con words, shiny mirror words that work to dazzle the eye with their analogic evocation of other times, other contexts, multiple histories. As a society, we have yet to look carefully beneath them to see where the seeds of prejudice are truly hidden.¹²²

The CRT view openly challenges conventional ideas about standards of merit. As such, it is substantially different from mainstream arguments in favor of affirmative action, which generally accept the validity of existing standards while advocating special consideration for African Americans. The critique of standards permeates CRT and provides CRT with a sense of radicalism by challenging fundamental social understandings about qualifications and merit. It also suggests that the crucial obstacle to the solution of racial problems is the absence of the necessary political will. The implication is that African Americans could readily attain economic and academic equality if only society would eliminate the standards that limit their access to desirable positions. Part II will address the feasibility of creating proportional representation in major American institutions, either by expanding affirmative action or by changing merit standards.

. . . Our acquiescence in treating it as “a question of standards” is absurd and self-defeating when you consider that we took no part in creating those standards and their fairness is one of the very things we want to call into question.

Delgado, *supra* note 96, at 1224-25 (footnotes omitted).

117. *Id.* at 1224-25. Delgado considers merit standards to be “like white people’s affirmative action A way of keeping their own deficiencies neatly hidden while assuring that only people like them get in.” Delgado, *supra* note 95, at 1364.

118. Delgado, *supra* note 96, at 1225.

119. Delgado, *supra* note 97, at 572.

120. *Id.*

121. WILLIAMS, *supra* note 77, at 103; *see also id.* at 99 (standards are merely “mind funnels”). *But see* Harris, *supra* note 1, at 1770 (recognizing that merit should be comprised of factors other than test scores, but that scores and GPA “are undoubtedly important factors”).

122. WILLIAMS, *supra* note 77, at 103.

II

THE DECREASING RELEVANCE OF AFFIRMATIVE ACTION

Opponents of affirmative action advocate its reduction or elimination. Proponents argue it should be maintained, or better yet, expanded. Although the debate itself is complex, the ultimate issue simply is whether to change the magnitude of affirmative action in our society. My thesis is that this issue has diminishing relevance to today's racial problems. Prompted by CRT's emphasis on the overall status of minorities in our society, this Section evaluates affirmative action at the macro-level, taking a panoramic view of American society as a whole.

The argument proceeds in several stages. Section A examines the overall societal level of affirmative action in order to provide a baseline. If affirmative action has already had dramatic effects on African American representation, further expansion might make a significant difference. On the other hand, if affirmative action has had little effect, neither expanding nor restricting it seems as likely to matter much.¹²³

Sections B and C consider possible changes in the present levels of affirmative action. Because of legal, political, and economic constraints, it is unlikely that affirmative action will be eliminated, and even less likely that it will ever lead to proportional African American representation in major institutions. In particular, the educational disadvantages of many African Americans sharply limit their ability to benefit from affirmative action by employers.

Moreover, our racial problems are changing in ways that make affirmative action less relevant. Although conventional methods of racial exclusion are being rectified, the prominence of other forms of discrimination is rising. Rather than directly blocking African Americans from competing for jobs or electoral offices, these new forms of discrimination may relocate employment opportunities or political power so that African Americans are no longer part of the pool. For instance, as whites abandon Northern industrial cities for distant suburbs or the Sun Belt,¹²⁴ affirmative action is likely to give African Americans only a larger share of a shrinking economic and political base. Alternatively, African Americans may find that "presence" does not necessarily entail full institutional participation. Furthermore, as discussed in Section D, affirmative action can do little to combat the growing level of African American alienation.

In short, CRT scholars like Bell and Delgado rightly question the transformative potential of affirmative action. They are wrong, however, to think that changing current standards of merit would be substantially more effective in increasing African American representation.

123. Whatever the level of effectiveness of affirmative action has been, it has been enough to spark strong white opposition. See *supra* Part I.A.

124. See *infra* note 178.

A. *The Baseline: The Current Scope of Affirmative Action*

To evaluate the affirmative action debate, it would be helpful to have some concept of scale. Are we talking about thousands of positions nationwide, hundreds of thousands, or millions? Given the extent of the controversy, one might assume that affirmative action has had a major impact, with many African Americans receiving better employment, educational, or political positions, perhaps at the expense of an equally large number of whites. As we have seen, however, some CRT scholars are skeptical of the benefits of affirmative action.¹²⁵

With respect to employment, a number of econometric studies have reviewed the impact of affirmative action.¹²⁶ Most of these studies focused on the federal executive order requiring government contractors to adopt affirmative action programs. These studies suggest that affirmative action has modestly increased the number of African Americans employed by these contractors (in the neighborhood of .15% annually), a significant gain over the long term.¹²⁷ However, while an early surge in wages apparently occurred when employers were bidding for a limited pool of African American employees, affirmative action has probably had little long-term effect on wages.¹²⁸

In the educational sphere, the effectiveness of affirmative action is difficult to gauge for several reasons. First, the number of African Americans in college has fluctuated greatly for unknown reasons.¹²⁹ Second, educational institutions generally do not publicize the statistics necessary to mea-

125. See *supra* text accompanying notes 100-06.

126. For a careful review of the literature, see George Rutherglen, *After Affirmative Action: Conditions and Consequences of Ending Preferences in Employment*, 1992 U. ILL. L. REV. 339. Rutherglen begins by considering the overall effect of anti-discrimination laws. The most sophisticated and careful studies conclude, contrary to some CRT views, that federal regulation has indeed been successful in reducing discrimination in employment. *Id.* at 347-48; see also Michael K. Braswell et al., *Affirmative Action: An Assessment of Its Continuing Role in Employment Discrimination Policy*, 57 ALB. L. REV. 365, 431-35 (1993) (finding positive effects of affirmative action requirements for federal contractors in the 1970s, but with tapering benefits in the 1980s); Harris, *supra* note 1, at 1788 n.329 (discussing benefits of affirmative action); Heckman & Verkerke, *supra* note 5, at 278-79, 297-98 (noting that civil rights laws raised black wages, especially in the South between 1965 and 1975, but concluding that the civil rights laws have accomplished little since then). *But see* Donohue & Siegelman, *supra* note 19, at 1015, 1024, 1027 (suggesting that current discrimination litigation centers around firing decisions, which may result in a small net incentive against minority hiring).

127. Rutherglen, *supra* note 126, at 349-50; see also A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 316-17 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) [hereinafter A COMMON DESTINY]. Affirmative action seems to have led to a sharp increase in the number of minority law professors. See Carrington, *supra* note 3, at 1126-27.

128. See James P. Smith, *Affirmative Action and the Racial Wage Gap*, AM. ECON. REV. 79, 83 (May 1993) (separately paginated Papers and Proceedings issue). For a review and methodological critique of the econometric studies, see John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. ECON. LIT. 1603, 1630-35 (1991).

129. A COMMON DESTINY, *supra* note 127, at 338-45. One possible factor is the contraction in the availability of scholarships since 1980. Another may be the attractiveness of the military as a career path for black men. *Id.* at 343-45; see also *infra* note 169.

sure the impact of affirmative action. Finally, even if the number of preferential admissions at any given school were known, we would also have to know whether those students would have been admitted to some less competitive school under a colorblind program. This information is not publicly available.¹³⁰

At the time of *Bakke*, only a handful of African Americans nationwide had the type of LSAT scores and GPAs required for admission to the nation's most selective law schools.¹³¹ African American test scores and grade averages may well have risen in the meantime, making race-conscious admissions less important. Nevertheless, it is plausible that a substantial number of African Americans have received significant educational opportunities as a result of affirmative action. The increased education, in turn, may have translated into improved employment prospects.

In the political arena, modern civil rights laws have had dramatic effects. African American political presence, particularly in the South, has

130. Indeed, a law student at Georgetown was threatened with discipline for allegedly releasing data on the subject. According to the student, the average LSAT for white students at Georgetown was 43 out of a possible 50, while the average score of black students was 36. The student also reported a difference in undergraduate grades. The Dean of Georgetown described the student's article as a "misleading mix of opinion and data." Michel Marriott, *White Accuses Georgetown Law School of Bias in Admitting Blacks*, N.Y. TIMES, Apr. 15, 1991, at A13. His article was, however, consistent with available information about the size of the gap at the national level. In 1988, the mean LSAT was roughly 33 for whites and 24 for African Americans. David B. Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42, 58 n.64 (1988).

The Supreme Court's approach to affirmative action probably has contributed to this situation by discouraging full disclosure of the operation of affirmative plans, thereby limiting public discussion of their design. As Solicitor General Drew Days points out:

[Many affirmative action programs] have not been openly adopted and administered. Consequently, they have not benefited from the scrutiny and testing of means to ends assured by public deliberation. Programs that cannot survive the light of explicit consideration are highly susceptible to abuse and unlikely to have a stable existence. In a society in which we place such importance upon "uninhibited, robust, and wide-open" debate of public issues, it is difficult to justify the idea of privately adopted programs using racial criteria to allocate resources.

Days, *supra* note 41, at 458-59 (footnote omitted).

131. Brief Amicus Curiae for the Association of American Law Schools at 27-32, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (No. 76-811) (citing F. Evans, *Applications and Admissions to ABA Accredited Law Schools: An Analysis of National Data for the Class Entering in the Fall 1976* (Law School Admission Council 1977)); *see also* Kennedy, *supra* note 85, at 1329 n.4 (noting that from 1970 to 1974 only one of twenty-six African Americans who were admitted to the University of California at Davis Medical School would have qualified for admission under the "regular" standards).

For some more recent statistics about racial differences in grade points and test scores in undergraduate programs, see D'SOUZA, *supra* note 19, at 3. According to D'Souza:

In 1988, nearly 100,000 blacks took the [SAT] test. Only 116 scored over 699 (out of 800) on the verbal section of the test; only 342 scored as high on the math section. Fewer than three thousand blacks nationwide scored over 599 on either the verbal or math SAT.

Id. at 41. Even among individuals with family incomes between \$50,000 to \$60,000 per year, the average African American combined score on the SAT was over 150 points lower than the average white and Asian American scores. Andrew Hacker, *"Diversity" and Its Dangers*, N.Y. REV. BOOKS, Oct. 7, 1993, at 21, 23.

increased radically.¹³² Even more so than within the educational sphere, it is difficult to identify the specific effect of race-conscious redistricting. Such redistricting has been used to create districts where minority groups form the majority of voters. A good argument can be made that this type of districting has resulted in an increase in the number of African American legislators.¹³³

Thus, affirmative action probably has had an impact on African American employment, education, and political power. Legal scholars, however, concern themselves less with this empirical question than with the normative question of whether the present level of affirmative action should be expanded or contracted. To the degree that changes in the current level of affirmative action are infeasible, however, the debate loses much of its practical value.

B. *Legal and Political Constraints on Changes in the Scope of Affirmative Action*

Several constraints would confine efforts at any major change in the current level of affirmative action. One such constraint is the federal judiciary. To the extent that expansion of affirmative action would violate present legal standards, it could succeed only if the Supreme Court substantially changes prevailing legal doctrine. On the other hand, reduction of the present level of affirmative action could occur if the Court adopts colorblindness as a norm. Neither outcome seems likely.

Putting aside the effect of future judicial appointments, the present Court is unlikely to move toward a substantially more favorable position on affirmative action. Justices Brennan, Marshall, and Blackman voted in favor of affirmative action in many of the cases discussed in Part I.B. They have since retired. Likewise, Justice White, who voted in favor of affirmative action in *Metro Broadcasting v. FCC*¹³⁴ and *Shaw v. Reno*,¹³⁵ was replaced by Justice Ginsburg. Her presence on the Court is not expected to significantly affect the Court's stance.

Similarly, it is unlikely the present Court will shift drastically toward colorblindness. Of the current Justices, only Chief Justice Rehnquist¹³⁶ and

132. In the two years following passage of the Voting Rights Act, signed into law by President Johnson on August 6, 1965, the percentage of African Americans registered to vote in Mississippi increased by a factor of nine. By 1980, the number of elected African American officials in the South rose from under a hundred to over eighteen hundred. ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 2-3 (1987).

133. The effectiveness of this type of redistricting is currently in dispute. See Randall Kennedy, *Blacks in Congress: Carol Swain's Critique*, 2:2 RECONSTRUCTION 34, 35-36, 39-40 (1993) (reviewing CAROL SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICAN INTERESTS IN CONGRESS* (1992)).

134. 497 U.S. 547, 552 (1990).

135. 113 S. Ct. 2816, 2834 (1993) (White, J., dissenting).

136. See *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., dissenting) (joined by Rehnquist, J.).

Justice Scalia¹³⁷ have ever fully endorsed colorblindness, but Rehnquist may have backed away from his position.¹³⁸ Justice Thomas is another possible vote for colorblindness.¹³⁹ Thus, at most, three votes for a colorblind Constitution may exist on the present Court. Moreover, as the abortion controversy illustrates, the moderate conservatives on the Court have little taste for radical changes in constitutional doctrine.¹⁴⁰ In short, given the Court's present make-up, affirmative action doctrine seems likely to remain relatively static.¹⁴¹ The longer current doctrine remains in place, the more solidified it becomes as a matter of *stare decisis*.

Political constraints also limit the likelihood of change in the status of affirmative action. The possibility that either major party will exercise political dominance long enough to produce a run of either highly conservative or highly liberal judicial appointments seems doubtful. Adopting a colorblind standard would require several strong conservative appointments, net of any retirements by conservatives or appointments of liberals by Democrats.¹⁴² At present, this scenario seems unlikely.

However, any major expansion of affirmative action also seems unlikely. As we saw in Part I, affirmative action is extremely unpopular with large blocs of white voters, contributing to the defeat of several liberal

137. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 521 (1989) (Scalia, J., concurring in the judgment). Justice Kennedy indicated some sympathy with this view as well, but declined to embrace it. *Id.* at 518-19 (Kennedy, J., concurring in part and concurring in judgment).

138. Justice Rehnquist chose to join Justice O'Connor's opinion in *Croson*, which affirmed that Congress has broad authority to "adopt prophylactic rules" to address situations where principles of equality are threatened, *id.* at 490, rather than Justice Scalia's partial concurrence, which relied upon the colorblind approach, *id.* at 521.

It is noteworthy that Justice O'Connor's opinion left open the possibility that even state or local entities could act to remedy identified discrimination, *id.* at 509, whereas Justice Scalia's concurrence would deny states the authority to remedy the effects of past discrimination, *id.* at 521.

139. Justice Thomas was on record as opposing affirmative action before his appointment. See Sigelman & Todd, *supra* note 19, at 242-43. Whether this remains his view is not entirely clear. See *United States v. Fordice*, 112 S. Ct. 2727, 2744-46 (1992) (Thomas, J., concurring) (arguing that certain remedial race-conscious reforms would be acceptable in the university context).

140. In *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992), Justices Souter, O'Connor, and Kennedy frustrated years of efforts by conservatives by reaffirming the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), and stressed the importance of adhering to precedent. *Casey*, 112 S. Ct. at 2808-09.

141. Of the recent opinions, *Metro Broadcasting* seems most at risk because it allowed Congress broad leeway on affirmative action even when Congress was not utilizing its special Fourteenth Amendment power to enforce equal protection in the realm of civil rights. See Neal Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 128 (1990).

142. On the other hand, even if Democratic appointments resulted in liberal dominance of the Court, the resulting shift in doctrine would not likely be radical. A liberal coalition would be unlikely to adopt a test any more favorable to affirmative action than that espoused by Justices Brennan and Marshall. Those Justices applied the same, intermediate level of scrutiny to affirmative action programs that the Court currently applies to statutes discriminating on the basis of gender. See NOWAK & ROTUNDA, *supra* note 33, at 681-83, 696, 698. Although this is a somewhat more lenient standard than the strict scrutiny applied in *Croson*, it would still place a substantial burden of proof on proponents of affirmative action. See *id.* § 14.23 (discussing application of the intermediate scrutiny test in gender discrimination cases).

presidential candidates since 1968.¹⁴³ Because of the political significance of this issue, even Democratic presidents are unlikely either to support federal legislation sharply expanding affirmative action or to appoint outspoken advocates to the Court. Thus, no realistic likelihood exists for a major expansion of affirmative action based upon political forces.

If anything, it is surprising that affirmative action has survived politically as well as it has. However, efforts to roll back affirmative action programs have also failed. For example, Reagan Administration proposals to eliminate much of the federal government's affirmative action program were unsuccessful, in part because of opposition from the business community.¹⁴⁴ Beyond the business community's resistance, three reasons seem to explain why affirmative action has survived the sometimes intense white opposition. First, as to existing programs, the burden of inertia is upon challengers to affirmative action. Supporters of existing programs often only need to block unfavorable measures, which is easier than proactive measures in our political system.¹⁴⁵ Second, affirmative action has become embedded in American society, so that eliminating it would impair a group "entitlement." Harvard sociologist Nathan Glazer, originally a strong opponent of affirmative action, conceded by 1988 that "uprooting affirmative action would be very difficult," as shown by the failed efforts of the Reagan Administration, which was "as determined an opponent [of affirmative action] as we are ever likely to see."¹⁴⁶ The reason, Glazer asserted, was that affirmative action had created firm expectations and institutional structures, so that abolishing it would cause major disruption.¹⁴⁷ Finally, given the almost inevitable use of statistics for enforcement and compliance pur-

143. See *supra* text accompanying notes 20-25; see also *supra* note 17; text accompanying note 29; WEST, *supra* note 94, at 6 (finding that the Republican Party since 1968 has played the "race card" to appeal to popular xenophobic images).

144. See Devins, *supra* note 47, at 354-55 (noting that while the 1980 Republican platform challenged Carter's affirmative action programs, Reagan, once in office, failed to repeal most of those same programs); Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 662 (1989) (discussing business community opposition "to the Reagan Administration's attempts to turn back the clock on affirmative action").

145. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 106-07 (1991). In the relatively few situations in which Congress has supported affirmative action, there has usually been a detour of some kind around the normal legislative process. See Farber & Frickey, *supra* note 58, at 713-16.

146. Nathan Glazer, *The Affirmative Action Stalemate*, 90 PUB. INTEREST 99, 111 (1988). Social Security provides the most obvious example of the difficulty of modifying "entitlements."

147. *Id.*; cf. Harris, *supra* note 1, at 1767-68, 1776 (stating that the Supreme Court treats white expectations and privileges as protected property interests); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1879-80 (1992) (suggesting that preexisting white expectations in employment provide basis for criticizing affirmative action plans). Once affirmative action has been in place for many years, white expectations presumably reflect the resulting change in employment opportunities.

poses under employment discrimination law, it would be difficult to prevent their informal use as targets.¹⁴⁸

Political prediction is always hazardous. Nevertheless, barring some unexpected development, the current political equilibrium will continue and affirmative action will remain more or less the same. As we have seen, any effort to change the status quo probably will have to overcome a considerable amount of inertia on the part of the federal judiciary. As a result, the political and legal constraints already discussed are mutually reinforcing. Radical change is unlikely to come from the federal judiciary, in part because the political situation is likely to remain stable, so that judicial appointments are unlikely to result in a sharp change in affirmative action law. Even if the political situation should become more liberal, expansion of affirmative action would encounter resistance from the bench, unless the views of the Justices also became more liberal through new appointments. Thus, for the next decade, if not the next generation, something close to the status quo is likely to endure.¹⁴⁹

In the longer run, the political situation is obviously less predictable. Beyond political and legal constraints, however, affirmative action is subject to other inherent limitations. As discussed below, these limitations are likely to reduce the relevance of the debate. Affirmative action has limited potential for addressing our most pressing racial problems, at least in its conventional forms. First, affirmative action is inherently incapable of expanding African American access to academic, political, and economic institutions significantly beyond current levels. Second, access is not necessarily the answer, or is, at least, far from being the *whole* answer.

C. The "Pool" Problem in Education and Employment

As we saw earlier, CRT scholars believe that many African Americans are fully qualified for jobs and educational opportunities but are excluded by invalid standards. Thus, they assume that many qualified African Americans can be found in the pool of potential employees or students. Under this view, it should be easy to increase greatly the number of African American employees and students through affirmative action, assuming the desire to do so exists. A better approach, according to CRT scholars, would be to change the standards themselves so that the selection process will better represent the applicant pool. Unfortunately, as we will see, the CRT assumption about the composition of the pool is far too optimistic.

148. See Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 305-06 (1989).

149. This is primarily intended as an empirical prediction rather than a normative evaluation. However, it does have some possible normative implications. It suggests that *any* sharp change in the level of affirmative action would increase racial polarization. Opponents of affirmative action should take into account the fact that abolition of affirmative action would increase black alienation. Proponents of affirmative action, on the other hand, should consider the possibility that expansion may trigger a backlash.

Part of the CRT position on standards seems correct. In some situations, African Americans have been excluded from employment or promotion by employment criteria unrelated to actual ability to perform the job. Affirmative action provides one possible remedy; the other possibility is to replace unjustified requirements with better ones. Revision of job qualifications is a superior remedy to affirmative action since it avoids any implication that African Americans are obtaining jobs despite deficient qualifications. Indeed, this preference for improved employment standards over affirmative action is essentially the law today. Under Title VII case law, now codified by the 1991 Civil Rights Act, employers must show a strong business justification if a test disproportionately disadvantages minority applicants.¹⁵⁰ Such a showing is required even if the employer has an affirmative action plan that compensates for the disparity in pass rates.¹⁵¹ Thus, employers may not use affirmative action programs as a shield to protect invalid hiring standards.

The CRT argument, however, is not simply that this approach is preferable, but that it can be implemented on a wide scale.¹⁵² In other words, CRT argues that current conceptions of "merit" are invalid and African Americans are as well qualified as whites for most positions. Unfortunately, as I will show in a moment, this is not true, and in fact is becoming less accurate due to shifts in the economy.

One probable reason for CRT skepticism about merit is that most CRT writers are law professors, and therefore most familiar with employment standards for lawyers and law professors. In fact, CRT scholarship (like other writing on affirmative action) often draws on examples within the law school context to support arguments concerning standards of merit.¹⁵³ The concept of "merit" is particularly problematic in the legal setting, in part because there is no clear consensus as to the nature of the task: exactly what does a good lawyer or a good law teacher do? Without that consensus, it is obviously more difficult to agree on qualifications.

To get a broader perspective, it may be useful to consider disciplines where qualifications are less contestable. Scientific occupations provide a sharp contrast with law schools. *Science* magazine recently presented a

150. See Rotunda, *supra* note 27, at 928-38. The leading case is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

151. *Connecticut v. Teal*, 457 U.S. 440 (1982).

152. See *supra* text accompanying notes 110-22.

153. See, e.g., BELL, *supra* note 19, at 142-45; Jerome M. Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141, 1156 (1992) (discussing law school hiring practices); Delgado, *supra* note 95, at 1359-60 (discussing the LSAT); Kennedy, *supra* note 109, at 731-35 (discussing contestability of standards of merit for legal scholarship); Charles R. Lawrence III, *Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas*, 20 U.S.F. L. REV. 429, 432-37 (1986); Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2260-64 (1992). Perhaps not coincidentally, law school faculties typically have the best minority statistics within their universities. See BELL, *supra* note 19, at 129 n.†.

special report on minority scientists.¹⁵⁴ Of sixty thousand full-time science professors, only one percent were African American in 1987.¹⁵⁵ Affirmative action among current recipients of Ph.D.s in science and engineering can have only a limited effect, simply because African Americans constitute less than two percent of that pool.¹⁵⁶ Sadly, the percentage of African Americans pursuing graduate degrees is declining.¹⁵⁷ In some fields, such as mathematics, the situation is even worse.¹⁵⁸

The racial composition of science faculties is not likely to change through affirmative action.¹⁵⁹ Nor does there appear to be an obvious way to modify standards to achieve that goal. For example, even if universities required only a bachelor's degree instead of a Ph.D. for new science professors, African Americans would still account for only five percent of this expanded pool.¹⁶⁰ The problem, in short, is not a contestable hiring standard, but a lack of African Americans with the education needed for scientific jobs. Neither affirmative action nor a redefinition of hiring standards

154. First Annual Report (special section), *Minorities in Science: The Pipeline Problem*, 258 SCIENCE 1175 (Elizabeth Culotta & Ann Gibbons eds., 1992).

155. Walter E. Massey, *A Success Story Amid Decades of Disappointment*, 258 SCIENCE 1177, 1178 (1992). The situation in engineering schools is similar. *Id.*

156. *Id.* at 1178 (1990 statistics); see *A COMMON DESTINY*, *supra* note 127, at 345 (finding that in 1980-81, African Americans comprised 3.9% of all Ph.D. recipients). In contrast, the percentage of Ph.D.s awarded to Asian Americans has risen steadily since 1975. Massey, *supra* note 155, at 1180.

157. *A COMMON DESTINY*, *supra* note 127, at 375; BELL, *supra* note 19, at 131; HENRY L. GATES, JR., *LOOSE CANNONS: NOTES ON THE CULTURE WARS* 107 (1992) (finding the number of full-time African American professors declining). Consider the following:

In 1987, new black PhDs included: one in computer science; three in chemical engineering; fourteen in economics; three in political science; nine in anthropology; two in philosophy; four in religion; and eleven in American literature. Recently published data for 1988 show that there were no new black PhDs in the United States in the fields of astronomy, astrophysics, botany, oceanography, ecology, immunology, demography, geography, European history, classics, comparative literature, German, Italian, Russian, Chinese, Japanese or Arabic literature.

D'SOUZA, *supra* note 19, at 168 (footnote omitted). According to D'Souza, half of the doctorates awarded to African Americans in recent years have been in education. *Id.* at 167.

More recent data is consistent with D'Souza's. In 1992, African Americans earned only 3.7% of doctorates (down from 4.5% in 1977), and 48% of those were in education. Denise K. Magner, *Blacks Earned Fewer Doctorates in 1992 Than in 1991, Study Finds*, CHRON. HIGHER EDUC., Sept. 29, 1993, at A18.

158. Rice University has granted the most mathematics Ph.D.s to minority-race U.S. citizens of any school in the country, a distinction attained by awarding Ph.D.s to less than two minority students per year. Paul Selvin, *Math Education: Multiplying the Meager Numbers*, 258 SCIENCE 1200, 1200 (1992). In 1991, nationwide, only ten African Americans were awarded mathematics Ph.D.s. *Id.* at 1201. This is an increase from the four African Americans awarded mathematics Ph.D.s in 1988, one of which was in mathematics education rather than mathematics. See D'SOUZA, *supra* note 19, at 168.

159. I do not want to imply that this problem is hopeless. The *Science* report contains extensive discussions of promising programs, as well as case studies of successful African American scientists. See generally *Minorities in Science: The Pipeline Problem*, *supra* note 154.

160. Massey, *supra* note 155, at 1178 (finding that in 1989, only 5% of bachelor's degrees in science and engineering were awarded to African Americans).

provides much hope for meaningful change. Thus, the challenge is to increase the size of the African American pool.¹⁶¹

Unfortunately, scientific occupations are merely an unusually clear example of a common situation. The educational disadvantages of African Americans begin far earlier than at the elite level of post-graduate studies.¹⁶² For instance, the mathematics gap begins at an early age. Only half as many African Americans as whites get as far as algebra in school.¹⁶³ Correspondingly, the percentage of whites taking more advanced mathematics courses is twice as high.¹⁶⁴ Even controlling for parental occupation, education, and income, African American children are still at a disadvantage on tests in vocabulary, reading comprehension, arithmetic reasoning, and computational skills.¹⁶⁵ Additionally, prior to beginning school, African American children do not perform as well on I.Q. tests,¹⁶⁶ perhaps for cultural reasons that may relate to discrimination.¹⁶⁷ Although some aspects of the education gap are beginning to close,¹⁶⁸ other recent changes are discouraging. After an earlier rise, the percentage of African Americans entering college in recent years has dropped substantially, while the percentage of whites has risen somewhat.¹⁶⁹

161. See D'SOUZA, *supra* note 19, at 167-68; cf. WILLIAM J. WILSON, *THE TRULY DISADVANTAGED: THE INNER CITY, THE UNDERCLASS, AND PUBLIC POLICY* 115-16 (1987) (finding that lower class African Americans, who lack educational credentials and other resources, receive little direct or indirect benefit from affirmative action); Kennedy, *supra* note 109, at 714 (acknowledging the seriousness of the "pool problem"). It is no surprise that Duke University's ambitious effort to double the number of its minority faculty was quite unsuccessful. See Culp, *supra* note 153, at 1162-64. Richard Delgado suggests that the "pool" can easily become a "river" or an "ocean" when faculties feel a sense of urgency. Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1876 (1990). However true this assessment may be in the law school setting, it is clearly inaccurate in more technical fields.

162. For example, according to a recent study: "[A]mong college-bound seniors, the median black student scores at the eighth percentile of white students in the life sciences and at the 18th percentile in algebra." Smith, *supra* note 128, at 82; cf. EDSALL & EDSALL, *supra* note 19, at 251 (describing similar findings regarding employment tests).

163. A COMMON DESTINY, *supra* note 127, at 351.

164. *Id.*

165. CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS* 138-40 (1992); cf. REYNOLDS FARLEY, *BLACKS AND WHITES: NARROWING THE GAP?* 22 (1984) (noting that African American children score lower on standardized achievement tests).

166. JENCKS, *supra* note 165, at 140. *But see* Aleinikoff, *Race-Consciousness*, *supra* note 3, at 1067-68 (implying that I.Q. tests may be invalid because of the failure of test designers to ensure equal scores for African Americans and whites).

167. A COMMON DESTINY, *supra* note 127, at 370-72. For a contrasting cultural case study, see Nathan Caplan et al., *Indochinese Refugee Families and Academic Achievement*, *SCI. AM.*, Feb. 1992, at 36.

168. A COMMON DESTINY, *supra* note 127, at 342 (finding rising African American achievement scores); JENCKS, *supra* note 165, at 177-81 (finding lowered dropout rates and other improved educational indicia for African American students); Donohue & Heckman, *supra* note 128, at 1606 (finding "sustained improvement in black status in employment . . . and schooling" since 1964).

169. A COMMON DESTINY, *supra* note 127, at 338-44; EDSALL & EDSALL, *supra* note 19, at 245. There also seems to be a gender disparity in educational paths: African American women outnumber African American men by 2:1 among high school graduates proceeding directly to college. GARY ORFIELD AND CARGLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK*

It is tempting to dismiss test scores or overall education as the kind of artificial qualifications we ought to be eliminating. This is true in some occupational settings, as shown by disparate impact litigation under Title VII.¹⁷⁰ But on a macro-level, African Americans face seriously limited opportunities because of a lack of skills and knowledge measured by these qualifications. As Stephen Carter points out, standardized tests tend if anything to overpredict African American job performance, thereby acting to a slight extent as a form of affirmative action.¹⁷¹ Disparity in skill levels has also been found in tests of "simulated real-world behaviors and activities" such as writing a letter, balancing a checkbook, or reading a map.¹⁷² These basic skills have obvious relevance to a broad range of jobs.

The ramifications of the education gap are likely to get worse. Despite some improvements,¹⁷³ the remaining disparity has an ever increasing economic impact because of changes in employer needs in the United States. In the face of international competition, good-paying, low-skill jobs are disappearing because of the comparative advantage of low-wage countries.¹⁷⁴ In a world market, the only way to secure high wages is to have high pro-

OPPORTUNITY 19, 21 (1991). Orfield and Ashkinaze also note that predominantly black high schools offer fewer advanced, college preparatory courses. *Id.* at 129.

One might think that the problem of declining black enrollment could be solved by more vigorous affirmative action at the admissions stage. Unfortunately, as Henry Louis Gates points out:

[T]here's an even bigger problem than getting these students, and that's keeping them. The attrition rate is depressing. At Berkeley, one in four black students will graduate. The fact is, according to the National Center of Education Statistics, that of freshmen blacks in 1980, only 31 percent had graduated by 1986. And while financial pressures explain some of it, they don't explain all of it.

GATES, *supra* note 157, at 107. Gates is Chairman of Afro-American Studies at Harvard University. Culp, *supra* note 153, at 1164.

170. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (holding that aptitude tests required for power company employees seeking job transfers were not related to performance on the jobs sought and thus were prohibited under Title VII); *Contreras v. City of Los Angeles*, 656 F.2d 1267, 1280 (9th Cir. 1981) (holding that tests with discriminatory impact are impermissible unless they predict or correlate with important working behaviors), *cert. denied*, 455 U.S. 1021 (1982).

171. See CARTER, REFLECTIONS, *supra* note 77, at 92-94; see also STEPHEN P. KLEIN, SUMMARY OF RESEARCH ON THE MULTISTATE BAR EXAMINATION 38-39, 61 (1993) (noting that multistate scores correlate well with LSATs and law school GPA; race and gender have little additional explanatory power); June O'Neill, *The Role of Human Capital in Earnings Differences Between Black and White Men*, J. ECON. PERSP., Fall 1990, at 25, 32, 40-41 (using regression analysis to demonstrate that standardized achievement test scores account for a significant portion of the wage disparity between African American and white males).

172. A COMMON DESTINY, *supra* note 127, at 353. About 20-25% of the difference can be accounted for by divergence in family background and education level. There is also some reason to hope that these differences are beginning to decline. *Id.* at 354.

173. See *supra* note 168.

174. Michael S. Knoll, *Perchance to Dream: The Global Economy and the American Dream*, 66 S. CALIF. L. REV. 1599, 1603-05 (1993); LESTER THUROW, HEAD TO HEAD: THE COMING ECONOMIC BATTLE AMONG JAPAN, EUROPE, AND AMERICA 52 (1992). Even a decade ago, it was becoming clear that the increasing economic reward for college attendance had the potential to disadvantage African American workers, who were less likely to have this background. See FARLEY, *supra* note 165, at 19 (finding that in 1982, 25 percent of white men had completed college in comparison to 12 percent of black men).

ductivity: such productivity typically requires a higher level of education and skill.¹⁷⁵

The shift in job markets has been especially devastating for younger African American men without a college education. Between 1973 and 1986, labor force participation by African American high school dropouts fell dramatically, and even high school graduates without a college education suffered substantially increased unemployment.¹⁷⁶ Moreover, a recent RAND study concluded that "the sharp rise in the income returns to schooling . . . favored the more highly educated white worker" over the average African American worker in terms of wages.¹⁷⁷

Other economic changes also impair the future effectiveness of affirmative action. Geographically, the movement of jobs from the Rust Belt to the Sun Belt has left many northern African Americans behind.¹⁷⁸ Finally, as major companies spin off work to former subsidiaries or networks of independent firms, it becomes harder to define or enforce affirmative action obligations. We are accustomed to comparing the composition of an employer's workforce or new hires to some pool of potential employees, but this comparison becomes increasingly difficult as the functional boundaries between firms become unstable and permeable.

175. A COMMON DESTINY, *supra* note 127, at 7-8; see CHARLES L. SCHULTZE, MEMOS TO THE PRESIDENT: A GUIDE THROUGH MACROECONOMICS FOR THE BUSY POLICYMAKER 291, 295 (1992) (discussing the importance of education for productivity and world competitiveness); JIM SLEEPER, THE CLOSEST OF STRANGERS: LIBERALISM AND THE POLITICS OF RACE IN NEW YORK 223 (1990) ("[P]rowess and precision are demanded today not by 'elite' or 'white' culture but, as the Japanese and others are demonstrating, by a new, universal culture enveloping the globe."); THURLOW, *supra* note 174, at 160, 255 (noting, for example, that to use statistical methods of quality control, production workers must know algebra). On the abysmal state of American education generally, see GATES, *supra* note 157, at 112 (noting that "[o]ne in seven American adults cannot locate the United States on a world map").

176. EDSALL & EDSALL, *supra* note 19, at 241.

177. Smith, *supra* note 128, at 84. The wage gap between white and African American men possibly would have narrowed to six percent by 1990 if (a) the rate of improvement in African American schooling had continued, (b) the income rewards to education had remained constant, and (c) the general wage spread between high and low income workers had remained in place. *Why the Erosion in Black Wage Gains?*, 17 RAND RES. REV. 1, 4, (Summer 1993); cf. Frank Levy & Richard J. Murnane, *U.S. Earnings Levels and Earnings Inequality: A Review of Recent Trends and Proposed Explanations*, 30 J. ECON. LITERATURE 1333, 1371-72 (1992) (documenting the declining position of young, less educated men).

178. A COMMON DESTINY, *supra* note 127, at 296. Similarly, in their study of Atlanta, Orfield and Ashkinaze found that the economic boom in the suburbs did little for African American employment and that white suburban politicians made deliberate efforts to isolate the suburbs by limiting public transportation from the city. ORFIELD & ASHKINAZE, *supra* note 169, at 56, 62-65; see also JENCKS, *supra* note 165, at 123 (citing 1968 paper that found that the trend in manufacturing jobs moving out of the central cities and exclusionary housing policies "contributed significantly to black joblessness"). As Aleinikoff has observed with respect to the design of affirmative action programs, "there will always be an upper limit on minority participation established by the overall nonmajority population of a locality." Aleinikoff, *Race-Consciousness*, *supra* note 3, at 1099. If firms relocate to areas with low minority populations, such as a predominantly white suburb, then affirmative action plans will have minimal effectiveness, as African Americans in the city will either not learn of the opportunity, or will live too far away to take advantage of it. JENCKS, *supra* note 165 at 123.

These findings concerning both the education and the impact of the changing job market for African Americans should lead society to address the causes. Because misunderstandings abound on these issues, it should be emphasized that there is no reason to believe that these differences in skills and training are innate. Nor can they be rationalized as purely the result of poverty¹⁷⁹ or parental neglect, for studies show that African American parents often emphasize the value of schooling.¹⁸⁰ Perhaps some will be tempted to say that African Americans have no valid complaint if their economic circumstances are due to "lower qualifications." Rather than being a basis for white complacency, however, the findings show the extent to which African Americans are at a disadvantage.

As we have seen, this educational disadvantage is often severe. Relatively few African Americans have obtained the educational background needed to function effectively in technical fields. Even more seriously, although some aspects of African American education have improved, African American workers are apparently chasing a moving target, because the level of skills and training needed in the global economy is rising even more rapidly. CRT literature on affirmative action rarely considers the hurdles African Americans face due to educational disadvantages or the impact of the changing economy, in part because, like most other legal scholars, CRT writers have focused too much on the law school context. In the law school setting, one can argue about the relative capabilities of African American applicants or employment candidates, but both clearly have the basic relevant qualifications, an undergraduate degree or a J.D. Thus, the argument in law schools is about relative, not minimal, competence. Unfortunately, the law school setting is atypical in many respects.

I wish that the "merit" standards were less valid than they have proved, because our race problem would then be more tractable. To be simplistic, the implication of CRT is that our society basically has an "attitude problem" caused by ingrained, destructive habits of thought. But the quest for racial justice is beginning to hit more tangible barriers—barriers that would not disappear with even the most dramatic enlightening of racial attitudes. Those barriers, in part, involve the increasing mismatch between African American educational attainments and the direction of economic growth. We will have to look beyond affirmative action for answers, and they will not be easy to find.

D. Limits on the Effectiveness of Racial Preferences in Redistricting

In the political arena, the analogy to affirmative action is the creation of voting districts with a firm majority of minority residents, devised to assure the election of minority political representatives. This technique is

179. Some discrepancies remain even when researchers control for parental income and social class. JENCKS, *supra* note 165, at 138-40.

180. A COMMON DESTINY, *supra* note 127, at 371.

controversial.¹⁸¹ Moreover, there are several significant limitations on its ability to increase minority political power. By definition, the technique does not work for statewide offices. While African Americans have increased their representation in state and local legislatures, they have not done as well in gubernatorial or U.S. Senate races.¹⁸² These offices are beyond the reach of creative redistricting. If African American representation is to increase, other methods must be identified.

Redistricting is also a setting in which distinctions between minority groups may be particularly important. For example, significant differences between African Americans and Mexican Americans reduce the utility of redistricting for the latter. First, cohesion often is lower among Mexican Americans than African Americans: about half of all Mexican Americans identify themselves on the census as "white."¹⁸³ Second, the response of whites to Mexican Americans is quite different: while whites usually move out whenever any substantial number of African Americans move into their neighborhoods, they show a greater tolerance for Mexican Americans.¹⁸⁴ Finally, redistricting to match the Mexican American population is hindered by the fact that Mexican Americans are far more dispersed residentially. A federal court, for example, constructed an "Hispanic seat" on the five-person Los Angeles County Board of Supervisors by combining almost all the districts with Hispanic majorities, but collectively those districts contained only about a third of the county's voting-age Hispanic population.¹⁸⁵

A related problem is that redistricting may favor one minority group only at the expense of effectively disenfranchising another. Lam Guinier, whose work has strong ties to Critical Race Theory, explains this phenomenon as follows:

[T]he effort to draw districts that have enough members of any one minority group to exert the most influence may dilute the voting

181. See Philip P. Frickey, Book Review, 5 CONST. COMMENTARY 451 (1988) (reviewing ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS*); Guinier, *Triumph of Tokenism*, *supra* note 30.

182. See generally Raphael J. Sonenshein, *Can Black Candidates Win Statewide Elections?*, 105 POL. SCI. Q. 219 (1990) (discussing the problems African Americans face in statewide elections).

183. See Peter Skerry, *Not Much Cooking: Why the Voting Rights Act is Not Empowering Mexican Americans*, BROOKINGS REV., Summer 1993, at 43, 43 (using figures from the 1990 census). Skerry also reports that "[w]hile blacks rarely marry outside their group, Mexican Americans frequently do. Indeed, exogamy rates for Mexican Americans have long been at least as high as those for European immigrant groups earlier this century." *Id.* Asian Americans may be more like Hispanics than they are like African Americans in these respects. See also Hacker, *supra* note 131, at 21, 22.

184. Skerry, *supra* note 183, at 43.

185. *Id.* Another problem is that many Mexican American residents cannot vote since they are not citizens. See Rudolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1499-501, 1502 n.179, 1515 (1993) (explaining that about 38% of Latino adults are non-citizens—a total of 5.2 million non-citizens in 1990—and, as a result of this and low participation rates, equal population districts composed of Latinos have fewer registered voters). Consequently, white politicians may not view Mexican American office-holders as having many votes to deliver in other contests.

strength of other minority groups in neighboring districts. Districting provides no clear theoretical justification for resolving—and may instead exacerbate—conflict between the interests of competing minority groups. For example, subdistricting may set off a “political land grab” in which each minority group has a legitimate but potentially unfulfilled claim to representation.¹⁸⁶

Even assuming that African Americans can attain legislative representation equal to their population ratio, twelve percent¹⁸⁷ is far from being a majority. To be effective, African American representatives must form coalitions with other minority and white legislators who share their interests.¹⁸⁸ However, it may be difficult to develop coalitions if African Americans are realigned to form new majority-minority districts since the representatives from their former districts will have less motivation, based on present constituents, to consider African American interests. Whether the net result would be an increase in African American legislative power is unclear.

Moreover, the creation of majority-minority voting districts is usually prompted by concerns over polarized bloc voting. But if the same polarized voting carries through to the legislature itself, the small faction of African American representatives will be consistently outvoted. As Guinier explains:

Black activists have long recognized that blacks cannot become an *effective political majority* without legislative allies. Yet, electing black representatives may simply relocate to the legislature polarization experienced at the polls. Indeed, some political scientists studying “the new black politics” in Cleveland, Chicago, and Atlanta have challenged the working assumption that black electoral success will ultimately reduce polarization. Based on empirical studies of local black officials and city council members, these scholars argue that black representatives often become an ineffective, “seen but not heard” minority in the legislature.¹⁸⁹

The risk, then, is that African Americans will obtain a presence in the legislature, but no power. Thus, legislative access is not enough. New solutions are needed if African Americans’ interests are to be effectively represented.¹⁹⁰

186. Guinier, *No Two Seats*, *supra* note 30, at 1453 (footnotes omitted); *see also* United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (upholding a redistricting plan that split a Hasidic Jewish community between two assembly and senatorial districts).

187. *See supra* note 2.

188. A COMMON DESTINY, *supra* note 127, at 251. With the rapid expansion of the Asian and Hispanic populations, the need for African Americans to enter into such coalitions is likely to increase sharply. *See* Buckley, *supra* note 2.

189. Guinier, *Triumph of Tokenism*, *supra* note 30, at 1116 (footnotes omitted).

190. Guinier and others have examined a number of alternative approaches. *See id.* at 1134-53 (examining and criticizing proportionate interest representation); Kathryn Abrams, “Raising Politics

Even where African American presence equals full participation in an institution, the effectiveness of affirmative action can be limited because the institution is losing political or economic importance. In those situations, participation is a hollow victory. Changes in population patterns create the risk that African American political power at the state and city level will be increasingly irrelevant. Historically, most government services have been funded and provided either by central cities or by the state and federal governments. The 1992 election marks the first time that suburban voters have become a national majority.¹⁹¹ The residents of these suburbs have a high demand for government services such as education, health care and recreational facilities. They do not, however, have a strong desire to pay taxes to provide these services to inner-city residents. One result is a growing tendency for services to be financed and provided at the suburban and county level,¹⁹² rather than by the federal or state government. Thus, an increase in the political voice of African Americans in central city and state governments may be counterbalanced by the diminishing resources of those governments. As the Edsalls observe, “[w]ith a majority of the electorate equipped to address its own needs through local [suburban] government, not only will urban blacks become increasingly isolated by city-county boundaries, but support for the federal government, a primary driving force behind black advancement, is likely to diminish.”¹⁹³ As with employment, changing the process for selecting representatives has only a limited ability to address emerging racial problems.

E. Cultural Alienation

As Richard Delgado points out, there is often a disparity between minority and white views of what constitutes racism. His discussion is worth quoting at some length:

To take an everyday example, students of color frequently complain that the university is a racist place. Liberal white sympathizers are distressed; they want to know what the blacks have in mind—what . . . race-based mistreatment the students have suffered. . . . But when the blacks explain what they mean when they say “the university is a racist place,” the whites are surprised—it turns out the blacks mean one thing, the whites another. The whites had formed a mental picture of physical assaults, exclusion from

Up”: *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988) (focusing on political participation rather than mere representation for minority voters); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989) (discussing the proper role of geographic factors and the meaning of effective access to the political process).

191. EDSALL & EDSALL, *supra* note 19, at 227.

192. *Id.* at 227-28. Structural reallocations of government authority are not covered by the Voting Rights Act. See *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 831-32 (1992).

193. EDSALL & EDSALL, *supra* note 19, at 231.

housing, slurs, badgering, and denials of service at restaurants. What they hear may include some of this, to be sure. But the blacks will also go on in some detail about the lack of black professors and fellow students. "This place is so white!" Other complaints may point out the lack of courses on black literature or African-American history and language. They will mention that there is no black theme house or student center; the cafeteria does not offer soul food.¹⁹⁴

In the words of a leading white sociologist, "[w]hen blacks assert that racism is endemic in American society, they usually mean that whites assume white culture is superior to black culture."¹⁹⁵ It is precisely this assumption that African Americans perceive as discriminatory.

In my experience, many whites tend to dismiss this sort of complaint—after all, the food in the cafeteria is usually terrible anyway, so who cares what dishes are served? In my view this is a mistake: even the cafeteria complaint should be taken seriously, as a minor symptom of a serious problem. To pursue Delgado's example, in complaining about the lack of soul food in the school cafeteria, African Americans are really complaining of a lack of full citizenship: if the cafeteria were really considered "theirs" as much as it is the white students', then it would serve their foods as well.¹⁹⁶ The lack of soul food is not a significant problem in itself; the real problem is the feeling of exclusion.

Perhaps this appears to be an overly serious response to complaints about matters as insignificant as cafeteria food, but such complaints are only a tiny indication of the alarming level of alienation in the African American community. For example, focus groups on crime reveal a widespread view among African Americans that the flow of crack cocaine into their communities is the result of a white conspiracy to keep them down.¹⁹⁷ Among African American New Yorkers, only thirty percent view the criminal justice system as fair, and an overwhelming majority believe that a bias uniformly exists in favor of whites.¹⁹⁸ Additionally, surveys show that

194. Richard Delgado, *Recasting the American Race Problem*, 79 CALIF. L. REV. 1389, 1395 (1991) (review essay) (footnotes omitted); see Barnes, *supra* note 73, at 1866 ("Throughout our lives we receive a pervasive message communicating that we do not truly belong."). Delgado may, however, be underestimating the extent of more blatant forms of discrimination. See T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 330-50 (1992) (discussing American discrimination and racism in various contexts).

195. JENCKS, *supra* note 165, at 129. In Jencks' view, this is an accurate description of white attitudes. Furthermore, he doubts whether true multiculturalism can be made to work in our society. *Id.*

196. Since this is a rather stylized example, I do not consider various factors that might be relevant to assessing the validity of this claim in a concrete situation, such as whether the students actually came from backgrounds where such foods are commonly served.

197. See EDSALL & EDSALL, *supra* note 19, at 237 (describing the African American belief that the white power structure has permitted, if not actively encouraged, the flow of drugs into African American communities).

198. *Id.* at 239.

alienation is widespread, that it is not strongly connected with social class, and that it may be growing.¹⁹⁹ Frightening evidence of this alienation is provided by a poll of African Americans in New York about whether AIDS was "deliberately created in a laboratory to infect black people." Ten percent of the respondents agreed with this statement completely, and another nineteen percent thought it might be true.²⁰⁰

The significance of African Americans' experience of exclusion is illuminated by neo-republican thought, and particularly by its stress on the importance of civic community.²⁰¹ Because republicans and other communitarians view participation in the community as a basic element of human thriving, being exiled or marginalized is a grave injury to individuals.²⁰² It also weakens the community by undermining the civic bonds that unify it, while eroding the political process by converting what should be a dialogue between fellow citizens into a repressive hierarchy. Thus, communitarians seek more than formal access by marginalized groups—they seek full participation in the life of the community.

Affirmative action might play some role in combatting alienation. Presumably, having at least some African American faces in major institutions is less alienating than "lily white" institutions.²⁰³ Yet, affirmative action to date has not prevented a high level of alienation, and it is doubtful that future increases in affirmative action could make any difference. Affirmative action is not structured to increase the number of African Americans in key institutions above their proportion in the general population, approximately twelve percent.²⁰⁴ This means that even in a best-case scenario, institutions will be overwhelming non-African American.²⁰⁵ Being out-numbered approximately nine-to-one will do little to combat the problem of alienation. Furthermore, if the road to success is thought to be a

199. A COMMON DESTINY, *supra* note 127, at 131-36. For example, 87% of African Americans surveyed thought that an African American generally would not receive the same wage as an equally qualified white, with over 30% thinking that wage equality is almost never true. *Id.* at 132. Even middle-class African Americans are skeptical of the fairness of American society. *Id.* at 212.

200. CARTER, REFLECTIONS, *supra* note 77, at 215. On the harmful effects of this alienation, see WEST, *supra* note 94, at 12, 17-18, 63-67.

201. A few of the complex connections between republicanism and affirmative action are explored in Daniel A. Farber, *Richmond and Republicanism*, 41 FLA. L. REV. 623 (1989).

202. See generally Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 WM. & MARY L. REV. 1 (1988).

203. See Carrington, *supra* note 3, at 1150-52 (asserting that unless there are a significant number of judges and lawyers of color, people of color may reasonably question whether their interests are given due weight). For suggestions that affirmative action may instead accentuate the perception by African Americans that they are victims of discrimination, see David P. Bryden, *On Race and Diversity*, 6 CONST. COMMENTARY 383, 423 (1989); SLEEPER, *supra* note 175, at 37, 176.

204. See *supra* note 2.

205. The remaining faces, almost ninety percent, will not be exclusively "white"; they will also be Mexican American and Asian American, a presence that may increase in coming years. See Buckley, *supra* note 2. But despite the rhetorical allure of the phrase "people of color," there are major differences between African Americans, Mexican Americans, and Asian Americans. Hence, the presence of these other groups may not have the desired reassuring effect for African Americans.

betrayal of the African American community, alienation within that community will not be diminished by an increase in the number of successful African Americans.²⁰⁶ Therefore, until attitudes change, increasing the number of "successful" African Americans will have little effect on the alienation of other African Americans. In short, affirmative action is unlikely to reduce feelings of African American alienation. The solution, if there is one, will have to be found elsewhere.

III

TENTATIVE THOUGHTS ON FUTURE DIRECTIONS FOR RACE SCHOLARSHIP

Recent race scholarship has often focused on the issue of affirmative action. Building on some commentary by CRT scholars, I have argued that this attention has been misplaced. To begin with, affirmative action programs are quite likely to remain stable, neither growing nor shrinking in any significant way. Both detractors and supporters of affirmative action have enough political leverage to prevent their opponents from making major advances. Moreover, the Supreme Court has settled on a compromise between unrestricted affirmative action and colorblindness; this compromise may yet be subject to some significant fine tuning, but there is little likelihood of any radical shift in the Court's approach.

Furthermore, as several CRT scholars have suggested, affirmative action cannot effectively address important emerging race issues. Because the educational system has failed so many African Americans, they have been denied skills that are increasingly necessary in the global economy. Affirmative action in hiring cannot address this critical problem. Additionally, affirmative action in the political arena, in the form of race-based districting, has limited potential for increasing African American political power. At best, affirmative action can provide only a partial solution for African American alienation and marginalization.

206. Recent ethnographic work by Fordham and Ogbu (1986) suggests that black student peer culture undermines the goal of striving for academic success. Among eleventh graders at a predominantly black high school in Washington, D.C., many behaviors associated with high achievement—speaking standard English, studying long hours, striving to get good grades—were regarded as "acting white." Students known to engage in such behaviors were labeled "brainiacs," ridiculed, and ostracized as people who had abandoned the group. Interviews with a number of the high-achieving students—who showed a conscious awareness of the choices they were making—indicated that some had chosen to put "brakes" on their academic effort in order to avoid being labeled and harassed.

A COMMON DESTINY, *supra* note 127, at 372 (citing other studies as well); *see also* Peller, *supra* note 109, at 834 (finding that in black nationalist analysis, "the very success of the black middle class in American society might . . . betray the aspirations of the black community"); Walter E. Williams, *Why Urban Problems Persist*, 66 S. CAL. L. REV. 1665, 1670 (1993); Marc Elrich, *Divided by Diversity: Why My Students Don't Buy Black History Month*, WASH. POST NAT'L EDITION, Feb. 21-27, 1994, at 25 (finding that a group of African American high school students believes the negative stereotype that "[b]lack kids who do their school work and behave want to be white").

The affirmative action debate has centered almost exclusively on questions of legitimacy. As a result, legal scholars, both mainstream and CRT, have invested their energies on the single question of whether race is a valid consideration in hiring employees, admitting students, or drawing electoral districts. Framing the issue so narrowly diverts attention from what happens before and after affirmative action. For instance, the debate on affirmative action in hiring overlooks the crucial question of whether African Americans can get the education they need to enter the relevant employment pool. Advocates for consideration of racial factors in college admissions, on the other hand, seem to think the problem has been solved when the proper proportion of African Americans gain admittance, without attending to the high attrition rates of African American college students. As both examples illustrate, we need to broaden our focus if we want a society in which no racial group is permanently relegated to the bottom.

A broader focus should include a careful look at institutions that seem to be relatively effective in meeting African American needs. These institutions are not always among the expected sources of cutting-edge social reform. One such institution is the United States Army. There is some reason to believe that the Army is the nation's most successfully integrated institution.²⁰⁷ General Colin Powell is only one example of a broader phenomenon: "[t]he U.S. Army has become one of the few sectors of American life in which large numbers of blacks are in positions of authority over whites."²⁰⁸ Careful study of the Army's success might provide a useful model for other efforts to remedy historic discrimination.

Another institution that deserves closer attention by legal scholars is the historically African American college. A recent study of minorities majoring in scientific fields found that these colleges graduate about twice their expected share of African American scientists, many of whom go on to receive advanced degrees.²⁰⁹ In rethinking the role of these colleges, we may need to reconsider the Supreme Court's ruling in *United States v. Fordice*,²¹⁰ which poses a possible threat to their continued

207. See A COMMON DESTINY, *supra* note 127, at 11, 71-74.

208. *Id.* at 72.

209. *Black Colleges Cultivate Scientists*, 258 SCIENCE 1216 (1992). A variety of questions about these colleges needs to be addressed. For example, it is not clear why they are apparently more successful with African American women than with African American men. See, e.g., Daniel Goleman, *Black Scientists Study the "Pose" of the Inner City*, N.Y. TIMES, April 21, 1992, (Science Times section), at C1, C7.

210. 112 S. Ct. 2727, 2743 (1992) (holding that implementation of facially race neutral policies does not necessarily fulfill the state's obligation to affirmatively dismantle a de jure segregated college system); see also *Knight v. Alabama*, 14 F. 3d 1534 (11th Cir. 1994) (applying the *Fordice* analysis to a desegregation action involving Alabama's historically black institutions). In his concurring opinion in *Fordice*, Justice Thomas commented that "[i]t would be ironic, to say the least, if the institutions that sustained blacks during segregation were themselves destroyed in an effort to combat its vestiges." *Fordice*, 112 S.Ct. at 2746 (Thomas, J., concurring). Apart from constitutional issues, there are other matters of federal policy involved. For example, the federal government is largely responsible for

existence.²¹¹ Whatever the ultimate legal verdict on these institutions, we cannot assume that affirmative action at previously all white universities has rendered historically African American colleges obsolete.

Race scholarship also needs to be more attentive to diversity within and between minority groups. Much of the current scholarship is written as if all groups of non-whites were fungible. CRT writings on "intersectionality" have begun to challenge aspects of this stereotyping by addressing the relationships between gender, sexual orientation, and race.²¹² However, with the notable exception of Roy Brooks' work, class divisions among African Americans have received little attention in the legal literature.²¹³ Furthermore, the differences between African Americans and other minority groups²¹⁴ too often have been ignored. We need a more sophisticated understanding of divisions between and within racial groups.

This inattentiveness to group differences reflects a general tendency to approach racial issues only on the plane of high principle. Obviously, racial justice does involve profound moral considerations. But then, so does health care. Indeed, health care involves some of the same moral considerations, inasmuch as providing care to the disproportionately nonwhite poor is a central policy issue. Nevertheless, we all realize that health care involves difficult tradeoffs and complex empirical questions. We need to pay more attention to those aspects of racial issues.²¹⁵

funding Howard University. See D'SOUZA, *supra* note 19, at 108. Perhaps Congress should increase funding in targeted areas.

211. For a fuller exploration of this question, see Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401 (1993). A related, important topic is the advisability of instituting black-oriented high schools. See generally, Michael J. Weber, Comment, *Immersed in an Educational Crisis: Alternative Programs for African-American Males*, 45 STAN. L. REV. 1099 (1993) (discussing the issues surrounding programs for improving the academic performance of African American males); Susan Chira, *Rethinking Deliberately Segregated Schools*, N.Y. TIMES, July 11, 1993, § 4 (Ideas and Trends), at 20 (discussing the advisability of segregated schools in light of the failure of integrated schools to reach minority groups). Of course, there is also a worrisome possibility of resegregation. For a discussion of both black academies and historically black colleges, see Drew S. Days III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53, 60-74 (1992).

212. See Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 584-85 (1990). The interactions between race and gender can be quite complex. For example, employed African American women now earn on average as much as employed white women, and African American women with college degrees earn more than white female college graduates. See Reynolds Farley, *The Common Destiny of Blacks and Whites: Observations About the Social and Economic Status of the Races*, in RACE IN AMERICA: THE STRUGGLE FOR EQUALITY 197, 204-07 (Herbert Hill & James E. Jones, Jr. eds., 1993).

213. This is one of the major themes developed in ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 34-128 (1990); see Johnson, *New Voice*, *supra* note 2, at 2038-39 (criticizing CRT scholars for confusing race and class issues).

214. See *supra* text accompanying notes 183-185.

215. For a notable exception, see Donohue & Heekman, *supra* note 128 (engaging in an empirical analysis of African American economic progress as influenced by federal civil rights policy).

We also need more of a dialogue between scholars of color and white scholars. Richard Delgado may be right in arguing that some white legal scholars have reacted to minority scholarship in discrimination law either by brushing aside their work or by leaving the field.²¹⁶ I am not suggesting that minority scholarship enjoys an entitlement to a favorable reception. Given the history of race relations in this country, however, white scholars should be careful before deciding that a substantial body of work by minority scholars should be ignored rather than critically engaged.²¹⁷ Moreover, whites should not vacate the field and act as if only scholars of color have reasons to want to understand and resolve racial problems.

Finally, discussion of racial issues must be as honest and open as possible.²¹⁸ This point should be completely trite, but unfortunately it is not. There are serious pressures operating against free discussion of racial issues.²¹⁹ One example of such pressure was the efforts by scholars to prevent Randall Kennedy from publishing his critique of Critical Race Theory.²²⁰ Another example was the shabby treatment received by Lani Guinier, whose innovative writings on voting rights led President Clinton to withdraw her nomination as Assistant Attorney General for Civil Rights.²²¹ The last thing we need to do is to repress fresh thinking about the difficult problem of race.

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216. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1353-61 (1992); see also Culp, *supra* note 2, at 1100 n.12, 1112 (decrying the "Woody Allen blues" in which whites feel incapable of dealing with racial issues and calling for open discussion of racial problems).

217. Two further clarifications are necessary at this point. First, I emphatically do not mean that minority scholarship should receive an uncritical response. Bad scholarship should be criticized, regardless of the ethnic identity of the scholar. Second, I do not believe that white scholars should make any effort to decide which minority scholars are presenting the "authentic" views of their group. Apart from other possible problems (such as what, if anything, "authenticity" means in this context), it seems the height of presumption for white scholars to tell minority groups whose voice truly represents them. See generally, WEST, *supra* note 94, at 25-27 (critiquing the concept of black authenticity). See also Carter, *Academic Tenure*, *supra* note 77, at 2075 (censuring Alex Johnson for claiming that Carter has adopted white views).

218. See Culp, *supra* note 153, at 1171-72 (stressing need for tolerance and diversity among scholars rather than unanimity).

219. See EDSALL & EDSALL, *supra* note 19, at 259.

220. See Kennedy, *supra* note 75, at 1811-12, 1818-19. According to a newspaper account:

[Kennedy's] decision to go ahead with his criticism was regarded as a betrayal by many minority professors and some liberal white law professors. After seeing a draft of his article, many urged him not to publish it.

"There was a sort of 'lynch Randy Kennedy' mind-set," said a white professor, speaking on condition of anonymity. Since the article was published, he said, some academics have made attempts to exclude Mr. Kennedy from professional forums where he could express his views.

Charles Rothfeld, *Minority Critic Stirs Debate on Minority Writing*, N.Y. TIMES, January 5, 1990, at B6. The hostile response of CRT scholars to Kennedy is discussed in Scott Brewer, *Choosing Sides in the Racial Critiques Debate*, 103 HARV. L. REV. 1844, 1845-47 (1990).

221. See *supra* text accompanying notes 29-31.

Despite some hopeful signs such as the growth of the African American middle class, many aspects of the race situation remain grim.²²² We face serious problems with no obvious solutions. Rather than lose hope in the face of these difficulties, however, we would do well to recall Gunnar Myrdal's classic observation about the American racial situation: "Nothing is irredeemable until it is past."²²³

222. See, e.g., WEST, *supra* note 94, at 35-36; see generally john a. powell, *Racial Realism or Racial Despair?*, 24 CONN. L. REV. 533 (1992). But see Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 370 (1992) (discussing the "precipitous collapse in [African American] economic status"). On the undeniably negative side, see Philip Yam, *Grim Expectations: Life Expectancy of Blacks is Sliding*, SCI. AM., Mar. 1991, at 33.

223. EDSALL & EDSALL, *supra* note 19, at 286 (quoting GUNNAR MYRDAL, 2 AN AMERICAN DILEMMA 997 (Pantheon Books 1972) (1944)).