"What Is She?": How Race Matters and Why It Shouldn't

Carol R. Goforth

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"WHAT IS SHE?" HOW RACE MATTERS AND WHY IT SHOULDN'T

Carol R. Goforth*

INTRODUCTION .................................................. 3
I. THE LEGITIMACY OF RACIAL CLASSIFICATIONS: WHAT DOES IT MEAN TO IDENTIFY SOMEONE AS BLACK? .... 11
   A. The Biological Basis for Racial Classifications ...... 12
   B. Societal Norms: Ethnicity and Culture as a Basis for Racial Classification .................................. 16
II. USE OF RACIAL CLASSIFICATIONS IN ADOPTION ........ 23
   A. Introduction to Transracial Adoptions ............... 23
   B. The NABSW and the Theory of "Cultural Genocide" ........................................ 24
   C. The State of the Debate over Transracial Adoption .............................................. 27
   D. The NABSW's Arguments Against Transracial Adoption ........................................... 29
      1. The Necessity for Coping Skills ................... 29
      2. Racial and Cultural Identity ....................... 36
      3. Barriers to In-Race Adoptions ..................... 40
   E. Other Objections to Transracial Adoption .......... 44
   F. What the Law Says and What It Should Say ........ 50
III. RACE AS A FACTOR IN CONGRESSIONAL REDISTRICTING ........................................ 52
   A. Congressional Redistricting Under the Voting Rights Act of 1965 ................................. 53
   B. Problems Inherent in the Current Approach ......... 62
IV. RACE AS A BASIS FOR DIFFERENTIAL TREATMENT IN EMPLOYMENT AND EDUCATION: THE CASE OF AFFIRMATIVE ACTION .................................. 69
   A. The Meaning of "Affirmative Action" ............... 70
   B. The State of the Law Regarding Affirmative Action ................................................. 74

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C. Justifications for Affirmative Action .................. 84
   1. Compensating for Past Discrimination and
      Correcting Existing Discrimination .................. 86
   2. Distributive Justice .................................. 99
D. Is There an Alternative? ................................ 104

CONCLUSION ................................................... 107
INTRODUCTION

“Oh, how beautiful! What is she?”¹ I cannot tell you how many times curious strangers have asked me that question when I have been out in public with my daughter. I know that if I answer, “She’s my daughter,” which is true, they will only clarify their question by saying something profound, like, “Yes, but what is she?”

My beautiful daughter, now ten years old, has long, straight black hair, big dark eyes and chocolate-colored skin. She looks rather exotic, and people have asked if she is East Indian or Native American, or if she was born in South America. The truth is that she is my husband’s biological daughter from his first marriage, and both she and her brother share their birth mother’s dark complexion.

Gail, the children’s biological mother, described herself as Black,² although one of her ancestors was apparently a Native American, and, given this country’s notorious history with slavery, she almost certainly had one or more ancestors of European descent as well.³ My husband, with his wavy black hair and deeply tanned skin, is proud of his European heritage, although I can never remember to which countries he has traced his illustrious ancestors.

¹. When I began this project, I hoped to write an Article which would provide an objective, analytic framework for evaluating how the incorporation of racial classifications into legal rules affects individuals and society. This required a blending of the dispassionate, objective analysis typical of law review articles with the emotional and human context often completely absent from such writings. In many ways, because of the necessity of blending such different approaches, this has been a very difficult piece to write. One of my colleagues described an early draft as being almost schizophrenic because the analytic segments seemed so distinct from the more personal perspective offered in certain portions of the Article.

I finally decided to accept that parts of this Article would have a very personal, emotional tone. These sections are intended to help provide a human framework for the analysis which is, in the end, the main focus of this Article.

². I speak of Gail in the past tense not out of any disrespect for her or her relationship with the children, but because she died before I had a chance to know her. William (my son) was four, and Carlissa was two when she died.

³. This mixed ancestry is not at all unusual. By 1918, the Bureau of the Census estimated that 75% of all Blacks in this country were racially mixed, and current estimates are that 20% of all genes of American “Blacks” are “White.” Ernest E. Kilker, Black and White in America: The Culture and Politics of Racial Classification, 7 INT’L. J. OF POL., CULTURE & SOC’Y 229, 231 (1993). One source estimates that between three-fourths and four-fifths of all “Blacks” in the United States have at least some White ancestry. CARL DEGLER, NEITHER BLACK NOR WHITE: SLAVERY AND RACE RELATIONS IN BRAZIL AND THE UNITED STATES 185 (1986). Degler also suggests that hundreds of thousands or even millions of those identified as “White” have some “Black” ancestors. Id.

In addition, some anthropologists have estimated that “as many as one-fourth of all Blacks in America have some Indian ancestry . . . .” KATHY RUSSELL ET AL., THE COLOR COMPLEX—THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS 12 (1992).
So what is my daughter? If there was an official inquiry, it is likely that my daughter would be identified as “Black,” under the infamous but well-entrenched “one drop” rule. Even a very small percentage of Black genes, assuming that genes can properly be identified by commonly accepted racial designations, means that an individual is to be considered Black, ignoring any other ancestry or genetic heritage.

Of course, I am not limited to the party line when responding to casual inquiries from strangers. I can provide all sorts of answers in response to their questions. For example, I can say: “Her birth mother was Black; her father is White” or “She’s biracial” or “She’s multi-racial” or, as one of my colleagues once suggested, “It’s none of your business.” Of course I could also answer that she is Black, assuming that if the facts of her ancestry were known this is how most


The “one drop” rule has been ascribed to various sources. For example, one commentator traces the origins of the “one drop” rule to legislators in the upper South who wanted to ensure that “any person with even a drop of Black blood would have the same legal status as a pure African.” Russell et al., supra note 3, at 14. Other sources place the origin of the rule in Louisiana. Virginia R. Dominguez, White by Definition: Social Classification in Creole Louisiana (1986); accord Kilker, supra note 3, at 230.

Regardless of the origins of the rule, in modern American society it does seem true that any known Black ancestry will lead to the societal designation of an individual as Black. This designation, of course, completely ignores any White or other racial heritage which an individual might in fact possess.

5. For example, in Plessy v. Ferguson, 163 U.S. 537, 541 (1896), overruled by Brown v. Board of Educ., 347 U.S. 483 (1954), the plaintiff was classified as colored despite being identified as having seven-eighths Caucasian ancestry and one-eighth African ancestry.

6. After significant reflection, I have decided to utilize and capitalize the terms “White” and “Black” throughout this Article, and to use these words in the sense that they are probably generally understood. I capitalize the words to emphasize the special considerations inherent in identifying individuals as “White” or “Black.”

First, people are neither white nor black, and these labels probably have more political ramifications than any biological or social considerations should warrant. In addition, many people have a mixed “racial” background, and using only these two alternatives tends to ignore the existence of bi- or multi-racial individuals.

However, in order to communicate, the words used must have a generally understood meaning. Therefore, except when otherwise noted, “White” will refer to a person who is of exclusively European descent, regardless of how dark or pale they are; “Black” will refer to individuals who have one or more African ancestors and who retain some identification with such ancestors, either because of appearance or because they were raised as members of a “Black” family, regardless of appearance.

This classification scheme is contrary to the answer I ultimately give my children about their racial identity, but if I chose instead to refer to those of mixed ancestral heritage as “Multi-racial,” I would constantly need to speak of “Blacks or Multi-racial individuals,” and this alternative seemed unnecessarily cumbersome.

7. These first two choices both ignore the American Indian ancestors from which Carlissa presumably inherited her heavy, straight black hair.
members of our society would categorize her. Regardless of all of these options, when faced with questions from strangers, my real dilemma is what I should say when it is my daughter who asks the question.

Even the casual reader will probably have noticed that all of this discussion has focused on my daughter, rather than my son, whom I have mentioned so far only in passing. My son has the same birth parents as my daughter, but strangers seldom, if ever, ask me about his race unless he is in the company of his sister. My son, who has the same chocolate-colored skin and dark eyes as his sister, has the kinky black hair and slightly broader nose which apparently identify him as Black in the minds of most observers.\(^8\) Despite the fact that strangers are comfortable with his racial identification, my son also asks about who and what he is.

The problem of racial identification in my home is compounded by a number of factors. For example, my skin is incredibly pale—I do not tan; I turn a bright and uncomfortable red if I stay out in the sun too long without some sort of protection from ultraviolet rays. Furthermore, my hair is a light brown, and my eyes are a blue-green. I look nothing like my adopted children, a fact upon which even my children's classmates have felt free to remark. Both children are well aware of this dissimilarity in appearance.

Adding to the children's natural curiosity about differences in our appearances and backgrounds, and greatly compounding the problem of racial identification in our family, the children's maternal grandmother, who became particularly close to them after her daughter's untimely death, at one point tried to inculcate in them a belief that they are "Black," not "White," and that neither I nor my husband will ever be able to understand that or help them learn about their true racial "identity."

Many of these views are also subscribed to by very influential forces in our society. For example, the National Association of Black Social Workers has opposed transracial adoptions on the grounds that White families are incapable of properly raising Black children in our racist

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8. Yet another colleague asked me if I think the reason more strangers have asked me about my daughter's racial background than about my son's heritage is gender related. I believe that it is the presence of superficial physical characteristics such as the texture of their hair and the shape of their noses which makes more people assume that they know "what" my son is, even if he is in my company, while they are far less sure of their racial characterization of my daughter. If gender does play a role in the questions, I am unaware of it.
society. This view has been incorporated into adoption policies in most states.

One of the most significant problems with such views is the impact they are likely to have on Black children, or children identified as Black, who are being raised in White or mixed-race homes. For example, after my daughter's grandmother started telling her that I would never really love or understand her because she and her brother are "Black" while I am "White," my daughter went through a phase of hating her skin color. She tried coloring it with finger paints, magic markers, and once with my face powder. Her self-portraits showed a little girl with pink skin and long yellow hair. Even her pre-school teachers commented on this with concern during parent-teacher conferences.

My son, always more restrained about his feelings, also has been troubled about his racial identity. For example, he once asked me how he could be "Black" when his father was "White." At other times, he also expressed concern that none of his friends wanted to believe we were his "real" parents because we are so different from him in appearance.

Neither I nor my husband is comfortable with any racial identification or classification for our children which does not allow them to accept and appreciate their "White" heritage as much as their "Black" identity. We therefore decided to tell them they were "multi-racial" when they asked, although we also agreed that we would tell them that other people may be inclined to identify them as "Black," just as their grandmother does. Since that decision, our son has apparently settled on describing himself as "Brown," which is factually accurate, even if it has no widely accepted meaning in the context of racial classifications, and is often used informally to describe a Latino background (which my son does not have). My daughter accepts or at least understands that she is different in appearance from me and her father, and she tells her friends that she is "Black and White." This satisfies our children now, while they are young, but I wonder and worry about whether these answers will continue to satisfy them as they grow up in our society, which seems to have a tremendous and, to my mind, illogical and destructive fixation on racial classifications. Moreover, I worry about their role in a society where many people will insist on identifying them by race, and almost certainly not by the racial identity that they have currently chosen for themselves.

9. See infra part II.
For example, when one applies for financial aid to go to college, the applicant is asked to identify his or her race by choosing between a number of little boxes. The same choices await anyone who applies for a bank loan to buy a car or a home, and often when he or she applies for a job. When it comes time to complete census information, the little boxes with arbitrary classifications are there in black and white. According to the Office of Management and Budget Statistical Directive 15, one can be “American Indian or Alaskan Native,” “Asian or Pacific Islander,” “Black,” “White,” or one can choose the ethnic classification “Of Hispanic Origin.” One cannot be more than one of these choices. This means that, unless things change, my son will one day find out that he cannot be “Brown,” and my daughter will learn that she cannot be both “Black and White,” at least not in the eyes of the law. They can, of course, choose to be “Other,” but that choice raises a host of issues too. Does choosing to be “Other” mean they are disavowing a connection with their Black and White roots? Moreover, the choice of “Other” seems to suggest a degree of difference and isolation which I hope my children never have to feel.

However, if the only drawback to racial classifications was that my children would have to choose, under certain circumstances, among racial classifications that do not perfectly fit their self-images, I would not mind, at least not very much. Certainly I would not care enough to write an article addressing the issue. What does disturb me is that these racial classifications are used for a multitude of purposes, and reflect an official acceptance of the notion that racial identification is important enough to justify extensive data collection efforts and, in certain situations, differential treatment based on those classifications. These notions are immensely troubling.

It is axiomatic that the question of race permeates our society. President Clinton, in a speech delivered at the National Archives on July 19, 1995, reaffirmed his belief that “the evidence suggests, indeed screams, that... [t]he job of ending discrimination in this country is not over.”10 Citing the facts that this country permitted slavery for centuries prior to the passage of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, and that another century passed before civil rights legislation was enacted, he concluded that the persistence of discrimination was not surprising.11 As a result, President Clinton reiterated his support for affirmative action programs designed to end discrimination, over the objections of Republi-

11. Id.
cans and some conservative Democrats. In sharp contrast to the President's position, Senate Majority Leader Bob Dole renewed his pledge to "get the Federal Government out of the group-preference business." The political debate over our country's race relations problems has become a national fixation. Affirmative action in particular has been called "the country's hottest political issue."

Even outside the political arena, the division between Blacks and Whites has been commented upon repeatedly in the popular press. Dozens of articles in magazines and newspapers discussed the growing divide between the races as illustrated by attitudes towards O.J. Simpson, Lewis Farrakhan and his "Million Man March," and various other social issues.

In addition to the ongoing political debate and popular commentary on issues relating to race, the jurisprudential ramifications of racial classifications have recently been subjected to review. During the summer of 1995, the Supreme Court rendered two major decisions which are expected to have a major impact on racial classifications and probably on race relations.

One of the two decisions was Miller v. Johnson, in which the Court struck down a congressional redistricting plan that Georgia had implemented following the 1990 Census. The plan, Georgia's third attempt to comply with the Voting Rights Act of 1965, called for the creation of three districts with a majority of Black voters, and was invalidated by the Court under strict scrutiny on the grounds that race

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13. Id.
16. See, e.g., Where Do We Go from Here? NEW REPUBLIC, Nov. 6, 1995 (five articles devoted to the Million Man March and Louis Farrakhan.); After the Cheers: The Justice System & Black America—Unreasonable Doubts? Simpson, Race & America, NEW REPUBLIC, Oct. 23, 1995 (ten articles devoted to the questions raised by the O.J. Simpson trial and the racial divisions revealed by the verdict and reactions to it). For lengthier commentary on the growing separation of and division between the races, see ANDREW HACKER, Two NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (1992) and LEE SIGELMAN & SUSAN WELCH, BLACK AMERICANS' VIEWS OF RACIAL INEQUALITY (1991).
had been an improper motivating factor in establishing district boundaries.19

The other Supreme Court decision was *Adarand Constructors, Inc. v. Pena*,20 a case which involved a challenge to a governmentally imposed affirmative action program. In *Adarand*, the United States Supreme Court generally decried the use of racial classifications by federal, state, or local governments unless the race-based program in question can withstand the rigors of strict scrutiny.21 The Court specifically noted, however, that the case is not to be viewed as prohibiting all race-based preferences22 and it actually provides a limited reaffirmation of benign affirmative action programs.

Our society is based to a significant extent on the notion that race matters and that the distinction between being Black and White is particularly significant. We have myriad rules and programs which depend and rely on racial classifications.23 Our preoccupation with race goes far beyond government programs and rules and, to some extent, permeates virtually every aspect of our lives.

I object to racial classifications partially because such classifications are generally arbitrary, rather than being based on any intrinsic differences among individuals. Despite substantial efforts to document a biological or genetic basis for racial classifications, the evidence shows that there is very little genetic variation between members of different races.24 The principal alternate justifications for racial classifications, the notions of social reality and ethnic heritage, are also insufficient to support the idea that there are intrinsic and important differences between individuals of different races.25 Moreover, the idea that social

19. *Id.* at 2494. Georgia had previously proposed two alternate plans which would have increased the number of minority-controlled districts from one to two. Although the Justice Department refused to approve either of these proposals, the Supreme Court found that any plan which served to ameliorate past discrimination would automatically comply with the Voting Rights Act. *Id.* For a more detailed discussion of *Miller*, see infra part III.


21. *Id.* at 2117. The Court stated that governments may not utilize race-based programs unless they "serve a compelling governmental interest, and [are] . . . narrowly tailored to further that interest." *Id.* For a more detailed discussion of *Adarand*, see infra part IV.


23. For example, adoption agencies are permitted, and sometimes required, to set guidelines for placement which include a consideration of race. The boundaries to congressional districts are established on the basis of residents' race. Educational and employment opportunities are allocated based upon the race of applicants. These three examples illustrate how race impacts the personal, political and professional aspects of our lives.

24. See infra part I.

25. Clearly, Blacks and Whites are subject to different experiences and pressures in our society. It is not surprising that these different experiences tend to produce different beliefs and attitudes.
reality requires us to recognize the concept of "race" seems to me an example of circular reasoning. Our society uses and relies upon rigid and artificial racial classifications, which reinforce certain social behaviors and attitudes, which in turn support the use of those same racial classifications, which in turn support the behaviors, ad infinitum.

This Article attacks the use of racial classifications by governmental agencies, and advocates the abolition of "official" racial classifications on the grounds that programs drawn along such broad lines cannot be narrowly tailored to serve compelling state interests. After examining the notion of race, and discussing the extent to which such labels are intrinsically meaningful, this Article focuses on three specific paradigms in which the effects of programs which result in differential treatment for members of different races are examined and analyzed. The first paradigm is that of transracial adoption, where treatment of adoptable children is based upon their race. The second paradigm covered in this Article is that of congressional redistricting along racial lines. The final paradigm which illustrates problems caused by the official sanction of differential treatment based on race is affirmative action in hiring and education.

These three examples are chosen not only because of the intrinsic importance of each of these issues, but because each affects a different part of our lives. The transracial adoption debate focuses on how race can play a fundamental role in governing and limiting the personal lives of those involved. The decision to proscribe which families can adopt which children affects the development of the family and the development of healthy, productive members of society. Congres-
sional redistricting provides an example of how race relates to the political process in this country and to our involvement in that essential process. A consideration of the political process and how race affects that process is critical because it is generally conceded that political powerlessness is one of the great barriers to racial equality in this country. Finally, the affirmative action debate impacts the question of how our resources should be allocated in connection with the professional and economic progress of those involved. Rules which allocate educational and employment opportunities on the basis of race have a tremendous impact on the economic position of affected individuals. This Article therefore picks three seemingly diverse topics, each of which involves rules that use racial classifications as a basis for differential treatment, to illustrate how the question of race permeates our society.

This Article suggests that in each of these three paradigms, the use of racial classifications as a basis for differential treatment has created more problems than it has solved. By legitimizing the use of race as a "proper" basis for differential treatment, such programs serve to reinforce the notion that race is intrinsically important. This in turn operates to increase the perception of differences among the races, which aggravates the racial tensions plaguing this country. So long as we continue to accept the notion that race is a legitimate basis for differentiating between individuals, the goal of a color-blind society is unobtainable.

I do not suggest that the history of our country and our society is not replete with examples of discrimination or that it is inappropriate to provide some form of redress for the actual victims of past discrimination. My concern is that the "solutions" we have embraced, which generally involve grouping individuals by race and then treating members of different groups differently based on such classifications, are actually part of the problem and are no solution at all.

I. THE LEGITIMACY OF RACIAL CLASSIFICATIONS: WHAT DOES IT MEAN TO IDENTIFY SOMEONE AS BLACK?

Essentially two justifications have been offered in defense of racial classifications. The first of these is the biological justification. This position is based on the belief that there are genetic differences between certain groups of people, which are reflected in the various racial classifications. Alternatively, notions of social reality and

ethnicity have been advanced as a justification for classifying persons and treating them differently on the basis of race. Both of these justifications will be examined in turn.

A. The Biological Basis for Racial Classifications

Conventional sociological usage suggests that "race" refers to "a group that is socially defined but on the basis of physical criteria." Separate races should therefore be identifiable by discrete physical attributes that are possessed by one race and one race only. The problem is that there is no set of physical characteristics shared by and unique to members of any racial group. Genetic variation is generally more attributable to geographic separation than any clear division along "racial" lines. Interestingly, geneticists have pointed out that there is more genetic variation within the human population identified as "Black" than there is between populations identified as "Black" and "White.

On the other hand, the typical man or woman on the street probably has a fairly well-established view of how to ascertain an individual's race based on personal characteristics. The characteristic that would probably be offered most often in support of racial classifica-

30. PIERRE L. VAN DEN BERGHE, RACE AND RACISM: A COMPARATIVE PERSPECTIVE 9 (1967) (emphasis omitted). This approach has clearly found its way into American jurisprudence. See, e.g., Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1093 (1988) (explaining that "the term 'racial group' means a set of individuals whose identity as such is distinctive in terms of physical characteristics or biological descent.").

31. See Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134 (Sup. Ct. App. 1806), quoted in PAUL FINKELMAN, THE LAW OF FREEDOM AND BONDAGE, A CASEBOOK 22-24 (1986) ("Nature has stampt upon the African and his descendants two characteristic marks, beside the difference of complexion... a flat nose and wooly head of hair.").

32. This position has apparently been acknowledged by the Supreme Court. "The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance." Saint Francis College v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987). Having said this, however, the Court went on to conclude that § 1981 "at a minimum" reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physionomically distinctive subgrouping of homo sapiens." Id. at 613 (quoting Al-Khazraji v. Saint Francis College, 784 F.2d 505, 517 (3d Cir. 1986).


34. Nei & Roychoudhury, supra note 33, at 11; see also Charles Petit, Scientists Call Race Insignificant: They Say Differences Are Mostly Superficial, S.F. CHRON., Feb. 20, 1995, at A1 (reporting that the American Association for the Advancement of Science has adopted this position).
tions is skin color, but facial features (ranging from the epicanthic fold to a broad or flattened nose or full lips) would probably also be mentioned, as would hair texture. Characteristics in addition to appearance might be considered in establishing racial identity. For example, given the prominence of a recent and very well publicized book purporting to demonstrate that Blacks are less intelligent (on average) than Whites, this might also be mentioned by a number of people asked to comment on racial classification. However, because intelligence is not readily apparent to the casual observer and may not be ascertainable even by conventional testing methods, most racial classifications are likely to be made on the basis of readily observable physical traits.

Despite the fact that most people in this country probably have relatively well-defined internalized guidelines by which they make judgments about the racial identification of themselves and others, these guidelines clearly do not always make racial identification easy or accurate. From my perspective, my children provide an obvious example. Strangers appear to be generally unable to identify the race of my daughter, as evidenced by the number of inquiries about her racial background. On the other hand, my son, who shares precisely the same ancestors as my daughter, is often identified as “Black,” although in fact he shares a mixed racial heritage. In addition, although I am well aware of the genetic make-up of my children, I have a difficult time ascribing a “race” to them because the commonly

35. The preeminence of this characteristic is readily apparent. Most obviously, racial classifications tend to be made along color lines, such as the division between “Black” and “White,” and identification of Native Americans as “Red,” and Asians as “Yellow.”

As recently stated in the popular press, “[t]o most Americans race is a plain as the color of the nose on your face.” Sharon Begley, Three is Not Enough—Surprising New Lessons from the Controversial Science of Race, NEWSWEEK, Feb. 13, 1995, at 67.

36. These very characteristics have been judicially recognized as the proper test of race. See Hudgins v. Wright, 11 Va. (1 Hen. & M.) 134, 139 (Sup. Ct. App. 1806), quoted in FINKELMAN, supra note 31, at 22-24.

37. The physical characteristics identified in the text are relatively immutable and clearly inherited. It is true that they can be changed with plastic surgery, or even less drastic methods such as chemical processing to straighten hair or lighten skin tone, but absent such artificial intervention, these characteristics are a matter of genetics.

By way of contrast, racial identification might also be made at least partially on the basis of clothing, accessories, hairstyle or the like. These kinds of considerations, however, are not biologically based and so would lend little credence to the notion that race is genetically determined. Moreover, because these attributes are so very easy to change, it is unlikely that these would be identified as a reliable way to determine the race of particular individuals.

38. RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994). “The average black and white differ in IQ at every level of socioeconomic status . . . . Attempts to explain the difference in terms of test bias have failed.” Id. at 269.
accepted dichotomy of Black or White seems to be inadequate to describe their "racial" identity.

Yet the inadequacy of popular racial classification schemes is not the only problem with relying on the notion that race is somehow dependent on discrete physical characteristics. Even if general agreement existed on which characteristics identify which races, and even if it were possible to make reliable judgments about "race" based on those characteristics, there is another fundamental problem with the way in which "race" has been defined in this country. If immutable physical characteristics do indeed define the parameters of the various races, then one would expect racial classifications to remain relatively constant. In fact, nothing could be further from the truth.

Race seems to be a particularly amorphous and fluid concept. Nowhere is this demonstrated more convincingly than in the racial classifications utilized by the Census Bureau in its data collection efforts.\(^{39}\) In the 1890 Census, eight separate racial classifications were recognized: White, Black, Mulatto, Quadroon, Octoroon, Chinese, Japanese and Indian. The classification of Black was reserved for those persons having three-fourths or more "black" blood; Mulatto described persons having from three-eighths to five-eighths black blood; Quadroon referred to those having one-fourth black blood; and Octoroon meant those persons having one-eighth or any trace of black blood. The 1900 Census dropped Mulatto, Quadroon and Octoroon from the list, reducing the number of racial classifications to five. "Mulatto" reappeared in the 1910 and 1920 Census, along with the possibility of a person being classified as "Other." "Mulatto" disappeared, apparently for good, with the 1930 Census, which also added Mexican, Filipino, Hindu and Korean to the list of available racial classifications. "Mexican" was deleted for the 1940 Census, and Hindu and Korean were removed for the 1950 Census, which also reclassified "Indian" as "American Indian." The 1960 Census added Hawaiian, Part Hawaiian, Aleut and Eskimo. In 1970, the categories of Part Hawaiian, Aleut and Eskimo were deleted and "Negro" became "Negro or Black." In 1980 and 1990, a number of additional categories (including Guamanian, Samoan, Korean and Vietnamese) were added, and Eskimo and Aleut were reinstated as possible racial classifications. In fact, in the 1980 and 1990 Census, there were fifteen options for determining the race of a respondent, although nine of

those classifications were grouped under the heading of "Asian or Pacific Islander."

The pressures to change the Census to reflect "new" understandings of racial classifications continue today. There is substantial pressure on the Office or Management and Budget and the U.S. Census Bureau to make changes to the existing classifications to recognize different racial groupings.40

One would think that if there were in fact discrete physical characteristics which positively identified an individual as being a member of one race and not another, then it would be easy or at least possible for people to accurately identify the racial heritage of individuals and it would not have been necessary to make such extensive modifications to the racial categories included in the Census. In reality, the Census has continually readjusted the list of available racial classifications precisely because there is no set of discrete characteristics which set people of different "races" apart.

Historically the notion that the "races" were separate and distinct because of biological and genetic differences was generally assumed to reflect reality.41 For example, the entire culture of slavery was predicated on the widespread acceptance of the now discredited idea that the Black race was genetically and inevitably inferior to the White race. This belief would have been entirely untenable without the underlying notion that there were biological differences between the Black and White races.

Over time, however, substantial data has been accumulated which suggests that biological differences among the races simply do not exist. Biologist Richard Lewontin made a strong case against genetic determinants of race in 1972.42 His conclusion, based on analyzing seventeen genetic markers in 168 separate populations, was that there

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40. See Daniel Seligman, Talking Back to the I.Q. Test, Guess Who's in Love: With Lefties, More Casino Wars, and Other Matters, FORTUNE, Oct. 16, 1995, at 246 (commenting particularly on the move to have Hawaiians reclassified as Native Americans, and to add a "Multiracial" category).


42. Richard Lewontin, The Apparition of Human Diversity, 6 EVOLUTIONARY BIOLOGY 381, 397 (1972); see also L.L. Cavalli-Sforza, The Genetics of Human Populations, 231 SCI. AM. 80, 80 (Sept. 1972) (noting that genetic determinants can lead to unreliable results due to genetic differences within the same race); Nei & Roychoudhury, supra note 33, at 41 (concluding that genetic variation is generally more attributable to geographic location than to racial bounds).
is more of a genetic difference among the members of any one race than between members of different races.43

The lack of biological support for the notion that human beings can be meaningfully classified along "racial" lines has produced a widespread change in attitudes in the academic community. For example, textbooks of physical anthropology are being rewritten to delete any mention of race as a valid technique for measuring or describing human variation.44 Although human variation indisputably exists, most modern scientists now concede that notions of racial classification do little to explain such variation and that current definitions of race are certainly inadequate to classify children of mixed-race unions.45

Unfortunately, racial classifications continue despite the lack of evidentiary support for the idea that biological differences exist among members of different races. Other explanations purporting to justify differing racial classifications have been adopted by those desperate to perpetuate the belief that there are meaningful differences among human populations based on race. Many of those who feel the need to perpetuate the idea that race matters now suggest that race is a valid social construct derived from culture and/or ethnicity. On closer examination, however, the idea that racial classifications are meaningful because of social differences such as cultural or ethnic backgrounds also appears to be fundamentally flawed.

B. Societal Norms: Ethnicity and Culture as a Basis for Racial Classification

A large number of commentators have favored a social rather than biological basis for race.46 For example, W.E.B. DuBois suggested

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43. Lewontin, supra note 42, at 397.
45. See Begley, supra note 35, at 67 (citing anthropologist Alan Goodman, Dean of Natural Science at Hampshire College).
46. See, e.g., Ashley Montagu, The Concept of Race 19-20 (1964) (criticizing the use of the word "race" to distinguish population groups "which happen to differ from other populations in the frequency of one or more genes"); Thomas Sowell, Race and Culture: A World View xiv (1994) ("Race is a biological concept, but it is a social reality"); Kevin Brown, Do African-Americans Need Immersion Schools?: The Paradoxes Created by Legal Conceptualization of Race and Public Education, 78 IOWA L. REV. 813, 824 (1993) (characterizing race as one of the most important social classification in use today) [hereinafter Brown, Immersion Schools]; Kilker, supra note 3, at 230 (stating that the biological concept of race is a dubious one); Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 13 (1994) (tracing the notion that there are three races (Caucasoid, Negroid and Mongoloid) to Medieval Europe, which had no exposure to persons from anywhere other than Europe, Africa and the Near East).
that instead of relying on biological or physical characteristics as indicators of race, the proper inquiry is to examine common history, traditions, and geography as the source of racial identification. Michael Omi and Howard Winant, after tracing how the construction of racial identity has changed over time, argued that race should be viewed "as an unstable and 'decentered' complex of social meanings constantly being transformed by political struggle." Henry Louis Gates has argued that "one must learn to be 'black' in this society, precisely because 'blackness' is a socially produced category." These commentators recognize race as a valid construct, but justify the concept as being derived from social, cultural and ethnic differences rather than being based on biology.

If race is to be regarded as important because of such social considerations, the question becomes whether cultural or ethnic differences really provide a basis for classifying individuals. There is substantial evidence that such differences cannot justify the way persons are classified or account for the importance attached to race.

Ethnic differences, for example, do not support the racial classifications which this country has used. If race was truly akin to ethnicity, one would expect that racial and ethnic groups would have been treated similarly. This is certainly not the case. While one can draw parallels between the treatment of certain ethnic minorities in the past, particularly those of Jewish ancestry and the Irish, and the treatment of certain widely recognized racial minorities, it is hard to equate the burdens placed on members of European ethnic groups with the genocidal attacks against Native Americans or the slavery and ensuing oppression of Blacks. Moreover, the history of America has generally been one of integration of ethnic minorities, as suggested by the well known "melting pot" metaphor used to describe

50. Others have drawn parallels between Blacks and other groups which were subjected to particularly virulent prejudice. See Jeff Jacoby, Race Doesn't Matter, BOSTON GLOBE, Mar. 16, 1995, at A13 ("If the Irish, the Jews, and the Chinese were able to overcome legal discrimination and societal exclusion without affirmative action, black Americans can, too. To claim otherwise is racist."); see also Bill Ong Hing, Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society, 81 CAL. L. REV. 863, 899 (1993) ("The biggest difference between today's Asian, Latino, and Haitian immigrants and Irish, Italian, and Southern and Eastern European immigrants of decades past is race. Certainly, all of these groups faced hostilities, discrimination, and even violence, but eventually the Irish and Europeans became part of the mainstream.").
American culture and society.\textsuperscript{51} Despite the traditional integration of ethnic minorities into American culture, members of certain racial minorities, particularly Blacks, have not been incorporated into "mainstream" American life. Blacks continue to face the results of invidious and even overt discrimination and hostility because of their race and because they are seen as "different" from and "inferior" to the White majority.\textsuperscript{52} Americans of Irish, Scandinavian, German or other European descent are not generally subject to such treatment.

In addition, to suggest that race can be viewed as an aspect of ethnicity does not explain why those of varied ethnic backgrounds are so often labeled and treated as members of the same race. For example, individuals of Chinese and Japanese descent do not share a common ethnic background, yet members of both groups are treated as being "Asian."\textsuperscript{53} Moreover, individuals are labeled "Black" regardless of their tribal or national affiliations or those of their African ancestors, or even if they cannot identify any such ancestors or background.\textsuperscript{54}

The reality is that racial identification in this country does not depend on cultural or ethnic background, or even current cultural preferences of the individuals so classified.\textsuperscript{55} Consider, for example, the

\textsuperscript{51} Jim Chen, Unloving, 80 IOWA L. REV. 145, 149-54 (1994) (describing America as a creole republic where the views and culture of all participants blend together to enrich all our lives).

\textsuperscript{52} Numerous commentators have discussed the negative stereotypes associated with being "Black." See, e.g., Michael J. Cassidy, Legacy of Fear: American Race Relations to 1900, at 32-63 (1985); George M. Fredrickson, The Black Image in the White Mind: The Debate on Afro-American Character and Destiny 1817-1914, at 53-58, 275-82, 325-32 (1971) (discussing various negative stereotypes that Whites have of Blacks); Drake St. Clair, Black Folk Here and There: An Essay in History and Anthropology 28-30 (1987) (tracing negative stereotypes through history); C. Vann Woodward, The Strange Career of Jim Crow 56-95 (1955); Charles R. Lawrence III, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 DUKE L.J. 431, 468 (noting that our racial stereotypes are often unconscious). While many of the stereotypes are far from new, recent evidence suggests that a depressing number of individuals retain certain basic negative assumptions about what it means to be Black. See Lynne Duke, Whites' Racial Stereotypes Persist; Most Retain Negative Beliefs About Minorities, Survey Finds, WASH. POST, Jan. 9, 1991, at A1. The National Opinion Research Center at the University of Chicago conducted a nationwide survey on attitudes towards Blacks. Of survey respondents, 62% characterized African-Americans as "more likely to be lazy" and 53% responded that African-Americans are "less intelligent." Id. A 1990 survey by the same organization reported similar results. Id.; accord Gotanda, supra note 4, at 27 ("The moment of racial recognition is thus characterized by an unconscious assertion of the racial hierarchy . . . .").

\textsuperscript{53} See, e.g., Chen, supra note 51, at 150-51.

\textsuperscript{54} It would not be uncommon for American Blacks to be unable to trace their ancestors back to any specific tribe or location in Africa. Slave owners systematically attempted to eradicate any such tribal or ethnic affiliations in order to create a cohesive work force.

\textsuperscript{55} See Kimberlé Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331, 1358 (1988) ("The most signif-
notion that one must "learn" to be Black. It is axiomatic that not every Black individual learns the same about what it means to be Black. No one seriously contends that only individuals who accept a particular set of beliefs, attitudes, or values can be "Black." Moreover, the notion that one must "learn" to be Black cannot be literally true. First, this would mean that children who have not yet had the chance to learn are not yet Black. Surely, the falsity of this premise is obvious to everyone. Second, it would mean that individuals who grew up in other countries, exposed to other cultures, would not be "Black" in the same sense that American Blacks are "Black." Yet the notion of race is painted in broad strokes, and it is as easy to identify a dark-skinned adult from Ethiopia as Black as it is to label a dark-skinned child from the Bronx.

Of course, "learning" to be Black in this country consists of more than learning to "walk the walk and talk the talk." Undoubtedly, "learning" to be Black also encompasses the experience of learning to deal with being identified as Black in our society. In turn, this includes learning to deal with a multiplicity of racial attitudes, and learning about prevailing Black attitudes, even if one chooses not to adopt them. However, learning to be Black (or more accurately, learning what it means to be Black) is independent of being identified as Black, and refers more to the notion that anyone who is Black in this country will have to learn to deal with what that racial identity means in a social sense. The underlying identification of individuals as Black does not depend on their having learned the same things about what it is to be Black or sharing the same cultural or ethnic backgrounds. By way of example, Jesse Jackson and Justice Clarence Thomas are both identified as "Black," but they are miles apart in attitudes and beliefs. One does not conclude that Justice Thomas is really a member of some other race merely because he does not share the attitudes which tend to be identified as Black.

Even those Blacks who are denigrated as "oreos" (Black on the outside, White on the inside) are clearly identified as being Black.⁵⁶
They are merely criticized for having chosen to adopt “White” attitudes which would be acceptable, or at least unremarkable, if the individual possessing those beliefs was White. The combination of being Black while identifying with White culture is what leads to the criticism. Moreover, Blacks who “pass” for White are still assumed to be “really” Black, as if the underlying race of the individual has some intrinsic importance apart from the way in which the individual in question is living his or her life, and even apart from the way in which other persons characterize that individual.

The truth is that racial classifications seem little more than an excuse to differentiate human beings according to their skin color. The importance of the color line can be determined simply by looking at the recognized races. There is the “White” race, which apparently is based on an exclusively European ancestry; the “Black” race, which requires at least one African ancestor; the “Red” race which identifies Native Americans; the “Yellow” race which encompasses all those (Whites); Catharine Pierce Wells, Clarence Thomas: The Invisible Man, 67 S. CAL. L. REV. 117, 148 (1993) (explaining how Justice Thomas was labeled an oreo because of his conservative views).

57. Stephen L. Carter, a professor of law at Yale University, writes that “[Blacks who ostracize other Blacks] really do believe that there is an important sense in which people of color who hold the wrong views have no right to call themselves people of color. They really do believe that the dissenters are traitors, Uncle Toms, merely biologically black, not bona fide representatives of their people.” STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 131 (1991). Note, however, the underlying assumption that even those “people of color” who hold the “wrong” beliefs are “biologically” Black.

58. For a discussion of “passing for White,” see RUSSELL ET AL., supra note 3, at 73.


This fixation on skin color is not at all unique to modern America. See, e.g., COLOR AND RACE (John Hope Franklin ed. 1968) (including chapters dealing with skin color and human relations, the perception of skin color in Japan, India, Northern Africa, South Africa Britain, Central American and the West Indies). It is nonetheless troubling that so many people seem to assume that skin color, and perhaps a few other superficial physical characteristics such as hair texture and shape of one’s eyes, translates readily into meaningful differences between groups.

Even within the context of a single racial classification, subtle variations in shade can result in litigation, scholarly analysis and popular comment. See, e.g., Walker v. Secretary of Treasury, 713 F. Supp. 403 (N.D. Ga. 1989) (dealing with a claim of illegal discrimination under Title VII of the Civil Rights Act of 1964 by a darker skinned Black employee against a lighter skinned Black supervisor); RUSSELL ET AL., supra note 3, at 24-40 (discussing how shades of skin color affect power and privilege); SCHOOL DAZE (Forty Acres and a Mule Filmworks 1988) (popular film by Black Director Spike Lee).

60. Presumably, any child resulting from the union of a member of the White race and a member of any other racial category would be classified according to the race of the non-White parent. See generally Ruth G. McRoy & Edith Freeman, Racial Identity Issues Among Mixed-Race Children, 8 SOC. WORK EDUC. 164, 165 (1986) (discussing the confusion experienced by one biracial child as he tried to determine his identity).

61. See supra note 4 (discussing the “one drop” rule).
of Asian descent, except presumably those with at least one African ancestor; and perhaps the "Brown" or Hispanic race. Of course these racial labels are purely fictitious, at least in the sense that there are no white, black, red, or yellow people walking around. Virtually everyone seems to be some shade of brown, admittedly ranging from the very pale to very dark, and everything in between. Some individuals are pinker than others, and some have more olive skin tones. Yet in gross terms, skin color is the single biggest factor in racial classifications.

Logically, this superficial physical characteristic is not one that should be important. One does not, for example, make broad generalizations about people based on such superficial characteristics as hair or eye color, shoe size, left- or right-handedness or height. Yet skin color matters to such an extent that it is used to classify individuals, and thereafter they are treated differently based upon that classification. In fact, this country is very used to using racial classifications that are generally based on skin color. It is hard to appreciate the impact of this mindset on our society.

For example, because we are so used to thinking about Blacks as a group, it is easy to make broad generalizations about the group as a whole based upon the conduct of a few of the group's members. The negative stereotypes which are applied to Blacks as a group mean that Blacks are raised in a different America from the one that White Americans experience. The process of being regarded with suspicion and hostility engenders, or at least encourages, certain attitudes.

62. Under the "one drop" rule, anyone with so much as a single Black ancestor would be classified as Black. See supra note 4 (discussing the "one drop" rule and its application).

63. One could make the argument that individuals completely lacking in skin pigmentation, albinos, are truly white, but this is not the basis upon which the racial classification of "White" is made.

64. At least one commentator has also questioned the rationality of classifying people on the basis of skin color. See, e.g., Brown, Immersion Schools, supra note 46, at 825 ("Throughout history, religious, biological, and culturally deficient explanations have provided the justification for racial attitudes and beliefs.").

65. See, e.g., DINESH D'SOUZA, THE END OF RACISM: PRINCIPLES FOR A MULTIRACIAL SOCIETY 245-87 (1995) (explaining how behaviors which might be viewed as racist, such as taxi-drivers refusing to pick up young Black men, or storekeepers refusing to admit young Blacks into their stores, can be explained as a reaction to fear). "[E]veryone knows that young blacks are convicted of a high percentage of violent crimes, and since most Americans are highly risk-averse to crime, they have good reason to take precautions and exercise prudence." Id. at 261.

66. Professor Brown, in discussing the arguments which support immersion schools for African-American students, has evaluated what it is to be Black in America today. Brown, Immersion Schools, supra note 46, at 825 nn.39-40, 825-30. In this context, he discusses the overwhelmingly negative stereotypes associated with being Black and some prevalent White attitudes about Blacks. Id. Professor Brown concludes that racism, however camouflaged, continues to exist, and that such attitudes place tremendous pressures on young Blacks growing up in
and beliefs, and the resulting shared views reinforce the notion that it is meaningful to think about Blacks as a group. After we classify individuals by race, and after we treat them differently on the basis of that classification, race does become important in a social sense.

The problem is obviously how to break this cycle. If we want to deconstruct the notion of race, and thereby defuse existing racial tensions, we need to consider whether recognizing that race itself is not a valid basis for differentiating between individuals might be a step in the right direction. Frankly, unless rules which impact differentially on individuals based on their race have the effect of minimizing the things which create essentially artificial differences between the "races," it is hard to justify those rules merely on the basis of the fact that the experience of the average Black in this country is different from that of the average White.

The remainder of this Article will address three specific examples of how race has been incorporated into American jurisprudence. In each of the three examples chosen (transracial adoption, congressional redistricting, and affirmative action) race has been used as a basis for treating individuals differently under the law. Legal acceptance of the notion that race matters, and matters to such an extent that individuals should be treated differently based upon that classification, le-

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67. For example, Professor Brown takes the position that "Black" culture or identity is a function of the negative stereotypes and pressures inflicted on Blacks by the dominant culture in our society. Brown, Immersion Schools, supra note 46, at 831-34.

68. This is far different from concluding that race matters because of cultural and ethnic differences. Normally, in order to use culture or ethnicity as a basis for differentiating between groups, one would expect to identify groups having a distinct and unique set of historical values, beliefs, traditions, attitudes, preferences and the like, perhaps derived from ethnicity or ancestral heritage. Yet when it comes to the idea that Blacks must be identified as a separate group because they have a separate culture, much of what has been said really comes down to an assertion that the process of growing up Black in our racist society produces a certain outlook which is inevitably different from the outlook of those who have not been subject to such racist pressures.

At least one scholar of color has commented on the intense pressures created by our preoccupation with racial classification. See Marian Wright Edelman, The Measure of Our Success: A Letter to My Children and Yours 28 (1992) ("It is utterly exhausting being black in America—physically, mentally and emotionally . . . . [T]here is no respite or escape from your badge of color.").

69. See infra part II.
70. See infra part III.
71. See infra part IV.
gitimizes the notion that race is an intrinsically important characteristic. In each case, substantial evidence exists that policies involving differential treatment are unlikely to help us overcome the problems faced by racial minorities in this country and may even make the problems worse.

II. USE OF RACIAL CLASSIFICATIONS IN ADOPTION

An examination of the rules applicable to transracial adoptions helps illustrate how counterproductive the official sanction of differential treatment based on race can be, even when the rules in question are well intended. In particular, this section of the Article will focus on the special rules that apply to adoption of Black infants and children by White couples or families. The different rules applicable to the adoption of White and Black children were imposed with the best intentions, primarily at the urging of Black adults who were apparently trying to protect the rights and interests of Black children. Nonetheless, the facts suggest that the differential policies put in place in order to protect Black children have actually done more harm than good, both for the children in question and for society at large.

A. Introduction to Transracial Adoptions

Historically, when adoption was suspect and adoptees often stigmatized, adoptions were usually arranged with the goal of finding children who would physically resemble their adoptive parents. However, for some time there have been isolated instances of White families adopting Black children. This is somewhat surprising given the systematic exclusion of Black children and infants from the adoption system in the United States prior to the advent of the civil rights movement. Adoption agencies were traditionally run for the benefit of White, middle-class families, and Black children were not wanted or accepted into that system.

72. The goal of adoptions was to mimic biology. The traditional "notion (was) that the adopted child, by physical appearance alone, could have been the birth child of the adoptive parents. The adoptive parents were supposed to be people who, by appearance and age, could have conceived the infant." Sanford N. Katz, Rewriting the Adoption Story, FAM. ADVOC., Summer 1982, at 9.

73. According to one source, "[i]nstances of whites adopting black children have been reported as early as 1948 in Minnesota, 1952 in New York, 1954 in Georgia, and 1955 in California." DAWN DAY, THE ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION 89 (1980) (citing JOYCE A. LADNER, MIXED FAMILIES 59, 149, 155, 159 (1977), and noting that the Georgia adoption was informal since Georgia prohibited interracial adoptions until the late 1960s).

The first efforts at organizing transracial adoptions in a systematic fashion in the United States can probably be traced to the efforts of the Minority Adoption Recruitment of Children's Homes (MARCH) formed in 1955. In the United States, the number of transracial adoptions increased dramatically following the organization of such groups. For example, surveys indicate that, in reporting agencies, the number of transracial adoptions rose from 587 placements in 1968 to 1,743 in 1970.

A number of theories have been advanced to explain the increase in transracial adoptions at this time. One factor which played a major role in the increase in transracial placements was that there were relatively few adoptable White children, especially infants, while many more Black children were in need of adoptive homes. The increasing awareness of the deficiencies of the foster-care system and the need for stable home environments also resulted in decreased barriers to transracial placements, especially since there were not enough Black families seeking to adopt. In addition, changing attitudes towards racial integration also played an essential role in transracial adoptions. The increase in transracial adoptions was accompanied, however, by an increasing level of opposition to the practice.

B. The NABSW and the Theory of "Cultural Genocide"

While the "Black Power" movement of the 1960's provided much of the theoretical basis for opposition to transracial adoption, the Na-

75. Allen C. Platt III, Note, Adopting a Compromise in the Transracial Adoption Battle: A Proposed Model Statute, 29 Val. U. L. Rev. 475, 479 (1994) (citing The National Association of Black Social Workers, Preserving Black Families: Research and Action Beyond the Rhetoric 31-32 (Feb. 1986) (unpublished report available from the National Association of Black Social Workers (NABSW))). In 1960, the Open Door Society, a group with the same basic agenda, was formed in Canada. Id. These groups urged transracial adoption as a solution to the problem of adoptable Black children waiting in institutions or foster care for permanent placement. Id. By 1969, there were nearly fifty similar organizations operating in the United States. Id.


77. See Margaret Howard, Transracial Adoption: Analysis of the Best Interests Standard, 59 Notre Dame L. Rev. 503, 509 (1984) (citing the dramatic decline in the number of healthy White infants as one reason for the increase in transracial placements).

78. These factors are also considered by Professor Howard. Id. at 505-14.

tional Association of Black Social Workers (NABSW)\textsuperscript{80} led the charge against such placements. The NABSW was not only the first group to mount organized opposition to adoption of Black children by White families, it has continued to be the most vocal and influential opponent of the practice.

The NABSW first publicly announced its opposition to transracial adoptions at its 1972 annual meeting. The 1972 position paper of the organization stated, in part, that “Black children in white homes are cut off from the healthy development of themselves as Black people.”\textsuperscript{81} The paper also argued that only a Black family can transmit the background and knowledge essential for a Black child’s survival in a racist society.\textsuperscript{82} The paper concluded pessimistically that “[o]ur society is distinctly Black or white and characterized by white racism at every level. We repudiate the fallacious and fantasied reasoning of some that whites adopting Black children will alter that basic character.”\textsuperscript{83} The paper set off a nationwide debate over the social and cultural ramifications of Whites adopting Blacks and quickly resulted in a drastic curtailment of the number of transracial placements.\textsuperscript{84}

Over time, the NABSW has clarified its reasoning in opposing transracial adoption. Essentially, the NABSW has three separate objections to the practice. The first objection is that White families are unable to provide Black children with social survival skills necessary for Blacks to understand and cope with a racist society.\textsuperscript{85} The second argument is that Black children will be deprived of their racial and cultural identity if they are reared in White homes.\textsuperscript{86} The third argument is that the only reason White families have been allowed to

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\item \textsuperscript{80} Joyce Ladner, Mixed Families 73-82 (1977).
\item \textsuperscript{81} National Ass’n of Black Social Workers, Position Paper (Summer 1973), quoted in Simon & Altstein, Transracial Adoption 50 (1977).
\item \textsuperscript{82} Id.
\item \textsuperscript{83} National Ass’n of Black Social Workers, Position Paper (Summer 1973), quoted in Ruth Colker, Race, Sexual Orientation, Gender, and Disability, 56 Ohio St. L.J. 1, 24 (1995).
\item \textsuperscript{84} Ladner, supra note 80, at 75.
\item The impact that the NABSW had on transracial adoption has been noted by numerous commentators. One individual wrote that the NABSW “condemned transracial adoption in terms so militant that transracial adoption fell by 39 percent in a single year.” Howard, supra note 77, at 517. The NABSW’s position against transracial adoption clearly contributed significantly to the decline of the practice. James S. Bowen, Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child, 26 J. Fam. L. 487, 502 (1987-88) (citing Silverman & Feigelman, The Adjustment of Black Children Adopted by White Families, Soc. Casework: J. Contemp. Soc. Work 529 (Nov. 1981)). The incidence of transracial adoption declined from a high of 2,574 placements in 1971 to 1,070 in 1976, the last year for which such statistics are available. Rita J. Simon & Howard Altstein, Transracial Adoption: A Follow-Up 96 (1981).
\item \textsuperscript{85} See infra part II.D.1 (discussing this objection in detail).
\item \textsuperscript{86} See infra part II.D.2 (discussing this objection in detail).
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adopt Black children is that discriminatory barriers exist which have prevented Black families from adopting Black children.  

If the position of the NABSW controlled the adoption process, presumably transracial adoptions would be absolutely prohibited. Not surprisingly, the absolutist position advanced by the NABSW has not itself been codified into law. The barriers which exist are often informal and are specifically designed not to look like outright bans on transracial adoption. These barriers, however informal, too often delay and even thwart transracial adoptions on no more than the basis of the child's race. For the children involved, this delay is often traumatic, albeit less so than an outright ban on transracial adoptions would be.  

Although many prospective adoptive parents might wish to consider the race or appearance of potential adoptees, that is far different from agency policies which institutionalize different treatment. The Supreme Court, in its landmark decision in *Palmore v. Sidoti*, explained that while the Constitution cannot control the fact that racial prejudice exists, "neither can it tolerate" such biases. Chief Justice Burger stated in the Court's opinion that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."  

Of course, the NABSW would argue that there are compelling state interests which justify the differential treatment of children waiting for adoption based on their race. The NABSW's arguments as to why

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87. See infra part II.D.3 (discussing this objection in detail).  
88. See infra part II.C (discussing the state of debate over transracial adoption).  
89. See infra notes 183-90 and accompanying text (noting that transracial adoption laws give undue weight to racial classifications).  
90. Even in situations where race is not given undue consideration under current standards, the fact that race can be considered means that adoption can be delayed for "reasonable" periods of time in order to attempt to locate suitable adoptive families of the "correct" race. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163, 1201 (1991); see infra notes 127-29 and accompanying text (discussing detrimental effects of delaying adoptive placements).  
92. Id. at 433.  
93. Id.  
94. A unanimous Supreme Court in *Palmore* concluded in the context of a custody fight that decisions based on racial classifications "are subject to the most exacting scrutiny" and "must be justified by a compelling state interest" in order to be held constitutional. Id. at 432.
transracial adoptions are not in the best interests of Black children may be viewed as an attempt to document such an interest.

C. The State of the Debate over Transracial Adoption

There is a tremendous body of literature on transracial adoption.95 In general terms, most commentators are critical of the existing barri-

95. Legal scholars have been particularly prolific. One of the most outspoken opponents of current barriers to transracial adoption is Professor Elizabeth Barolet of Harvard. See, e.g., Elizabeth Barolet, Race Separatism in the Family: More on the Transracial Adoption Debate, 2 DUKE J. GENDER L. & POL'Y 99 (1995) (responding to the various arguments which have been made in opposition to transracial adoption); Barolet, supra note 90, at 1163 (discussing and criticizing the unique role which race plays in the adoption context). Other law professors have also criticized barriers to transracial adoption. See Susan J. Grossman, A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings, 17 BUFF. L. REV. 303, 335-41 (1967-68) (maintaining that race-based adoption statutes are unconstitutional); Howard, supra note 77, at 545-49 (arguing that intervention and placement decisions involving black children should always be driven by a “child-centered” analysis rather than being based upon race); Joan Mahoney, The Black Baby Doll: Transracial Adoption and Cultural Preservation, 59 U. Mo. KAN. CITY L. REV. 487, 491-94 (1991) (arguing that presumptions against transracial adoption are not justified, although recognizing that race may be an important consideration in the adoption context); see also Shari O'Brien, Race in Adoption Proceedings: The Pernicious Factor, 21 TULSA L.J. 485, 491-93 (1986) (hypothesizing that allowing race to be a controlling factor in adoption decisions hinders rather than promotes well-being of the children to be adopted); Myriam Zreczny, Note, Race-Conscious Child Placement: Deviating from a Policy Against Racial Classifications, 69 CHI.-KENT L. REV. 1121, 1142-49 (1994) (objecting to policies which utilize race as a basis for making placement decisions when race is not viewed as relevant in other contexts).

The critics of such policies have included some scholars of color. See, e.g., Chen, supra note 51, at 153-54 (describing placement decisions which turn upon the race of those involved as antithetical to the ideal of a Creole republic); Forde-Mazrui, supra note 89 (suggesting that transracial adoption may be in the best interests of Black and particularly biracial children).

On the other hand, current race-matching policies also have some very vocal supporters. Chief among these is Professor Twila Perry. See Perry, Discourse and Subordination, supra note 28 (identifying and discussing two distinct perspectives in the adoption debate, the colorblind individualist perspective and the color and community consciousness perspective); Perry, supra note 76 (suggesting that best interests analysis as applied to transracial adoptions may be reasonable in theory but problematic in practice); accord Bowen, supra note 84, at 504-06 (noting that the conflict of values between the dominant (White) culture in America and Black subculture makes the question of transracial adoptions particularly troublesome); Ruth-Arlene W. Howe, Redefining the Transracial Adoption Controversy, 2 DUKE J. GENDER L. & POL'Y 131, 152-61 (1995) (arguing that race cannot be ignored and that the debate over transracial adoption is really a debate over White adult’s rights to adopt rather than Black children’s need to be adopted); see also Fenton, supra note 74, at 46-48 (criticizing the current child welfare system as poorly equipped to meet the special needs of Black children and the Black community).

Other scholars suggest a compromise which would allow some race-matching, but in the context of the best interests of the children involved. See Jane Patterson Auld, Racial Matching vs. Transracial Adoption: Proposing a Compromise in the Best Interests of Minority Children, 27 FAM. L.Q. 447 (1993) (proposing limiting racial matching to initial placement of children into foster homes); Eileen M. Blackwood, Note, Race as a Factor in Custody and Adoption Disputes: Palmore v. Sidoti, 71 CORNELL L. REV. 209, 222-24 (1985) (suggesting that race can be an appropriate consideration in making placement decisions); see also Rebecca L. Köch, Note, Transracial
ers to transracial adoption.\textsuperscript{96} Some scholars have, however, taken the position that there are real and important reasons for race-matching in adoption.\textsuperscript{97} Although a complete review of all that has been written on the transracial adoption debate is not necessary to an understanding of the positions taken in this Article, it is important to provide a basis for placing the discussion in context.

Professor Twila Perry has suggested that there are two distinct ways in which to approach the question of whether transracial adoption is in the best interests of all of those concerned; she suggests that there is a "colorblind individualist perspective" and an alternative view which encompasses "color and community consciousness."\textsuperscript{98} Professor Perry associates the former view primarily with White scholars and

\textit{Adoption in Light of the Foster Care Crisis: A Horse of a Different Color}, 10 N.Y.L. Sch. J. Hum. Rts. 147 (1992) (urging a compromise approach in light of the increasing demands being placed on the foster care system).


96. The writings of Professor Bartholet exemplify this position. See Bartholet, supra note 95, at 103-04; Bartholet, supra note 90, at 1183-1200. Professor Bartholet is not the only scholar taking this position, however. In fact, some Black scholars have rejected the notion that policies opposing transracial adoption best serve the interests of those involved. See William E. Cross, Jr., \\textit{Shades of Black—Diversity in African American Identity} 108-13 (1991) ("Being middle class, bicultural, and mildly estranged are consequences one should gladly exchange for the pathology, poverty, and lack of hope similar children might experience if left in nonpermanent-care arrangements."); Forde-Mazrui, supra note 89, at 967 (advocating race-neutral placement policies).

97. Among those taking this position, Professor Twila Perry's work is notable. See Perry, \textit{Discourse and Subordination}, supra note 28; see also Bowen, supra note 84. Bowen is concerned about and seems generally opposed to transracial adoption. \textit{Id.} at 506-08. He argues that its benefits have not been proven. \textit{Id.} at 507. However, he agrees that any placement for hard-to-adopt Black children is preferable to languishing in the foster care system. \textit{Id.} at 511.

It is, however, those who write from the psychosocial and psychological perspective rather than law professors and legal scholars who seem most concerned with transracial adoption. See, e.g., Amuzie Chimezie, \textit{Transracial Adoption of Black Children}, 20 Soc. Work 296, 297 (1975) (stating that satisfaction of psychological needs is often more important than satisfaction of physical needs).

the latter with minority scholars, although she is careful not to suggest that all White scholars or minority scholars fit within this framework.\(^9\) Indeed, some scholars of color have been quite critical of existing race-matching practices.\(^10\)

In general terms, those who accept the "colorblind individualist perspective" oppose the use of racial classifications in the adoption context. This position is colorblind because its adherents see barriers to transracial adoption as a step back towards a more segregated society.\(^11\) It is individualistic because it focuses on the best interests of the individual children in question who are waiting for adoptive homes.\(^12\)

In equally broad terms, those who write from the "color and community consciousness" perspective consider what it means to be Black in our society and conclude that the necessity of developing healthy values, attitudes, and self-awareness in Black children justifies at least some attempt at race-matching.\(^13\) In addition, this position considers the interests of the Black community rather than focusing solely on the interests of the child who is waiting to be adopted.\(^14\)

The best way to analyze these conflicting approaches may be to examine the arguments which have in fact been made in the transracial adoption debate. Because the NABSW's position was so influential in shaping the current policies regarding transracial adoption, the next section of this Article considers the arguments raised by the NABSW in opposition to the practice.

\textbf{D. The NABSW's Arguments Against Transracial Adoption}

\textit{1. The Necessity for Coping Skills}

The first rationale advanced by the NABSW in opposition to transracial adoptions is that only Black families can provide Black children with the skills and coping mechanisms necessary for survival in a racist society.\(^15\) This argument has also been made by scholars who have adopted what Professor Perry has characterized as the "color and

\(^{9}\) Id. at 43-44.

\(^{10}\) See, e.g., Forde-Mazrui, supra note 89, at 939-42.

\(^{11}\) See, e.g., Forde-Mazrui, supra note 89, at 939-42.

\(^{12}\) Id. at 45 n.44-45.

\(^{13}\) Id. at 46.

\(^{14}\) Id. at 43.

\(^{15}\) Id. at 47.
community consciousness" perspective. There are, however, a number of responses to this argument.

First, and most depressingly, there is little evidence that Black families are generally successful in transmitting the skills necessary for success in our "racist" society. If it were true that Black families successfully teach children to thrive in our society, presumably there would be evidence that Black children raised in Black families would be less susceptible to the problems which plague far too many members of the Black community. Surely there would be some evidence that being raised in a Black home would result in decreased incidence of drug abuse, criminal activity, or eventual dependence on welfare. If this cannot be shown, at least there should be evidence that Black adoptees raised in Black homes have better levels of self-esteem, better peer relations, or better academic performance. In reality, such evidence is sadly lacking. There is in fact no evidence that Black adults are more successful at teaching Black children to cope with our "racist" society, at least if "coping" means scaling the barriers to success that societal racism throws in the way of Blacks.

This is not meant to be a criticism of Black families. It is hard to see how parents of any race could adequately teach Black children how to cope adequately with the discrimination which exists in our society, at least if "coping" means turning the experience into something remotely positive. It seems an impossible task to cope with even those most overt forms of racist behavior which still occur. For example, how does anyone "cope" with a burning cross planted by strangers on your front yard? How is someone expected to "cope" with finding the words "Die, Nigger!" scrawled anonymously across the windshield of their car?

106. Id. at 57-65; see Bowen, supra note 84, at 510-11 (describing the potential survival devices which might be taught to Black children).

107. The problems faced by Blacks in this country are legion and being raised in a Black home does not seem to change the grim statistics. Black children are approximately twice as likely to be born prematurely, live in substandard housing, and die within the first year of life. See Children's Defense Fund, Key Facts (1986). In 1985, the mortality rate of Black infants was a shocking 18.2 deaths per 1,000 live births; the rate for Whites was 9.3. U.S. Bureau of the Census, Statistical Abstract of the United States: 1988, at 75, 76 (1987). Blacks are plagued with illiteracy. Statistics suggest that approximately forty percent of minority youths are functionally illiterate. See N. Francis, Equity and Excellence in Education, in Association of Black Foundation Executives Conference Proceedings 73 (1985). Blacks are also less likely to be employed. U.S. Bureau of the Census, Statistical Abstract of the United States: 1988, at 140 (1987); see also infra note 393 and accompanying text (comparing various statistics of Blacks and Whites).

Rules and policies which have discouraged the transracial placement of children have not been successful in helping Black children overcome the odds against them.
The victim of such racial harassment can of course file formal complaints with the authorities, but this is unlikely to result in apprehension of the responsible parties. In the end, the only way of coping with such antisocial behavior is to get on with life, because there is no effective way to respond to cowards who are unwilling to do so much as reveal their identity. This coping mechanism, to the extent that it is a coping mechanism, is no more or less likely to be successful when taught by White families.

The more invidious forms of discrimination, like being ignored by salespersons in stores, being conspicuously followed by store security personnel, being marked down for misbehavior in school while similar behavior by White children is ignored, being consistently passed over for promotion, or being stopped and questioned more often by the police, can be just as emotionally damaging and is just as impossible to cope with in the sense of turning the event into a positive or learning experience.108

It is possible that the NABSW means something entirely different by suggesting that only Blacks can teach Black children "coping" skills. For example, coping could mean learning strategies for confronting the sources of racist behavior and attempting to change the policies which encourage or permit such discriminatory actions. If this is what is meant by "coping," there is far too much evidence that, despite all the efforts of Black families to teach their children to cope with racism, efforts at eradicating racism have been distressingly unsuccessful.109 Racist assumptions and patterns of behavior still persist in our society. Moreover, in this limited context, to the extent that there is a difference between the way Whites and Blacks react, White families may actually be better equipped to help Black children learn coping strategies designed to minimize future racism. Certainly in the corporate setting, the ultimate decision-making authority is likely to rest with White males and someone who is well versed in the way in which White males make decisions might be more likely to be able to influence those policies. Someone raised without such insights may be less likely to be able to effect a more positive outcome to racist patterns of behavior than merely accepting or ignoring it.

108. Of course, the impossibility of turning this type of experience into something positive would confront White families just as clearly as it confronts Black families.

Yet another potential coping mechanism is to overcome the discrimination through personal success. However, if this is what is meant by coping, there is no evidence that Black parents are better able to teach these skills to Black children than White parents. In fact, it has been suggested and supported by research that Black children who identify with mainstream ideas and values generally do better academically.\footnote{Signithia Fordham, \textit{Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory}, 58 Harv. Educ. Rev. 54, 79-80 (1988) (discussing empirical study showing that the majority of high-achieving Black high school students have adopted dominant cultural values); Kathi Overmier, \textit{Biracial Adolescents: Areas of Conflict in Identity Formation}, 14 \textit{J. Applied Soc. Sci.} 157, 165 (1990) (finding that biracial adolescents who identify with White middle-class values do better in school); see also Bartholet, \textit{supra} note 90, at 1222 n.159 (noting research that suggests that transracial adoption has a positive influence on I.Q. development of Black children raised in White families).} This is especially significant because adults who have done well academically tend to enjoy more success later in life. This conclusion is supported by evidence which suggests that Blacks who identify or comport with mainstream (or "White") ideas and values generally have better professional and financial success.\footnote{Cf. Fordham, \textit{supra} note 110, at 80 (analogizing high-achieving Black students with Blacks who do better in the workforce and stating that both refuse to identify "too strongly with the Black community").} Although Black parents can instill these values and attitudes in their children, there is not even an intuitive argument which suggests that White parents would be less able to do so.\footnote{The strength of this response to the argument that White parents cannot teach Black children adequate coping skills depends to some extent on who has the burden of proof concerning whether White parents would necessarily fail Black children. If we start with the presumption that White parents will not know enough or be sufficiently motivated to teach successful coping strategies to Black children, then evidence that Black families may also be unsuccessful is less than persuasive. If, however, we start from the assumption that race should not matter in the adoption context, then evidence that neither Blacks nor Whites are particularly successful in teaching coping strategies is significant.}

Logically, a regime in which race plays a significant and often determinative role in the outcome of adoptions ought to be subject to strict scrutiny.\footnote{Cf. Bowen, \textit{supra} note 84, at 507 (complaining that the success of transracial adoption has not been proven); Perry, \textit{Discourse and Subordination}, \textit{supra} note 28, at 57-65 (suggesting that the experience of Blacks is such that substantial evidence would be needed to overcome the belief that Whites would generally be unable to successfully raise Black children in our society).} This is the outcome that would appear to be mandated by the Supreme Court's decision in \textit{Palmore v. Sidoti}.\footnote{466 U.S. 429 (1984).} This approach would place the burden of establishing that there is a significant harm associated with allowing White parents to adopt children identified as Black on those opposing such placement. Presumably, this would require empirical evidence of negative outcomes from transracial adop-
tions in order to justify adopting or retaining rules and policies which act as barriers to transracial placements of Black children.

The bulk of empirical evidence suggests exactly the opposite—the experiences of Black children raised in White homes are as positive as those of Black children raised in Black homes. Admittedly, it is difficult to determine how to measure positive outcomes in adoptions. Nevertheless, studies which address such diverse benchmarks as social adjustment, self-esteem, racial self-identification, and comfort levels with other Blacks and Whites, all suggest that transracial adoptees do not suffer from being raised by parents of a different race. Studies have reported good social adjustment for transracial adoptees, self-esteem that is as high as that of children adopted into same-race families, appropriate self-identification, and high comfort levels with other Blacks and Whites. None of these studies supports the idea that transracial adoptees will be unable to cope with life in America.

It is true that a few studies have identified some areas of concern. For example, one study found that young, transracially adopted Black males were slightly more likely to experience serious school problems


118. In fact, one study found not only that Black transracial adoptees related as well to Blacks as inracial adoptees, but also that they related better to Whites than the inracial adoptees. Shireman, supra note 117, at 71-74.
than Black males adopted into Black homes. One study found a slightly higher rate of disruptions (i.e., where the adoption does not work out) for transracial placements, although at least two other studies found no change in disruption rates between transracial and same race adoptions. In addition, some studies show that relatives and neighbors are less likely, at least initially, to be supportive of transracial adoptions. Some anecdotal evidence also suggests that transracial adoption can leave Black children feeling confused or isolated. None of this evidence suggests, however, that as a general rule transracial adoption leads to negative outcomes for the children involved.

Despite the lack of evidence that supports the conclusion that White parents cannot successfully raise Black children, transracial placements are still difficult. Although tens of thousands of Black children wait to be adopted and an insufficient number of Black families wait to adopt them, the popular press is full of stories of Black children who have been removed from loving White foster parents the moment those foster parents indicate a desire to adopt the child. To deprive a child of a loving home on the basis of nothing

119. Id. at 63.
124. See infra notes 148-50 and accompanying text (reciting the grim statistics relating to the adoption of Black children).
125. See infra note 151 and accompanying text (stating that Black children are less likely to find permanent placement outside the foster care system).
126. See, e.g., Ilene Barth, Another Child Torn from Those Who Love Her, Newsday, Mar. 12, 1989, at 9 (describing removal of foster child from White foster parents); Mona Charen, For Children Alone, The Best Color Is the Color of Love, Rocky Mtn. News, Feb. 24, 1994, at 41A (stating that “in case after heart-wrenching case, white parents who attempt to adopt black children are thwarted by a social-work system that places racial purity above other considerations in deciding the fates of children”); Michael Precker, The Battle for Christopher, Dallas Morning News, June 6, 1993, at 1F (describing in detail the removal of a four-year old Black boy from a White woman he considered to be his mother); Barbara Bisantz Raymond & Judy Turner, The Color of Love, Redbook, Aug. 1992, at 140 (describing obstacles imposed when White family tried to adopt Black foster child); Same-Race Adoption Law Ignores Deep Emotions, Chi. Trib., Jan. 4, 1993, at 11N (reporting that a Black three-year-old was taken from White foster parents whom she had called Mommy and Daddy for most of her life); Bill Sloat, Court Skeptical on Custody Bid, Plain Dealer, May 4, 1994, at 2B (federal appeals court expressed misgivings about asserting jurisdiction over appeal of White foster parents from lower court’s decision re-
more than the race of the prospective parents seems a poor choice, especially from the child's point of view.

As evidenced by a tremendous body of research, the harms caused by delays in the adoption process are dramatic. One harm documented by empirical studies is that the longer adoption is delayed, the greater the risk of adoption disruption, where the adopted child is unable to assimilate into the adoptive family and must be returned to the foster care system. Another concern is that the longer adoption is delayed, the greater the risk of maladjustment for the child. One recent study concluded that "there is little doubt that, if the alternative is between a transracial adoption and languishing in a sea of indecision about placement, the former is vastly superior."

127. There is a substantial body of support in the mental-health fields for the idea that continuity of relationships is absolutely vital to the proper psychological development of children and that any unnecessary delay in achieving permanent placement is extremely detrimental to the children involved. See, e.g., Bartholet, supra note 90, at 1223-25 (discussing the body of research demonstrating serious harm to children caused by delay in placement and concluding that current same-race placement policies are detrimental); Perry, supra note 76, at 72-73 (citing studies on psychological bonding and discussing the importance of children being able to bond with their families); Patricia W. Ballard, Note, Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place, 17 J. Fam. L. 333, 355 (1978-79) (noting overwhelming recognition of harm to child caused by delays in permanent placement); see also Marlon N. Yarbrough, Comment, Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence, 15 S.U. L. Rev. 353, 358-59 (1988) (arguing that delaying or denying adoption placement to Black children on the basis of race is overt racism).

128. See Feigelman & Silverman, Chosen Children, supra note 115, at 92-93 (comparing the significance of the race-matching factor to the significance of delay in placement); Richard P. Barth et al., Predicting Adoption Disruption, 33 Soc. Work 227, 231 (1988) (documenting benefits of permanent adoption and finding age at placement and previous adoptive placement related to adoption disruption, but race difference between parent and child not related).

129. It is universally agreed that stability and continuity are important to a child's normal psychological development, especially during the early years. E.g., Anna Freud & Dorothy Burlingham, Infants Without Families: Report on the Hampstead Nurseries: The Writings of Anna Freud 182-83 (1973). Feigelman and Silverman report that these studies indicate that "the absence of a stable and enduring parental relationship is seen as devastating and traumatic to a child's development." Feigelman & Silverman, Chosen Children, supra note 115, at 92. One study even concludes that stability and permanence is more important than biological relationships. Joseph Goldstein et al., Beyond the Best Interests of the Child (1973). Feigelman and Silverman themselves conducted a study on the same issue and their conclusion was that "the deleterious consequence of delayed placement are far more serious than those of transracial adoption." Feigelman & Silverman, Chosen Children, supra note 115, at 100.

130. Thriving Kids; Exploding Myths About Adoption, Star Trib., July 1, 1994, at 16A (quoting a report from the Search Institute, a Minneapolis-based research group studying 715 adopt-
In view of this evidence which supports transracial placements, how can the NABSW and others who adopt the "color and community consciousness" perspective continue to oppose such adoptions? The must answer lie with the continuing distrust between the races. If there is no significant empirical evidence to support the hypothesis that Black children should not be adopted by White parents, all that is left is intuition. Clearly, the intuition of the NABSW and scholars who advocate continuing race-matching policies leads to the belief that White families, however well intentioned, are not in a position to appreciate what it means to be Black. This necessarily means that they will not be in a position to teach children about what it means to be Black. In addition, there is a general awareness that racism is subtle and may even be subconscious, and this translates into the additional fear that White adoptive parents may be unable to overcome ingrained, racist attitudes.

One might hope that studies refuting the notion that transracial adoptions result in negative outcomes in terms of poor-self image, adjustment problems and the like would be enough to dispose of such fears, and there is some evidence that a growing number of Blacks do support transracial adoption. Notwithstanding such support, barriers to transracial adoption remain in place, possibly because of other problems which the NABSW has identified with such placements.

2. Racial and Cultural Identity

The second objection to transracial adoption raised by the NABSW is that Black children will be deprived of their racial and cultural identity if they are reared in White homes. There are a number of re-

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131. See Perry, Discourse and Subordination, supra note 28, at 71 (citing Rita J. Simon, Black Attitudes Toward Transracial Adoption, 39 PHYLON 135 (1978), which found that less than one-third of those interviewed believed Whites were competent to raise Black children in our society).

132. Perry, Discourse and Subordination, supra note 28, at 63.

133. See, e.g., Bartholet, supra note 90, at 1236 ("Reported surveys of black community attitudes indicate substantial support for transracial adoption . . . ."); Rita J. Simon, Transracial Adoption in South Africa: Phase I, Vol.2, no.1 RECONSTRUCTION 102, 104 (1992). But see Perry, Discourse and Subordination, supra note 28, at 62 n.120 (noting that people are often color-conscious of transracially adopted children).

134. See infra notes 183-90 (noting that transracial adoption laws give undue weight to race classifications).

135. Perry, Discourse and Subordination, supra note 28, at 47.
sponses to this contention, but the first problem is to define what is meant by "racial" and "cultural" identity.

As these terms are used by the NABSW, there is no real difference between the concepts of racial and cultural identity. If "race" is treated as a biological construct, it is impossible to deny anyone their racial identity. A person's ancestors are who they are; an individual's genetic makeup is immutable. Moreover, if members of our society are going to identify someone as Black, it will happen, regardless of whether that person is raised in a White home, a Black home, or a multi-racial home. Thus, absent the cultural context, the idea that children can somehow be deprived of their racial identity is highly suspect.

The basis for the NABSW's position in this regard is more likely premised on the idea that raising a Black child in a White home will somehow threaten the development of that child's cultural identity as a Black person. In other words, the real objection is probably that, as a result of being raised in a White home, someone who is "really" Black may wind up acting "White."

There are two ideas implicit in this position. The first is that children raised in a White home will not be "Black" in some fundamental sense; the second is that this lack will be detrimental to the children involved. If these premises are accepted, it follows that the color of one's skin is the best determinant of whether one will be a good or even adequate parent for a Black child.

This type of attitude can be extremely damaging to those who do not fit comfortably within the preconceived notions of others as to

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136. Of course, to the extent that one is worried about the ability of adoptive parents to transmit information about specific ancestors, Black adoptive parents are in no better a position than White adoptive parents. In fact, even Black biological parents are not always in a particularly good position to impart to their children an appreciation of their ancestry beyond two or three generations. In part this is attributable to the horrors of slavery, where slave owners systematically sought to erase tribal and cultural identity in order to promote a more effective work force. Mary C. Waters, The Role of Lineage in Identity Formation Among Black Americans, 14 QUALITATIVE SOC. 57, 60 (1991). In addition, the system of slavery also contributed to mixing of "White" and "Black" blood, but typically in the context of rape or coercion of the mothers as slaves. Id. Not surprisingly, Black slave families were often reluctant to pass along specific information about White fathers. Id.

137. It is this brand of thinking which leads to the promulgation of such pejorative terms as "oreo," referring to someone who is Black in appearance but who has adopted White attitudes. See supra notes 56-58 and accompanying text.

138. This relates back to some of the ideas discussed in the preceding section of this Article. Presumably, failing to properly identify with being Black could lead to such negative outcomes as low self-esteem, poor social adjustment or problems with self-identity. See supra notes 115-18 and accompanying text (discussing studies suggesting that transracial adoption does not lead to such outcomes).
what it means to be Black. For example, my children, and a growing number of other children who will be identified as Black, have a multi-racial heritage. Many of these children, mine included, are in fact part White. To believe the message of those who say that White attitudes are wrong and harmful, and that White identity is incompatible with being Black, means that these children will have to deny part of who they are. Even worse, the innate distrust and prejudice implicit in the assumption that Whites cannot adequately care for and raise Black children is likely to be incorporated somewhere into the belief systems of children exposed to that view, even if they are raised in a White or multi-racial home.

My children have been hurt immeasurably, not by being raised in a White home, but by being told that they are being cheated by having White parents. It is hard to believe that anyone would seriously argue that there is only one acceptable way to raise a child, of whatever racial makeup, and that all other ways are harmful, but that is the essential result of rules which say that only Black parents who will teach Black culture and identity can successfully raise Black children. Assuming that there is a set of experiences, attitudes, beliefs, values, and preferences sufficiently concrete and cohesive to constitute a viable Black culture or cultures in this country, this does not mean that all Blacks must buy into those beliefs and value structures, or that one must be Black to appreciate or, more importantly, teach appreciation of such culture.

The objections to using “Black culture” as a basis for determining who can adopt Black children are threefold. First, Black parents will not always rear their children in accordance with the NABSW’s ideas of what constitutes appropriate Black culture. Second, there is no evidence that White parents cannot inculcate an appreciation of Black culture, however defined, in transracially adopted Black children. Finally, and most importantly, there is no evidence that only one type of culture, that identified by the NABSW as being Black, is good for Black children.

The first two objections seem obvious. There is plenty of evidence that not all individuals of a particular race, or any other group for that matter, will share the attitudes, ideas, values and beliefs of all other members of that group. Suggesting that all Blacks should identify fully with Black culture buys into and perpetuates racial stereotypes, a notion which inevitably works against those who are stereotyped. It is

139. It is well recognized that not all members of particular groups will share the same values and expressions of behavior. Tommy E. Whittier et al., Strength of Ethnic Affiliation: Examining Black Identification with Black Culture, 131 J. Soc. Psych. 461, 461 (1991).
unrealistic to implement policies which assume either that Black adults will always teach their children the same version of Black culture\textsuperscript{140} or that White parents cannot adequately expose their children to such attitudes, beliefs and experiences.\textsuperscript{141} It is axiomatic that things which are generally regarded as representing "Black culture" are neither appreciated by or participated in by all Blacks, nor exclusively appreciated by or participated in by Blacks. Rather, many things that are generally thought of as representing Black culture are generally a matter of taste which a significant number of Blacks may not enjoy and an even greater number of non-Blacks may appreciate.\textsuperscript{142}

These arguments are, however, less telling than the final point. Even if one were willing to assume that Black culture will be best taught by Black adults or that it cannot adequately be taught to a Black child by a White family, the benefits of denying a child an adoptive home merely to improve his or her chances of learning "Black culture" are not immediately obvious.

First, it is clear that if the only way for Black children to have a positive self-image was for them to identify with Black culture, then there would be a benefit to participating in that culture. However, the

\textsuperscript{140} It is in fact clear that not all Black families identify with or would transmit Black culture to their children. There are, for example, Blacks who choose to live in virtually all-White neighborhoods and who choose to send their children to schools where they may be the only Black children in any of their classes. See Mahoney, supra note 95, at 498.

\textsuperscript{141} One study showed that in 1972, 75% of parents with transracially adopted children made efforts to foster their child's ethnic identity through such things as books, music, toys and by providing opportunities to play with other non-White children. SIMON & ALTSTEIN (1977), supra note 76, at 102-03.

\textsuperscript{142} For example, an appreciation for jazz, particular sports, particular authors, and the art of story-telling have been identified by some as part of "Black culture." See Jerome M. Culp, Jr., \textit{The Michael Jackson Pill: Equality, Race, and Culture}, 92 Mich. L. Rev. 2613, 2617, 2619 (1994). In his article, Professor Culp presents a parable arising out of the discovery of a pill "that if taken by black people will remove all vestiges of being black." \textit{Id.} at 2615. The article is presented in the form of a fictional dialogue concerning the desirability of Blacks taking this "Michael Jackson Pill." \textit{Id.} One of the concerns raised is that removing the physical appearance of race might also result in a loss of culture. \textit{Id.} at 2617-19. Yet it seems obvious that there is nothing inherent in jazz, basketball, story-telling or Toni Morrison's writings that makes it essential for all Blacks to appreciate them or that prevents non-Blacks from enjoying them. In fact, this is one of the points presented in Professor Culp's article. \textit{Id.} at 2617. This point of view is expressed by "Professor Not-Professor-Bell," a character who is an "amalgam of many views from within the black academic community." \textit{Id.} at 2615 n.9. This point of view is also expressed by "Geneva Crenshaw," another fictitious character originally created by Professor Derrick Bell. \textit{Id.} at 2613 n.2. For reference to "Geneva Crenshaw," see DERRICK BELL, AND \textbf{WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE} 51-74 (1987). It is true that Blacks may be more prone than Whites to appreciate certain forms of artistic and creative expression. It does not seem accurate, however, to assume that these forms of cultural expression are uniquely Black in such a way that one can assume a Black child raised in a White home will be unable to gain an appreciation for them or to assume that a Black child will inevitably acquire an appreciation for them just because the child is raised in a Black home.
evidence suggests that a positive self-image is not dependent on identifying with Black culture. Alternatively, if the only way for Black children to assure success in today's society is to identify with Black culture, then that might provide a sufficient basis for concluding that Black culture is essential. However, evidence exists which suggests that not only is this not the case, but that greater levels of success may be achieved when the child does not identify overly strongly with what has been called Black culture. The reasons for this are not entirely clear, but it does appear that there are at least aspects of Black culture that appear to foster or encourage "failure," at least in terms of academic and financial success. Certainly, there are innumerable Black parents who not only do not encourage this belief in their children, but actively discourage it. Moreover, even if this was an attitude inculcated by Black parents, it does not seem to be an attitude designed to help their children deal successfully with life.

For these reasons, the argument that transracial adoptions should be disfavored in the law because of the inability of White families to teach Black culture seems to be an inadequate basis for denying Black children an adoptive home.

3. Barriers to In-Race Adoptions

The third and final objection to transracial adoption offered by the NABSW is that the only reason White families have been allowed to adopt Black children is that discriminatory barriers exist which have prevented Black families from adopting Black children. Alice G. Thompson, co-chair of the Family Preservation Task Force of the NABSW, has said that "the main reason I'm against transracial

143. Studies have shown that transracially adopted Black children feel positive about their racial identity even when they do not particularly identify with Black culture. Ruth G. McRoy et al., supra note 116, at 525 (stating that transracial adoptees have self-esteem levels as high as inracial adoptees, even though they are less likely to identify strongly as Black); see also supra notes 115-18 and accompanying text (noting numerous studies which gauge the social adjustment, self-esteem, and self-identification of transracial adoptees).

144. See Sophronia Scott Gregory, The Hidden Hurdle, TIME, Mar. 16, 1992, at 44 (stating that "[s]tudents [who try to succeed] . . . find themselves reviled as 'uppity,' as trying to 'act white,' because many teenagers have come to equate black identity with alienation and indifference"); Lena Williams, In a 90's Quest for Black Identity: Intense Doubts and Disagreement, N.Y. TIMES, Nov. 30, 1991, at A1 (noting that "Black youths, for example, are sometimes accused by their peers of 'acting white' simply because they study hard, go to the library or use standard English"). This has been characterized as an "anti-achievement ethic," and to the extent it is integrated into Black culture or becomes an accepted aspect of Black identity, it means that "[s]ocial success depends partly on failure." Gregory, The Hidden Hurdle, supra, at 45.

adoption . . . is that it's unnecessary. There are plenty of black families who would love to adopt a child, but there are barriers built into the system." 146 She has suggested that "[s]tudies have shown that when agencies are sensitive to African American families they have no trouble finding enough black families to adopt black children." 147

Putting aside for a moment the notion that there are plenty of hypothetical Black families who might be available if things were different, the actual statistics on the adoption of Black children are grim. 148 There are hundreds of thousands of children in foster care in this country, many available for and awaiting adoption, and far too many of those children are Black. 149 Although only twelve to fourteen percent of the total population in this country is Black, statistics indicate that nearly forty percent of children needing adoptive homes are Black. 150 On average, Black children wait far longer than White children to be adopted, and are substantially less likely to find permanent placement outside the foster care system. 151

146. Id.
147. Id.
148. "Beneath the controversy lies the inescapable arithmetic of adoption supply and demand. In 1991, the most recent years for which numbers are available, 31 percent of U.S. adoptive parents were black, while 67 percent of waiting children were, according to the National Adoption Center." M. A. J. McKenna, Transracial Adoption, ATLANTA CONST., Mar. 21, 1995, at E1; see also Nina Shokraii, Adoption and Racial Preferences, WASH. TIMES, Feb. 22, 1995, at A19 ("The tragedy is that while there is a shortage of families of color waiting to adopt children, there is an excess of prospective white parents eager to take on the responsibility.").

149. "Advocates contend that a preference for same-race placement forces black and biracial children to wait in foster care for years. While blacks are 13 percent of the U.S. population, black children account for more than half of the 500,000 children in foster care." McKenna, supra note 148, at E1.

150. See Cass R. Sunstein, The Anticaste Principle, 92 Mich. L. Rev. 2410, 2444 (1994) (stating that 12% of the general population is Black); Eubanks, supra note 95, at 1248 (stating that approximately 14% of children under the age of nineteen are Black); McKenna, supra note 148, at E1 (setting the percentage of Blacks in the general population at 13%).


151. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 7 (1990) (recognizing the median length of stay for Black children in foster care is one-third longer than for the national median); see Bartholet, supra note 90, at 1193-94 (describing policies that involve holding minority children in foster or institutional setting for substantial periods of time when no inrace adoption is possible); Fenton, supra note 74, at 44 (comparing statistics of White children and Black children involved in the foster care system and their respective chances of exiting the system).
The problem is not that Black families do not adopt Black children. The evidence reveals that, when socio-economic status is taken into account, Blacks adopt at a higher rate than White families.152 The problem is that there are so many Black children waiting for adoption. Moreover, the number of children in foster care has been increasing and is expected to increase even further in the future. In addition, because a disproportionate number of Black children are victims of abuse, neglect, homelessness, substance abuse, and the AIDS epidemic,153 the number of such children in the foster care system is likely to increase at a fast pace. This means that it is extremely unlikely that it will be possible to reduce the delays in permanent placement experienced by Black children unless barriers to transracial adoption are removed. This is likely to be true even if in-race placements are also encouraged, simply because the mismatch in numbers is so great. Forcing Black children to wait for a “same-race” home would only be justifiable if there was no real harm in delaying permanent placement to adoptable but waiting children; this is not the case.154

It has been suggested that same-race families could be found for Black children if traditional middle-class values were not emphasized in the adoption process, and if Black families were actively sought out by adoption agencies. There is nothing objectionable about actively recruiting prospective adoptive families, and a very good case can be made for dispensing with certain criteria which traditionally were applied to couples seeking to adopt, such as medical infertility and a commitment on the part of the wife and mother to be a full-time homemaker rather than working outside the home.155 In fact, many of the traditional requirements for adoptive parents have been aban-

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152. See Macaulay & Macaulay, supra note 79, at 279. The North American Council on Adoptable Children has concluded that Black families actually adopt four times more than White families. Fenton, supra note 74, at 45 n.42.

153. See Fenton, supra note 74, at 39.

154. See supra notes 127-29 and accompanying text (noting numerous researchers who have concluded that a delay in adoption is extremely traumatic and detrimental to the child’s psychological well-being).

155. This and the following information about adoption standards comes from Macaulay & Macaulay, supra note 79, at 275. According to one study, the most common traditional standards imposed by adoption agencies included the following:

(1) The couple had to have a good income and middle-class life style, including a well-kept home, perhaps large enough so that the child could have a room of his or her own.

(2) The wife had to be a full-time mother, and she could not desire to work outside the home.

(3) The couple had to offer medical evidence that they were infertile.

(4) The couple’s health had to be excellent, including their mental health.

Id.
doned or softened so that they are no longer applied inflexibly. In general, current standards refer to the ability of the prospective adoptive parents to meet the needs of the child or children being adopted.

It is true that some of the “middle-class” values which have traditionally appeared in adoption standards are still used today. For example, all things equal, it is desirable to have a home where there is a good income and an adequate home. It is preferable to have a stable home environment which includes a father figure, and it is desirable for both parents to enjoy good health. However, there is a sound basis for retaining such considerations, even if they do represent middle-class White values.

The reality is that adoption agencies today are permitted to consider a variety of factors in determining whether a particular placement is in the best interest of the child concerned. The argument that adoption policies fail to adequately search for Black families is therefore substantially weaker than might have been true in the past.

One other objection has been made to the practice of transracial adoption as part of the solution to the crisis of unadopted Black children. Some commentators have contended that there are insufficient White families willing to adopt Black children, particularly those most in need of adoptive homes: those with disabilities, older children and those in sibling groups. This is the weakest of all arguments against transracial adoption. In essence, the argument says that because we cannot guarantee that transracial adoption will help all Black children, we should not permit it to help any Black children.

Even if only a fraction of Black children waiting to be adopted are transracially placed, those children will have been helped. Denying them the best opportunity for a stable home simply because they were not White is a form of discrimination. The real issue is whether the child will be better off in a family that is not White. The answer to that question can only be determined by evaluating the specific needs of the child and the abilities of the adoptive family.

Additional factors included the age of applicants and marital status. See Fenton, supra note 74, at 46.

156. For example, the Illinois Department of Children and Family Services lists the following factors which are to be considered in evaluating prospective placements: 1) the wishes of the child who demonstrates the maturity and cognitive ability to participate in the decision; 2) the physical, mental, and emotional needs of the child; 3) the child's need for stability and continuity of relationship with parent figures; 4) the interaction between the child and the prospective adoptive parent; 5) the prospective adoptive parent's ability to meet the physical, mental, and emotional needs of the child; and 6) the ability of the prospective adoptive family to provide an environment which would preserve the child's racial, ethnic, and cultural heritage. Zreczny, supra note 95, at 1123 n.14. Additional factors might include: the “moral fitness of the two parties”; the age, sex, and health of the child; and the potential family environment. See D. Michael Reilly, Constitutional Law: Race as a Factor in Interracial Adoptions, 32 CATH. U. L. REV. 1022, 1022 n.1 (1983).
born Black is racist, and, as a friend and colleague so eloquently stated, unloving. 157

E. Other Objections to Transracial Adoption

Although the objections raised by the NABSW have undoubtedly been the most influential in shaping policies which discourage the practice of transracial adoption, there are other objections to the practice. For example, some commentators have suggested that policies which favor same-race placements are a positive step towards correcting the familial imbalances which are a legacy of slavery.158

There is abundant and heart-wrenching evidence of the break up of families under slavery.159 For those enslaved, the nuclear family was not a protected unit. Children did not belong to their parents, but rather to their “masters,” and could be separated from their parents at any time.160 It has been suggested that some Blacks perceive transracial adoption as a continuation of White control over Black children and the further disempowerment of Blacks.161 “For many Blacks, then, transracial adoption is inextricably linked to the fragility of the Black family, which fragility is the result of racism and oppression.”162

If one views the current problems evidenced by the break-up of Black families as a legacy of this shameful past, it can be argued that it is necessary to take even extraordinary steps to reintroduce stable family relationships into Black life. However, it seems unfair to ask Black children waiting for adoptive homes to assume the burden of remedying this legacy of slavery. In fact, the Supreme Court has said that it is impermissible to adopt programs which place “the brunt of a

157. See Chen, supra note 51, at 174 (stating that it is unloving to condition parental affection on anything, least of all race).

158. See generally Perry, Discourse and Subordination, supra note 28, at 40 (stating that transracial adoption may actually subordinate Black children and Black people rather than making them equal).

159. See, e.g., LINDA BRENT, INCIDENTS IN THE LIFE OF A SLAVE GIRL 6 (1973) (reciting how all five of her grandmother's children were sold away from her after long years of faithful service); BULLWHIP DAYS—THE SLAVES REMEMBER 149, 290, 292, 293 (James Mellon ed. 1988) (reciting anecdotes about the break up of their families by several slaves); DEBORAH GRAY WHITE, AIN'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH 34, 145, 149 (1985) (blaming part of this on the attitude of slave traders who tended not to view fathers as part of the family unit); see also HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM 262-63, 1750-1925 (1976) (describing separation of a four-year-old from her family).

160. See Anita L. Allen, Surrogacy, Slavery and the Ownership of Life, 13 HARV. J.L. & PUB. POL'Y 139, 140 n.9 (1990) (stating that slave mothers had no legal claim of right to their children and the masters could buy and sell the children to third parties without the consent of the biological mothers).

161. Perry, Discourse and Subordination, supra note 28, at 55.

162. Id.
benign [race-based] program” on individuals, particularly “those least well represented in the political process.”163

Moreover, there have been substantial efforts at keeping families, Black and White, intact and in reuniting children with biological parents wherever possible. The express goal of child welfare establishments has been to keep families together. As Professor Bartholet recently noted, efforts at family reunification have been so significant that “many are now questioning whether we have gone too far in this direction, preserving families at the cost of subjecting children to unconscionable abuse and neglect.”164

It is certainly true that there are sound reasons for actively searching for Black families willing to serve as adoptive families. However, this does not mean that it is just or necessary to demand that children wait in the limbo of foster care for such families to be found. One can applaud the efforts at recruiting Black adoptive families, which have resulted in Black families adopting at relatively high rates,165 without concluding that the diverse and diffuse needs of the Black community in general outweigh the needs of individual Black children to find adoptive homes as soon as possible.166

Another possible basis for opposing transracial adoption might be derived from a consideration of the justifications which have been advanced to support immersion schools (schools which adopt a curriculum specifically designed for Black children). In essence, this argument is that if Black children would do better when educated with other Black children, might they not also do better if they are raised in a Black family.

164. Bartholet, Race Separatism, supra note 95, at 101.
165. When socio-economic factors are controlled for, Blacks adopt at a higher rate than do Whites. See Fenton, supra note 74, at 45 n.42.
166. One commentator described the relative interests of the Black community and Black children as follows:

Furthermore, even if the law allowed courts and agencies to balance cultural interests against the child’s interests in placement proceedings, the child’s interests would substantially outweigh cultural interests. A child whose placement is delayed suffers immediate, concrete, and probably irreparable harm. Black culture, by contrast, if harmed at all, suffers the minute and diffuse harm that results when a de minimis number of Black children are placed in white homes. Therefore, advancing cultural interests in the child-placement process compromises the interests of individual Black children and is not necessary for Black cultural preservation.

Forde-Mazrui, supra note 89, at 961-62.

Kim Forde-Mazrui’s voice may be particularly important in this debate as he is himself a member of the Black community whose interests he is evaluating.
One of the leading proponents of immersion schools is Professor Kevin Brown, who has written several articles on the subject.\textsuperscript{167} Professor Brown aptly concludes that "[t]he benefit of any education is measured by how well it prepares students to deal with the situations that they will encounter throughout their lives."\textsuperscript{168} He also concludes that American society has adopted a stereotypic view of African-Americans which is particularly negative. In this view, Blacks are portrayed and seen as "poor, lazy, lustful, ignorant, and prone to criminal behavior."\textsuperscript{169} Because individuals identified as Black cannot choose to avoid these stereotypes, they must learn to deal with them. Professor Brown supports immersion schools as an "opportunity to develop teaching strategies, techniques, and materials that take into account the influence of the dominant American and the African-American cultures on the social environment and understandings of African-Americans."\textsuperscript{170} In this environment, it is at least possible that educators will be able to formulate and teach strategies and techniques to Black students to help them overcome racial obstacles. It may also be possible that cultural conflicts between the dominant American culture and the Black culture can be minimized in such an environment.

Arguably, similar concerns might be applicable to the transracial adoption debate. In fact, much of this is incorporated into the position of the NABSW, which postulates that only Black families are properly equipped to teach Black children how to deal with racism.\textsuperscript{171} However, the argument in the context of immersion schools is that such single-race schools offer the possibility of developing and teaching solutions to racism. Presumably because immersion schools allow teachers to concentrate on the special problems of their students and those aspects of history and society most likely to help overcome or rebut the negative stereotypes often applied to Blacks as a group, the possibility of developing successful strategies is heightened, and the motives for minimizing the clash between dominant and minority cultures are more pronounced. Whatever the validity of these arguments in the context of immersion schools, they do not seem to translate well into the adoption setting.

\textsuperscript{168} Brown, Immersion Schools, supra note 46, at 819.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} See supra part II.D.1.
In any family, parents are (or at least ought to be) motivated to find strategies which will help their children develop into happy and productive members of society. Undoubtedly, where Black children are involved, this would include the need to develop and teach coping strategies for dealing with our admittedly racist society. However, there is little reason to believe that Black families will be more motivated or have more resources available to devote to the search for strategies which will be helpful to the children in the home. In fact, as previously discussed, there is evidence that White families are in fact as successful as Black families in teaching Black children to succeed in our society.172

Similarly, any multi-racial family will be faced with the need to minimize the clash of cultures. It might be easier for a Black family to teach certain attitudes and values generally identified as Black culture,173 but it is just as likely that a White family would find it easier to teach “White” culture. There seems little reason to believe that it would be easier for either group to teach cultural attitudes and beliefs in a way which minimizes the differences between the two cultures. Since there is as much hope for this happening in a White family as in a Black family, the need to minimize the clash of cultures does not seem to be an argument which justifies the adoption or retention of policies which prevent White families from adopting Black children in need of homes.

Finally, opposition to transracial adoptions might also be explained by considering transracial adoption from the perspective of those who are deeply suspicious of the motives of White adoptive parents. Professor Twila Perry, in explaining her opposition to transracial adoption,174 has examined a number of explanations for why Blacks might be suspicious of the motives of White adoptive parents.

For example, Professor Perry is greatly concerned by the fact that many Whites seeking to adopt transracially turn to international adoptions rather than adopting Black children waiting to be adopted in this

172. See supra notes 110-11 and accompanying text (stating that White families are as successful as Black families in teaching Black children to succeed in society).

173. But see notes 140-42 supra and accompanying text (noting that not all Black families choose to transmit Black culture, and certain forms of culture are not uniquely Black or White).

174. Professor Perry’s opposition to transracial adoption is not, however, absolute. She recognizes the harm where children are removed from those they have come to regard as primary care-givers and psychological parents, and she would not oppose transracial adoption if it means disrupting existing family-type relationships. Perry, Discourse and Subordination, supra note 28, at 100-05. Perry also discusses the merits of NABSW’s position that only Black families can provide Black children with essential coping skills. Id. at 96-124.
She sees this as evidence supporting the Black community's opposition to transracial adoption on a theoretical level—if Blacks cannot trust Whites to value Black children except as a last choice, they obviously cannot trust Whites to raise those children in a loving and supportive environment.176

Assuming that Blacks do in fact oppose transracial adoption in significant numbers,177 there are two questions which still have to be answered before this can be taken as support for policies which disfavor transracial placements. First, is the perception of Blacks accurate? Do Whites in fact take Black children only as a last resort? And second, even if most Whites are not at all willing to adopt Black children, does that mean that our society should endorse rules which institutionalize this negative preference?

As to the first question, there are a number of reasons why Whites seek to adopt internationally. First, it is extraordinarily difficult to adopt newborns, of whatever race, in this country, simply because there are more people waiting to adopt infants than there are infants needing to be adopted. Moreover, even where Black infants are available, race-matching policies virtually guarantee that White families will not be able to adopt, at least not immediately. Thus, the barriers to transracial adoption in this country may easily explain why Whites adopt internationally.

A second reason may be that the plight of international adoptees is seen as particularly poignant. The response of White Americans to stories about the tragedy of Korean war orphans, abandoned children in South America or babies lying essentially unattended in dark wards in Romania can easily be viewed as a particular reaching out to these children in need rather than a rejection of other children of whatever race. In fact, there were a number of efforts to pursue adoption of Black war orphans in Somalia and Rwanda on similar humanitarian grounds.178

175. Id. at 60-61.
176. Id.
177. This itself is a position which is the subject of some debate. Professor Bartholet suggests that there is substantial evidence that Blacks, in growing numbers, support transracial adoption. Bartholet, Race Separatism, supra note 95, at 104. Professor Perry is profoundly critical of studies purporting to demonstrate the validity of this position. Perry, Discourse and Subordination, supra note 28, at 62-63 n.120.
178. See Adoptions Hard in Somalia: Orphans Caught in Legal Chaos, GREENSBORO NEWS & REC., Mar. 7, 1993, at A11 (reporting that U.S. officials have received adoption requests from soldiers and civilians); Steve Fainaru, Thousands of Rwanda Kids are Orphans in Zaire, SUNDAY PATRIOT-NEWS, HARRISBURG, Aug. 7, 1994, at A10 (describing how the Red Cross received calls from people wishing to adopt Rwandan orphans); Maggie Jackson, Rwanda Prohibits Adoptions;
Finally, there is evidence that, notwithstanding the barriers to transracial adoption, it does occur. Particularly in private agencies, where race is less of a concern, a substantial percentage of Black children are in fact adopted transracially.\textsuperscript{179} This does not fit at all with the stereotyped view of Whites as rejecting of Black children.

In the end, however, it is the answer to the second question which is more telling. Even if most Whites are unwilling to envision their family with Black children, does that necessarily mean that we ought to have laws which enforce and thereby legitimize this separation? As Professor Bartholet has recently suggested, the law should not countenance policies which enforce such racial separatism to the detriment of the individuals involved and society at large.\textsuperscript{180}

A second example from Professor Perry’s work also illustrates how the perspective of the Black community on transracial adoptions may differ from that of White America. Professor Perry sees the transracial adoption debate as involving an attack on the parenting skills of Black women.\textsuperscript{181} Because mothers in general continue to play a dominant role in child-rearing, and Black mothers fit into this pattern at least as clearly as White mothers, Professor Perry suggests that arguments opposing same-race placements for Black children can be viewed as a critique of Black mothers.\textsuperscript{182}

However, it is possible to read the literature cited by Professor Perry without concluding that it contains or constitutes an attack on Black mothers. The arguments in favor of transracial adoption are more of an attack on policies which act as a barrier to Black children

\textit{Decision Raises Debate of How to Best Help the Homeless Children}, FRESNO BEE, Aug. 29, 1994, at D11 (describing efforts of “hundreds of Americans” to adopt young Rwandans).

In the end, the failure of these efforts to result in widespread placement of Somalian and Rwandan orphans was due to laws in Somalia and Ethiopia making adoptions in general illegal or preventing international placements, and is not attributable to refusal of White Americans to adopt Black children. See \textit{Aid Workers Agonize over Somalian Orphans’ Plight}, SALT LAKE TRIB., Sept. 10, 1992, at A6 (reporting that adoption is illegal in Somalia); Jack Kelley, \textit{Orphans ‘Don’t Deserve to Die,’} USA TODAY, Aug. 2, 1994, at 1A (stating that a report from the State Department warns that there is no legal way to adopt Rwandan orphans); Donatella Lorch, \textit{Rwanda: Rape, Used as Weapon, Creates ‘Genocide Orphans,’} N.Y. TIMES, May 20, 1995, at H10 (reporting that foreign adoption is illegal in Rwanda).

\textsuperscript{179} See Bartholet, supra note 90, at 1184. Another source cites an interview with one agency which indicated that approximately 60% of the Black children it places are placed transracially. See Zreczny, supra note 95, at 1123 n.11 (referring to a 1993 telephone interview with the directors of The Cradle Society).

\textsuperscript{180} Bartholet, supra note 95, at 102-03.

\textsuperscript{181} Perry, \textit{Discourse and Subordination}, supra note 28, at 94.

\textsuperscript{182} Professor Perry suggests that the negative portrayals of Black parents in connection with the transracial adoption debate “raise the question of whether advocates of transracial adoption believe that white women are generally better at mothering than Black women.” Perry, \textit{Discourse and Subordination}, supra note 28, at 95.
having any mother, rather than suggesting that Black mothers would do an inadequate job. In general, the arguments in favor of transracial adoption are not based on the conclusion that Black mothers are worse than White mothers, but on the notion that there is no proof that they are so much better that it is worth delaying adoptive placements even though there are White mothers waiting for the chance to adopt.

If one starts from the proposition that adoption should be delayed or denied only when there is proof that the delay or denial is necessary for the well-being of the child, or even for the good of society as a whole, none of the arguments against transracial adoption provide enough support to justify the government's use of race as barrier to adoption of Black children.

F. What the Law Says and What It Should Say

Even though empirical support for policies opposing transracial adoption is sadly lacking, it is legally permissible to consider race in deciding placement options for Black children, so long as it is not the only factor. Not only is race expressly mentioned in some state statutes, it is given substantial unofficial weight elsewhere. As a result of compromises, a recent attempt by concerned legislators to increase the placement options for Black children actually further legitimized the use of race as a factor in placement decisions. The real problem is that rules which make it possible for race to be considered in the adoption process mean in fact that Black children will continue to suffer unnecessary delays in being adopted, and that some children who might have been adopted will not be. The poli-

183. See In re Adoption of a Minor, 228 F.2d 446, 448 (D.C. Cir. 1955).
185. The unwritten rules favoring race-matching have been detailed by Professor Bartholet. See Bartholet, supra note 90, at 1183-84; accord Zreczny, supra note 95, at 1123 (“[P]ublic agencies almost always declare the ability to preserve a child’s racial, ethnic, and cultural heritage as one issue to be considered . . . .”).
187. See Forde-Mazrui, supra note 89, at 939-42 (describing how courts give undue weight to race when they are allowed to consider it as a factor in placement decisions).
cies of adoption agencies, written and unwritten, and decisions from various courts indicate that race is in fact a significant factor in denying and delaying adoptive placements. Regardless of how mildly such policies are worded, it is clear that there are substantial barriers to transracial adoption imposed by governmental authorities on the basis of race.

While the best interests of the child is the articulated standard most often given lip service in the adoption arena, it is all too clear that the presumptions in favor of race-matching and against transracial placements are functioning in such a way that this standard is not being met. As Professor Randall Kennedy, a well-known scholar who has published extensively on the issue of race-relations, recently noted, "[a]ll across the United States, adults seeking to offer loving, secure homes to parentless children are obstructed by officials obsessed with racial matching . . . ."

There is one final question about the role of race in adoption and placement decisions which needs to be addressed. This Article takes the position that the government should not use race as a basis for making placement decisions, but what happens when it is the choice of the prospective parents or the preference of a child old enough to be able to express concern about concepts like race? While most of us would prefer to live in a society where race would not play a role in such decisions, even from the perspective of the individuals involved,

188. Professor Elizabeth Bartholet, a Harvard University Law Professor who has written extensively about transracial adoption, has concluded that "[e]very state has written or unwritten policies that recommend racial matching in adoption." Ruth Richman, Transracial Adoptions Get a Vocal Advocate, PLAIN DEALER, Dec. 7, 1993, at 6C (quoting Bartholet). She is not the only one to have noted the prevalence of policies which work against transracial adoption. Another commentator has stated:

However, current adoption practices, both formal and informal, are working to prevent white parents from adopting minority children. It takes twice as long for a white family to adopt a black child than for them to adopt a white child or a child from abroad; and while federal, state, and local laws actively prohibit discrimination on the basis of race for a whole range of activities, race can and is used as a basis of discrimination in adoption cases.

Shokraii, supra note 148, at A19.

189. See, e.g., Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (stating that transracial adoption is "potentially tragic" because such parents may be unable to cope with child's problems), cert. denied, 437 U.S. 910 (1978); In re Adoption of a Minor, 228 F.2d 446, 447 (D.C. Cir. 1955) (citing lower court, which had opined that the child in question might lose his White status if adopted by a Black man); In re B. Children, 391 N.Y.S.2d 812, 814 (N.Y. Fam. Ct. 1977) (overruling social agency decision to leave Black child with White foster mother by relying in part on view that such children "could develop dysfunctional coping mechanisms"); In re Davis, 465 A.2d 614, 623 (Pa. 1983) (arguing that child raised in racially different environment may face hostility of adoptive parents' relatives).

we do not. Many White parents will not want to adopt a child of a different race. Some older Black children may also not want to be placed in a White home. To tell them that race cannot be considered seems to be one way of encouraging failed placements, certainly not a desirable outcome.

The real problem with the present system is that official policies essentially mandate consideration of race when placement decisions are being made. Such policies reinforce the notion that race is a proper basis for distinguishing between individuals by officially sanctioning the differential treatment of individuals based on the color of their skin. In the context of adoption, the children denied adoptive homes are harmed, and society suffers from the artificial barriers between the races imposed as a result of rules which say that it is better not to place Black children in White homes.

Our government should not be in the business of encouraging racial separation, not in the arena of child placement or elsewhere. Rather, we need to focus on steps which are likely to break down the barriers between the races. As Professor Chen, a scholar of color writing about racial divisions in the familial context, urges, "children [should] be raised to regard race as an irrelevant category, . . . one that can never be used productively to define." Especially when the government uses race to distinguish between individuals, the resulting problems are overwhelming. This statement is equally true in other contexts.

III. RACE AS A FACTOR IN CONGRESSIONAL REDISTRICTING

The second paradigm in which this Article examines the effects of differential treatment based on racial classification is congressional redistricting. As every voter in America probably knows, where one lives determines one's congressional district. This in turn determines who will be the eligible candidates in a given election and ultimately

191. See supra notes 183-89 and accompanying text (discussing case law and statutes which allow the race of the child to be considered and the detrimental results which follow).

192. Chen, supra note 51, at 174 (quoting Emily S. Tai, Lesser Half, 2 RECONSTRUCTION 17, 18 (1994)).

193. To avoid confusion, it is important to distinguish between "districting" or "redistricting" and "apportionment" and "reapportionment." "[A]pportionment and reapportionment involve the allocation [by Congress] of a finite number of representatives among a fixed number of pre-established areas. Districting and redistricting . . . refer to the processes by which the lines separating legislative districts are drawn [by states]." Hays v. Louisiana, 839 F. Supp. 1188, 1190 n.1 (W.D. La. 1993) (quoting Charles Backstrom et al., Issues in Gerrymandering: An Exploratory Measure of Partisan Gerrymandering Applied to Minnesota, 62 MINN. L. REV. 1121, 1121 n.1 (1978)).
who will be the congressional representative. The boundaries of such districts, which seem to be constantly subject to change,194 are a source of much debate and frustration, as well as some amusement, when one contemplates the truly bizarre shape of some districts.195

Perhaps the most incisive, and certainly one of the most clever, explanations of redistricting was advanced by Professors Aleinikoff and Issacharoff: "In a democratic society, the purpose of voting is to allow the electorate to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors."196 The process of drawing congressional districts has been said to be no more than "politics pure, fraught with the capacity for self-dealing and cynical manipulation."197 Undeniably, race has played a significant role in political process in this country, historically to the disadvantage of minorities.198 Clearly, drawing districts so as to intentionally frustrate the ability of Blacks or other racial groups to choose candidates to represent their interests is unfair and unconstitutional.

A. Congressional Redistricting Under the Voting Rights Act of 1965

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."199 The Supreme Court has held that the essential mandate of this provision is racial neutrality, which means that it is impermissible to rig the democratic process in such a way as to intentionally exclude minorities from participating in elections, or even to minimize the voting power of minority groups.200

194. The boundaries of congressional districts are generally revised whenever census data suggests that changes in population have resulted in districts which do not adequately insure proportional representation.


197. Id.


199. U.S. Const. amend. XIV, § 1.

200. See Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (noting that states have many legislative means both to punish and prevent discrimination and "to remove arbitrary barriers to minority advancement"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 291 (1978) (holding that "racial and ethnic classifications of any sort are inherently suspect and thus call for the most exacting judicial examination"); Loving v. Virginia, 388 U.S. 1,
The principle of racial neutrality applies to all aspects of the electoral process, as well as to a state’s redrawing of its congressional districts.\textsuperscript{201}

The Voting Rights Act of 1965\textsuperscript{202} was intended to help remedy the rampant discrimination that had resulted in a variety of barriers to effective minority participation in the democratic process.\textsuperscript{203} The Voting Rights Act has been quite successful in combating overt discrimination on the basis of race and in dramatically increasing minority participation at the polls.\textsuperscript{204}

Although the Voting Rights Act applies to discrimination anywhere in the electoral process, certain parts of the statute focus on the redistricting process. For example, section 2 of the Act requires all state redistricting plans to provide an equal opportunity for minority voters to elect the candidates of their choice.\textsuperscript{205} Section 5 of the Act,\textsuperscript{206} which only applies to those jurisdictions found to have had a history of systematic racial discrimination, establishes a particular review process.
by which the Department of Justice (DOJ) examines proposed changes to voting laws.\(^{207}\) Section 5 is often referred to as the "preclearance section,"\(^{208}\) and it requires subject jurisdictions to obtain approval for any changes in congressional districts from the United States Attorney General or the United States District Court for the District of Columbia.\(^{209}\) The burden of proof lies with the proponent of any change, who must establish the absence of discriminatory intent or effect before a proposed change is enacted.\(^{210}\)

The constitutionality of this provision was challenged in 1966 in *South Carolina v. Katzenbach*.\(^{211}\) The United States Supreme Court upheld section 5, noting that it represented "an uncommon exercise of congressional power."\(^{212}\) The majority in *Katzenbach* reasoned that, as a practical matter, courts lacked the ability to remedy systematic discrimination on a case-by-case basis, and therefore the unusual preclearance procedures of section 5 were necessary.\(^{213}\)

The importance of section 5 has varied over the years. While the original focus of activities pursuant to the Voting Rights Act was not section 5, the provision’s significance was greatly enhanced as a result of the Supreme Court’s decision in *Allen v. State Board of Elections*.\(^{214}\) In *Allen*, the Supreme Court interpreted section 5 broadly, holding that it applies to even minor changes to state voting practices.\(^{215}\)

However, in *Beer v. United States*,\(^{216}\) the Court dramatically limited the reach of section 5, holding that the "effects" language of that provision would only apply if the proposed change "would lead to a retrogression in the position of racial minorities with respect to their

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207. At the Act’s inception, only seven states were subject to the provision: Alabama, Georgia, South Carolina, Mississippi, Louisiana, Virginia, and parts of North Carolina. 28 C.F.R. pt. 51 app. (1995). Today the provision applies to sixteen states or parts thereof. 28 C.F.R. pt. 51 app.

208. The reason for this reference is the requirement, contained in section 5, that any new state voting "qualification, prerequisite, standard, practice, or procedure" must be approved by the Attorney General before implementation. 42 U.S.C. § 1973c (1994).

209. Only jurisdictions which have been found to have discriminated in the past are subject to this preclearance requirement. 42 U.S.C. § 1973c (1994). Under the procedures established in the statute, if the Attorney General rejects a particular change, the jurisdiction retains the right to seek a declaratory judgment that the proposed change will not violate the Act. § 1973c.

210. § 1973c.

211. 383 U.S. 301 (1966).

212. *Id.* at 334.

213. *Id.* at 328, 334-35.


215. *Id.* at 566-67.

effective exercise of the electoral franchise.”

This meant that, absent discriminatory intent, a proposed change would violate section 5 only if minority voting strength would actually be diminished under the new plan.

For the most part, litigation alleging that redistricting has the effect of discriminating against minorities in violation of section 5 is now limited to cases involving discriminatory purpose or intent.

Therefore, section 5, by itself, is useful only in a limited number of situations because a discriminatory purpose exists only if there is proof of a “design or desire to restrict a minority group’s voting strength.”

Because of the narrowed focus of section 5, Congress amended section 2 of the Act in 1982 to prohibit racial discrimination in all forms, regardless of discriminatory intent. As a result of this amendment, whenever a redistricting plan is discriminatory, it will violate section 2. In addition, Congress specified that section 5 preclearance is not to be awarded whenever there would be a violation of section 2. The effect of amending section 2 to remove the traditional requirement that a plaintiff alleging discrimination under the Equal Protection Clause must establish intent to discriminate was therefore to bring section 5 back into the limelight.

The Supreme Court first addressed the amended section 2 in 1986 in Thornburg v. Gingles. Thornburg held that a violation would be established under section 2 whenever “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”

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212. Id. at 141.


218. Id. at 44 (quoting S. REP. No. 97-417, 97th Cong., 2d Sess. 28 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206). The test established in Thornburg requires plaintiffs to make a three-pronged showing in order to prevail in a redistricting case. The claimant must establish: (1) that there exists a large and geographically compact minority population that could be grouped in a single district; (2) that this group is politically cohesive; and (3) that members of the majority
As a result of the inclusion of section 2 standards into the preclearance criteria, the DOJ was able to breathe new life into section 5. In fact, the DOJ has not hesitated to evaluate proposed changes in congressional districts based on standards which are not covered by the direct language of section 5.225 John Dunne, then-Assistant Attorney General of the United States, outlined practices to which the DOJ looked in evaluating redistricting proposals under section 5 in remarks addressed to the 1991 National Conference of State Legislators.226

These practices led some commentators to complain that the only way to obtain preclearance from the DOJ was to create gerrymandered227 districts designed to maximize minority voting power.228

consistently vote as a bloc and make it virtually impossible for minority candidates to be elected. Id. at 50-51.

225. McDonald, supra note 204, at 869 ("Indeed, the Attorney General is administering the statute in such a manner now.").


According to Mr. Dunne, the DOJ would look askance at any of the following practices:
1) Concentrating members of minority groups into a single district when they might have been a majority in multiple districts.
2) Fragmenting a compact minority group into multiple districts in order to insure that they constitute an electoral minority.
3) Reducing the percent of minorities in a district where minority voters were previously able to elect candidates by very slim margins.
4) Preserving old district lines at the expense of minority voters.
5) Altering district boundaries to prevent minority voters from constituting a majority.
6) Drawing district boundaries to place minority groups at a disadvantage in electing their candidates.
7) Deviating from established redistricting criteria without a reasonable explanation.
8) Excluding minority participation in the redistricting process.
9) The unexplained or arbitrary use of multi-member districts.
Id. at 389 n.67.

227. The term “gerrymander” has a fascinating history. In 1812, then Massachusetts Governor Elbridge Gerry created a district having such a bizarre shape that one commentator apparently suggested it looked like a salamander. Gilbert Stuart, a noted painter, thoughtfully replied that it was not a salamander, it was a “gerrymander.” Aleinikoff & Issacharoff, supra note 196, at 588 n.1 (citing Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment, in MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1984)). The pejorative term remains in the modern lexicon.

228. It was precisely this position, taken by the DOJ when it examined the new districts proposed by Georgia following the 1990 decennial census, that led to the recent Supreme Court decision in Miller v. Johnson, 115 S. Ct. 2475 (1995). The particular option favored by the DOJ was the “max-black” plan drafted by the ACLU which would have maximized the number of minority controlled districts in the state. Id. at 2484.
Many observers and commentators have objected vehemently to this practice. 229

In 1993, the Supreme Court addressed the issue of racial gerrymandering in Shaw v. Reno. 230 The redistricting plan in Shaw had received preclearance under section 5, but the plaintiffs in that case, who were White, argued that the plan in question was so irregular that it could "be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification." 231 This, the plaintiffs contended, violated their Equal Protection rights. 232 The Court agreed, holding that the plaintiffs had stated a cognizable claim under the Equal Protection Clause. 233 Shaw, therefore, makes it clear that preclearance does not preclude a successful constitutional challenge. 234

Shaw did not answer the question of whether the redistricting plan in question was unconstitutional, although Justice O'Connor did warn that racially motivated legislation, including that which would create new districts, would be unconstitutional unless supported by a sufficiently compelling justification. 235 With regard to the question of when a redistricting plan would violate the Equal Protection Clause, the Court provided the example of drawing a district to include minorities "by disregarding traditional districting principles such as compactness, contiguity, and respect for political subdivisions," thereby creating a district where voters shared no common associations other than their skin color. 236

The Supreme Court made a more recent pronouncement on congressional redistricting on June 29, 1995. In Miller v. Johnson, 237 the Court evaluated Georgia's redistricting plan implemented following the 1990 Census. As had been the case with the redistricting plan in

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230. 113 S. Ct. 2816 (1993). The Court addressed the issue of whether five White plaintiffs had standing to challenge North Carolina's redistricting legislation under the Equal Protection Clause. Id. at 2820, 2824.

231. Id.

232. Id. at 2824.

233. Id.

234. Id. at 2831; see also Allen v. State Bd. of Elections, 393 U.S. 544, 549-50 (1969) (stating that private parties may prevent the enforcement of new enactment laws only by using traditional constitutional attacks).

235. Shaw, 113 S. Ct. at 2832.

236. Id. at 2827.

Shaw,\textsuperscript{238} the Georgia plan had been subject to preclearance under section 5 of the Voting Rights Act.\textsuperscript{239} The history of Georgia’s redistricting plan is rather convoluted.

Between 1980 and 1990, Georgia had ten congressional districts, only one of which included a majority of Black voters.\textsuperscript{240} The 1990 Census indicated that the state was entitled to an eleventh district, and Georgia’s General Assembly drew up guidelines requiring single-member districts of equal population, contiguous geography, non-dilution of minority voting power, and compliance with the Voting Rights Act.\textsuperscript{241} In August 1991, the General Assembly, in special session, proposed a plan which would have created a second district in which racial minorities constituted a majority of eligible voters, and an additional district where Blacks would have constituted thirty-five percent of the voting population.\textsuperscript{242} This proposal was rejected by the DOJ despite the fact that the proposal would have resulted in an increase in the number of minority-controlled districts and even though Georgia had no intent to discriminate.\textsuperscript{243} The reasons given by the DOJ were that the proposed plan created only two districts in which minority populations were a majority of the voters and that certain minority populations had been left in White-controlled districts.\textsuperscript{244}

Georgia tried another proposal that also would have created only two districts in which Blacks were a numerical majority, and the plan was denied again by the DOJ.\textsuperscript{245} In denying the second redistricting proposal, the DOJ relied on a so-called “max-black” plan, drafted by the American Civil Liberties Union, which would have allowed for the creation of three minority-controlled districts, albeit of unusual configuration.\textsuperscript{246}

Following the second rejection, the Georgia General Assembly gave in and devoted its efforts to creating three districts in which Black

\textsuperscript{238} Shaw, 113 S. Ct. at 2831.
\textsuperscript{239} Id. at 2483-85. Georgia was designated as a covered jurisdiction in 1965 by the Attorney General. 42 U.S.C. § 1973b(b) (1994); see 28 C.F.R. pt. 51, app. (listing states subject to the provisions of § 4(b) of the Voting Rights Act and the year in which the state became subject to the provisions); see also City of Rome v. United States, 446 U.S. 156, 161 (1980) (stating that Georgia became a covered jurisdiction in 1965 and, thus, its municipalities must comply with the preclearance procedure).
\textsuperscript{240} Miller, 115 S. Ct. at 2483.
\textsuperscript{241} Id.
\textsuperscript{242} Id.
\textsuperscript{244} Miller, 115 S. Ct. at 2483-84.
\textsuperscript{245} Id. at 2484 (citing lower court opinion, Johnson v. Miller, 864 F. Supp 1354, 1365-66 (1994)).
\textsuperscript{246} Id.
populations would constitute a numerical majority.\textsuperscript{247} The DOJ precleared this proposal.\textsuperscript{248}

After elections in which three Black candidates were elected from the three Black-maj rity districts, a challenge to the new Eleventh District, one of the new minority districts, was filed by a group of White plaintiffs who alleged that the new district violated their Equal Protection rights.\textsuperscript{249} The district court agreed that the plan which had created the new Eleventh District was invalid under \textit{Shaw}.\textsuperscript{250}

The district court first determined that the plan had to be evaluated under strict scrutiny because race had been the predominant force in the redistricting plan.\textsuperscript{251} The court then found that, although complying with the Voting Rights Act could be a compelling state interest,\textsuperscript{252} the Act did not require three Black districts, and thus the plan was not narrowly tailored to comply with the Act.\textsuperscript{253}

Before the United States Supreme Court, the appellants first argued that the district court's finding that race was the predominant factor in drawing the Eleventh District was not supported by the evidence.\textsuperscript{254} The appellants contended that the General Assembly's deliberate classification of voters along racial lines was insufficient to support the lower court's finding that the district should be subject to strict scrutiny, and that only proof that the district's shape was so bizarre that it could not be explainable on any grounds other than race would suffice.\textsuperscript{255} The Supreme Court rejected this argument, holding that the district court's determination that race was the predominant factor in drawing the Eleventh District was adequately supported by "the shape of the Eleventh District, together with the relevant racial demographics,"\textsuperscript{256} as well as direct evidence presented by the state itself about its redistricting process.\textsuperscript{257}

The Court then applied strict scrutiny to Georgia's redistricting plan.\textsuperscript{258} In doing so, it found that the state's interest in complying with the Voting Rights Act could not be used to justify the challenged state action since the Act, if constitutionally applied, could not be read

\begin{footnotesize}
\begin{enumerate}
\item[247.] \textit{Id.}
\item[248.] \textit{Id.}
\item[249.] \textit{Id.} at 2485.
\item[251.] \textit{Id.} at 1378.
\item[252.] \textit{Id.} at 1381-82.
\item[253.] \textit{Id.} at 1392-93.
\item[255.] \textit{Id.}
\item[256.] \textit{Id.} at 2488-89 (citing \textit{Johnson}, 864 F. Supp. at 1375).
\item[257.] \textit{Id.} at 2489.
\item[258.] \textit{Id.} at 2490.
\end{enumerate}
\end{footnotesize}
to require the creation of three minority-controlled districts. As the Court explained, "Georgia's drawing of the Eleventh District was not required under the [Voting Rights] Act because there was no reasonable basis to believe that Georgia's earlier enacted plans violated § 5." The Supreme Court concluded that no plan which served to ameliorate past discrimination could possibly be violative of section 5.

To summarize the law as it currently exists, any redistricting plan which is primarily motivated by racial considerations must be judged under strict scrutiny. Plaintiffs may prove the racial motives of the state by establishing that the district in question is so bizarre that it cannot be reasonably explained by anything other than race, or by any other evidence which supports the inference that the plan was primarily racially motivated. Preclearance from the DOJ is no guarantee of judicial approval. Rather, a racially motivated redistricting plan can be justified only if it is narrowly tailored to satisfy a compelling governmental objective. The need to remedy past discrimination would be such a purpose. It is unclear whether a state will be able to justify a racially motivated plan by proving that the plan was necessary to comply with section 5 of the Voting Rights Act, but it is clear that section 5 cannot be read as requiring the maximization of minority power in the electoral process unless the previous plan actually discriminated on the basis of race and the new proposal is designed to remedy that discrimination. If a plan improves the voting power of racial minorities, however marginally, it is deemed to be

259. Id. at 2491-92.
260. Id. at 2492.
261. Id. Obviously, this analysis would have applied to either of the first two proposals made by Georgia's General Assembly, since both of those proposals would have increased the number of minority-controlled districts and since neither of those plans was in any way motivated by discrimination. See Johnson v. Miller, 864 F. Supp. 1354, 1363-64 & n.7 (1994).
262. Miller, 115 S. Ct. at 2485-86.
263. Id. at 2487.
264. Id. at 2491-92.
265. Id. at 2490-91.
266. This was not the holding of Miller, in that Georgia did not, and could not, argue that the purpose of the Eleventh District was anything other than compliance with the Justice Department's orders. Miller, 115 S. Ct. at 2490-91. However, Shaw v. Reno is cited in Miller as standing for the proposition that "[t]here is a 'significant state interest in eradicating the effects of past racial discrimination.'" Id. at 2490 (quoting Shaw v. Reno, 113 S. Ct. 2816, 2831 (1993)).
267. The viability of this justification is still an open question. See Miller, 115 S. Ct. at 2490-91 (stating that compliance with section 5 did not suffice in the case at bar, "[w]hether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest").
268. Id. at 2490-91; see also Mobile v. Bolden, 446 U.S. 55, 75-76 (1980) (plurality opinion) (stating that "the Fourteenth Amendment does not require proportional representation as an
ameliorative and can never be found to violate the Voting Rights Act absent proof of actual discrimination.\textsuperscript{269}

Therefore, states can and sometimes must use race as a basis for fashioning congressional districts, although the precise limits of their power to do so is uncertain.

\textbf{B. Problems Inherent in the Current Approach}

One problem with using the current rules which allow the race of residents to be considered in determining appropriate boundaries for congressional districts is that this reinforces the notion that race is an inherently significant human characteristic. If, as the first section of this Article contends, race is a social and political construct which is not based on intrinsic differences between individuals,\textsuperscript{270} the only justification for adopting rules based on race must be either that it is beneficial to society to use race as a legal construct or that the only solutions to a particular problem require reliance on racial classifications as a proxy for making distinctions on the basis of "real" differences. Neither of these positions seems supportable in the context of congressional redistricting.

First, it does not seem to be a very good idea to encourage the notion that racial identity is so important that it says more about a person than political ideology, religious affiliation, socio-economic status, or anything else. Ideally, everyone should be judged as an individual, not as a member of a group, and each member of any racial group should be free to adopt his or her own political agenda. When the law acts as if members of a given race share certain attitudes, which is an implicit assumption when race is used as a basis for drawing congressional boundaries, this encourages the belief that broad generalizations about members of the group are appropriate. This in turn creates a mindset which allows stereotypes to persist. Such a mindset also tends to undermine our efforts to create an integrated, color-blind society by making efforts to end race-based discrimination look half hearted. In addition, such generalizations also place pressures on members of that group to conform to a certain set of beliefs. This creates an artificial pressure for the races to remain separate. These problems will be addressed in turn.

The first problem is created when the law legitimizes the use of race as a basis for making broad generalizations about individuals. Once

\textsuperscript{imperative of political organization"}); Beer v. United States, 425 U.S. 130, 141 (1976) (discussing ways in which states had circumvented court decisions striking down their discriminatory laws).

\textsuperscript{269} Miller, 115 S. Ct. at 2492.

\textsuperscript{270} See supra part I.
people are acclimated to thinking about members of a given race as if every person of that race shares certain characteristics, it is all too easy to perpetuate negative stereotypes about people who are identified as belonging to that race.271 Once we accept the false premise that all members of a racial group share similar outlooks, attitudes and behaviors, a premise which our current method of congressional districting encourages, it is hard to avoid falling into the trap of overgeneralizing about members of that racial group in contexts other than political cohesiveness. When the news programs on television show clips of Blacks being arrested, it is too easy to think of Blacks as criminals. When the press reports high incidents of drug use among young Blacks, it is too easy to make the mistake of assuming that Blacks in general fit that pattern. Stories about the Black drop-out rate, Black unemployment, teen pregnancies among young Black women, and the like also support negative stereotypes about Blacks in general.272 Unfortunately, such beliefs are only reinforced when the law also assumes and acts as if broad generalizations based on race are legitimate and appropriate.

In addition to making it easier for Whites to perpetuate negative stereotypes about Blacks, the adoption of laws and rules which rely on race as a basis for differentiating between individuals also undermines the goal of a color-blind society. After all, how color blind can society

271. For a discussion of the prevailing stereotypes which are applied to Blacks, see supra notes 52, 65-66.

272. The problem is that when we are bombarded by negative information about some Blacks, it no longer seems irrational to make assumptions about Blacks in general, if we are accustomed to thinking about Blacks as a cohesive group whose members generally share common ideas, attitudes and beliefs. One scholar of color, Dinesh D'Souza, has carefully documented the basis for many of the negative stereotypes which appear to confront Blacks.

Take, for example, the problems that young Black men face in trying to find a cab in New York City. D'Souza found that cabdrivers who admitted a reluctance to pick up young Black males had previous experiences with threats, robberies and assaults by other Blacks, or had perceived a pattern of Blacks refusing to pay a tip or "beating the fare." D'SOUZA, supra note 65, at 250-53. Similarly, the perception of Blacks as criminals can be traced to a general awareness of the fact that young Blacks are convicted of a high percentage of violent crimes. Id. at 261-62. The fact that Americans are risk averse can therefore explain the phenomenon of Whites crossing the street to avoid passing closely by a group of Black youths. Id. at 264-66.

If, however, we were not accustomed to thinking of race as an intrinsically important characteristic, such generalizations would be less likely to occur. We would not, for example, tend to generalize that all people who have red hair are criminals just because we have witnessed crimes being committed by other redheads. Nor do we make generalizations about people on the basis that they are right or left handed, have blue or green eyes, are bald, etc. Because we do not generally regard such superficial physical characteristics as defining, in any important measure, the individuals who possess those biological traits, we do not feel comfortable making generalizations on that basis. Race, however, is a very different matter, precisely because we have become so used to making judgments based on race.
be if the law persists in classifying individuals by race and by making decisions based on those classifications?

On one hand, we say that race should not matter; but, on the other hand, we act as if it does by adopting rules and laws which treat Blacks as a group apart. Race relations in America have been an enduring problem and there have been any number of efforts directed at eradicating unfair and discriminatory treatment of individuals based on their race. It is likely that part of the reason that racial tensions continue to be so high is that, while we pay at least lip service to the notion that we want to end disparate treatment based on race, we also retain a wide variety of official policies which institutionalize such differential treatment.

Ideally, to move toward a color-blind society, the law ought to encourage the notions that race does not matter, and that race is not an appropriate basis for making broad generalizations about individuals. Using race as a basis for drawing congressional boundaries therefore seems a step in precisely the wrong direction.

Finally, it seems obvious that members of any racial group ought to be permitted to adopt beliefs and attitudes with which they are comfortable. When the law says that Blacks should be concentrated in a single voting district, the pressure on Blacks to conform to the political views held by other Blacks is increased. There is a political motivation to denigrate those Blacks who adopt mainstream or White values. To make race relations even less friendly, such division between the races also acts to reinforce the idea that Whites cannot share concerns and beliefs with Blacks, and therefore must not be allowed to have voting control in any district where Black political ideals are supposed to prevail. Again, a system which encourages such divisions between the races does not seem to be designed or likely to ease racial tensions.

These problems with broad racial classifications illustrate why establishing congressional district boundaries based on the race of residents can be harmful to society. Official policies which require that individuals be classified by race and then treated differently according to that classification make it harder for us to make progress towards a point where race will no longer be a dividing line between individuals.

273. Others have documented and discussed the tendency of some Blacks to reject other Blacks who espouse traditionally White values. Certainly Justice Clarence Thomas has been criticized for failing to adhere to "Black" values. See infra note 439. For a further discussion of the problem of Blacks denigrating other Blacks who adopt mainstream or "White" values, see supra notes 56-57 and accompanying text.
Even acknowledging that the official use of race as a basis for distinguishing between individuals can be detrimental to society, it might be possible to justify the use of racial classifications if the only way to assure fair representation in our political process is to draw congressional districts so as to concentrate minority populations in separate districts. There are a number of responses to this claim.

First, current rules governing the redistricting process make it clear that racially-motivated districts are unlikely to address discrimination against or underrepresentation of Blacks or other minority groups. To the extent that states wish to continue to draw districts in an attempt to minimize minority voting power, the Supreme Court’s interpretation of the Voting Rights Act is one which will probably allow such behavior to continue. So long as the jurisdiction camouflages the state’s motives, it ought to possess enough flexibility to hold minority gains to a bare minimum, even in the face of increasing minority populations. Since the Miller Court rejected the approach taken by the DOJ which would have required Georgia to maximize the number of minority-controlled districts, such a failure to maximize minority voting power cannot be used as a basis for challenging residual inequality in the electoral process. Moreover, under Miller a state cannot deliberately seek to maximize minority voting power under the Voting Rights Act absent proof of a compelling state interest, which is likely to be hard to prove.

Finally, even if one assumes the very best of motives for state officials charged with redistricting, the decision of where to place boundary lines is one which would test the powers of Solomon. Deciding where to draw district lines in an attempt to allocate fairly voting power to discrete and cohesive minority groups is virtually impossible given our fragmented society. Even assuming that all members of a racial minority share cohesive political views, those persons are not likely to be living in one geographically contiguous, segregated area. Rather, they are likely to be geographically dispersed, and drawing a gerrymandered district, which, of necessity, will also include individuals not of that minority group, is basically as unfair to those individu-

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274. This attempt to minimize minority voting power is certainly plausible given the political nature of the redistricting process. Wherever those in control of the districting process are unlikely to be supported by a minority-controlled district, there is a built-in incentive to create districts which will sufficiently fragment the voting power of minority groups who would otherwise be likely to elect political opponents of those charged with establishing district lines.

275. Again, given the fact that motives and intent are always so hard to establish, it is quite likely that a state could easily hide a real objective to minimize minority voting power.

als who are not in the favored minority as placing the members of the racial minority in a predominantly majority-controlled district.

If race-based congressional districts are unlikely to remedy the problems of discrimination against, and underrepresentation of, Blacks, it is hard to see how these problems can be used as a justification for using race in the drawing of such districts. Given the significant drawbacks to using race as an official basis for differentiating between individuals, one would think that race-based decisions would only be made if they were a powerful and effective tool against oppression. Moreover, one would expect the use of race to be necessary, and this is perhaps the most important objection to using race as a basis for determining congressional districts.

Even if one assumes that race-based congressional districts would be an effective way in which to combat discrimination against minorities, given the problems created by the official use of race as a basis for differentiating between individuals, it would seem logical to avoid this alternative except as a last resort. The reality is that there are other options which should at least be explored before one concludes blindly that society must continue to differentiate between individuals on the basis of their race.

Professor Lani Guinier, for example, has offered a number of suggestions for remedying the persistent problem of underrepresentation of minorities in the political process which do not require that the government classify persons by race or use those classifications to make official policies. In 1991, Professor Guinier suggested that we move to a system of proportionate interest representation to remedy the problems of minority participation in the political process. Her concept of proportionate interest representation would require at-large elections, without any requirement of majority approval for candidates.

277. Professor Guinier achieved a degree of notoriety when President Clinton nominated her, on April 29, 1993, to be Assistant Attorney General for Civil Rights. The barrage of strident criticism that followed the President's announcement resulted in a decision to withdraw the Guinier nomination on June 3, 1993. See Jeffrey H. Birnbaum & Joe Davidson, Clinton Pulls Plug on Choice for Rights Post, WALL ST. J., June 4, 1993, at A16; Bob Cohn, So Long, Lani, NEWSWEEK, June 14, 1993, at 26, 27. The bulk of the criticism, and the precise views which the President cited in explaining why he had changed his mind about the nomination, were Professor Guinier's proposals concerning minority participation in the political process. David Van Biema, One Person, Seven Votes, TIME, Apr. 25, 1994, at 42.


279. An election where voters elect more than one candidate for the same type of office is said to be "at-large." See Ronald W. Chapman, Judicial Roulette: Alternatives to Single-Member Districts and a Legal and Political Solution to Voting-Rights Challenges to At-Large Judicial Elec-
Under current rules, a political candidate can only be elected if he or she receives at least fifty percent plus one of all votes cast. This means that it is possible for a group having as much as forty-nine point nine percent of the vote to wind up with none of its candidates being elected. Even if the minority group is sufficiently cohesive that its candidates win a plurality, in a run-off election, the majority can still elect its candidate of choice.

The problem is illustrated by Professor Guinier in a colorful example in which she posits a hypothetical jurisdiction containing two kinds of people: yellow and blue. In this hypothetical society, yellow people constitute seventy-five percent of the population, and a substantial percentage of these yellow people would vote only for yellow candidates. However, a small group of yellow people are more tolerant, but they constitute only seventeen percent of the jurisdiction's total population. Blue people are also politically cohesive, but because they constitute only twenty-five percent of the voting population, they have never succeeded in electing any blue candidates.

Under Professor Guinier's proportionate interest representation proposal, "[i]nstead of requiring the 50% plus one vote for election jurisdiction-wide, the votes needed for election would be reduced, for example, to 20% plus one of all votes cast" (assuming that four candidates were to be elected). The voters would also be given four votes and allowed to "cumulate" those votes, by casting one, two, three or four for one candidate, until all four votes have been used. This proposal would result in a politically cohesive minority having at least twenty percent plus one of the vote being guaranteed the ability to elect at least one representative. In her hypothetical jurisdiction, Professor Guinier concludes that if the blues work with the liberal
yellow voters, the eventual outcome of an election could be one blue candidate, one green candidate, and two yellow candidates.\textsuperscript{287}

It seems obvious that this approach would do far more to guarantee fair representation of minority interests than our current rules which focus on creating districts drawn along racial lines. By replacing single-member districts with at-large elections with winners elected by a plurality vote, representation of politically cohesive minorities would be guaranteed. No one would be effectively disenfranchised by being placed in a single-member district where they would always be outvoted. No one would be given the essentially impossible task of drawing fair and appropriate district boundaries. The fairness of the elections would not depend on the fairness of the boundaries so drawn. Most importantly, this approach avoids giving the stamp of official approval to the notion that race matters so much that people can be classified along broad racial lines and properly treated differently based on that classification.

It is far beyond the scope of this Article to delve into the precise nature of alternatives to single member districts drawn along racial lines; instead, it should be enough to show that there is an alternative to using race as a basis for the official function of drawing congressional districts. If there is no need to use race as a proxy for determining the existence of meaningful differences among members of the electorate and there are significant disadvantages to continuing to do so, it seems obvious that the best approach would be to prohibit the consideration of race in the drawing of congressional districts.

It is not the thesis of this Article that different voices should not be included in the political process. The problem is that using race as a basis for deciding to whose voices to listen undermines the goal of a color-blind society where race is generally regarded as irrelevant in the eyes of the law and, eventually, in the eyes of society's members. Ideally, once race is excluded from consideration as a basis for drawing boundaries, other avenues would be explored to guarantee representation of the diverse interests and points of view which exist in this country. Professor Guinier offers one possibility, and surely there are others.

\textsuperscript{287} Guinier, supra note 278, at 1140.
IV. Race as a Basis for Differential Treatment in Employment and Education: The Case of Affirmative Action

The final section of this Article examines how differential treatment based upon racial classifications fares within the context of affirmative action in education and employment. Both education and employment opportunities are discussed in this section because they represent two distinct stages of professional development. Denial of educational opportunities early in life often translates into a denial of career and employment opportunities later in life. The affirmative action debate thus impinges on professional development at every stage of life—preparation for a career in early adulthood, and the rate and extent of professional progress once a career has been established. To the extent that affirmative action programs allow or require race to be used as a basis for determining to whom opportunities (either in education or employment) should be made available, racial classifications become intertwined with professional development as well as with the personal and political aspects of our lives.

It is the central thesis of this Article that differential treatment of individuals based on their race should not be permitted where it results in denial of opportunity to others who are not members of the favored group. Obviously, because of the breadth of this topic, and because it is only one of three separate examples of how race has been incorporated into law as a basis for determining how to treat individuals in our society, there is no way to address all of the issues related to affirmative action in this forum. This Article focuses solely on affirmative action as it applies to race, and it uses the illustration of affirmative action for Blacks rather than entering the debate over the propriety of extending affirmative action to certain other racial groups who may have differing interests or claims.288

The following materials discuss the general arguments which have been made in favor of, and in opposition to, affirmative action. In addition, the final section of this Article also introduces the notion that alternate methods of achieving a fairer allocation of resources needs to be explored if affirmative action, as it is currently constituted,

is abandoned, although such alternative approaches will not be explored in depth.289

A. The Meaning of “Affirmative Action”

At the outset, it is important to make sure that there is a common understanding of what is meant by “affirmative action.” These two words call up all sorts of images and trigger numerous associations, and for many people, many of these are negative.290 Clearly, the popular press assumes that many people strongly associate racial quotas, set-asides, or other programs guaranteeing preferential treatment at the expense of “majority” applicants with the notion of affirmative action.291 This interpretation of affirmative action is actually a significant distortion of what the phrase originally meant.

“Affirmative action” first appeared in federal legislation in 1935, albeit in a context other than civil rights.292 The National Labor Rela-

289. For example, one alternative to using race as a basis for allocating scarce resources would be to provide special opportunities for those most handicapped by socioeconomic status. Alternatively, one might change the criteria used in the admissions or hiring process to make sure that minority applicants are not indirectly disfavored because of their race. In addition, this discussion of alternatives to conventional affirmative action programs assumes that direct barriers to minority representation and participation have been removed. In any case where such barriers still exist, I would, of course, favor taking immediate steps to see that such obstacles are eliminated. For a further discussion of alternatives to criteria which may act as indirect barriers to minority representation and participation, see infra part IV.D.

290. Among the negative associations which one might have to affirmative action are reverse discrimination (which has caused a growing resentment and backlash against the very groups once though to be benefitted by affirmative action), tokenism (the phenomenon or perception of hiring, promoting, or admitting a minimal number of women or minorities and no more), the assumption that members of “favored” groups cannot compete on the real merits (which ignores the reality that preferential treatment is not the only reason to hire, admit or promote women and minorities), and the legitimization of “race” as a meaningful classification upon which important decisions can properly be based.

It is not, however, only Whites who have negative reactions to affirmative action. A recent article addressing affirmative action starts with an impressive list of quotes from individuals possessing a variety of perspectives, all of whom are critical of affirmative action. See Harris & Narayan, supra note 109, at 1-3 (quoting Ellis Cose, The Rage of a Privileged Class 1, 130-31 (1993); Amy Hill Hearth, Having Our Say: The Delany Sisters' First 100 Years 110 (1993); Cornel West, Race Matters 52, 64 (1993)). As Professors Harris and Narayan note, these comments come from a Black conservative, a Black liberal, a Black on the radical left, a White conservative and a Black woman over one-hundred-years old.

What their views have in common is this: they all begin with a recognition that being a Black American has historically meant and continues to mean being the target of profound exclusions and unequal treatment; and they all end with either a rejection of, or a lack of enthusiasm for, race-based affirmative action policies that are meant to mitigate this exclusion and unequal treatment.

Harris & Narayan, supra note 109, at 3.

291. See infra note 425 (discussing popular attitudes toward affirmative action).

tions Act, which was intended primarily to prohibit employers from harassing unions, required individual employers who had committed certain unfair labor practices "to take such affirmative action" as will be necessary to remedy the unlawful labor practice. The history of the phrase "affirmative action," as used in this legislation, indicates that it was intended to require employers who had been found to have violated specific statutory prohibitions to take "affirmative action" to neutralize their illegal conduct.

When Congress finally enacted significant legislation addressing civil rights, it also included the phrase "affirmative action." The Civil Rights Act of 1964 outlawed discrimination in employment, voting, public schools, and federally funded programs. The legislation specifically contemplated affirmative action to remedy past discrimination. Title VII, the most far-reaching part of the statute, prohibited discrimination in employment and authorized the federal courts to order appropriate "affirmative action" on any employer who "has intentionally engaged in or is intentionally engaging in an unlawful employment practice." This language appears to track the focus of the National Labor Relations Act, in that affirmative action was required to remedy specific prior instances of discrimination.

The term "affirmative action" also appears in Executive Order 11246, issued by President Lyndon Johnson in 1965, which directed that "all Government contracting agencies ... [must] take affirmative action to ensure that applicants are employed ... without regard to their race, creed, color, or national origin." Two years later, this order was amended by the addition of a prohibition against discrimination on the basis of gender. Substantial evidence exists to suggest

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295. Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (1994) (prohibiting racial discrimination in voting (Title I), public accommodations (Title II), public facilities (Title III), public schools (Title IV), programs receiving federal funds (Title VI), and employment by firms affecting interstate commerce (Title VII)).
296. 42 U.S.C. § 2000e-5(g) (1994). The Act did, however, provide that nothing in Title VII shall be interpreted to require: preferential treatment to any individual or to any group because of the race, color, religion, sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer.
that President Johnson also intended that the phrase have a limited meaning.

The first case which appeared to accept that "affirmative action" authorized more than limited remedial measures was *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor*. This case upheld the use of racial quotas in hiring as a method of ensuring future equal opportunity. The Supreme Court also came to adopt an expansive approach to Title VII and affirmative action, eventually holding that Title VII did indeed authorize preferential treatment based on race to remedy past discrimination, that Title VII did not require that a court have proof of conscious intent to discriminate prior to ordering remedies, and that it was not necessary to specifically identify victims of discrimination in order to impose remedial programs.

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299. See Andritzky & Andritzky, *supra* note 292, at 257-72. The real question is why the term "affirmative action," as used in the Civil Rights Act of 1964 and Executive Order 11,246, has come to be understood to mean so much more than a reference to neutralizing specific instances of past discrimination. Perhaps one explanation lies in the historical context in which the Civil Rights Act was enacted and the Executive Order was issued and, more importantly, the context in which those provisions came to be interpreted.

The Supreme Court's landmark decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), provided a substantial basis for the notion that officially sanctioned race-conscious measures might be required in order to remedy past discrimination. The direct result of *Brown* was massive involuntary desegregation of the nation's public schools; but the indirect results over time have included a large number of remedial race-conscious measures designed to achieve racial equality even absent proof of specific discrimination.

300. 442 F.2d 159 (3d Cir. 1971).

301. *Id.* at 177; see James E. Jones, Jr., *Twenty-One Years of Affirmative Action: The Maturation of the Administrative Enforcement Process Under the Executive Order 11,246 as Amended*, 59 CHI.-KENT L. REV. 67, 93 (1982) (stating that "prior to this case [affirmative action] had little content and no clear definition").

302. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), a sharply divided Court invalidated a set-aside program for medical students. Four Justices would have found the set-aside to be permissible under the Constitution. *Id.* at 325 (Brennan, White, Marshall and Blackmun, JJ.). Four of the Justices, Stevens, Burger, Stewart and Rehnquist, would have ruled in favor of the White plaintiff on statutory grounds. *Id.* at 408, 418-19. Justice Powell, who cast the deciding vote, concluded that a preferential program could be justified if it was needed to remedy past discrimination or if it was intended to create diversity among the student body. *Id.* at 307, 311-13. He concluded that the plan at issue in the case did not satisfy these standards. *Id.* at 319-20. However, a majority of Justices in *Bakke* clearly articulated a position that would support some preferential programs.

303. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (stating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability").

304. In *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979), the Court upheld a private, voluntary affirmative action plan simply on the basis that Blacks as a group had been historically excluded from the craft trades which would be affected by the plan at issue in the case. Similarly, in *Fullilove v. Klutznick*, 448 U.S. 448, 490-92 (1980), the Court upheld a feder-
Despite the fact that Title VII has been interpreted quite broadly, it is still not accurate to view affirmative action as being synonymous with quotas, set-asides or similar preferential programs pursuant to which members of a preferred group receive special treatment at the direct expense of persons who are not members of that group. In actuality, any program designed to avoid or mitigate the effects of discrimination can be classified as affirmative action. For example, in the arena of employment, actively seeking to increase the pool of minority applicants by advertising available positions in publications designed to reach members of such minorities would be an affirmative act to avoid discrimination. Eliminating barriers to employment which disproportionately impact minorities without being truly related to prospective employees' ability to perform the job is also an affirmative act designed to remedy discrimination. Of course, creating an additional job line which is reserved for minority applicants would be affirmative action as well, and setting quotas by race would also qualify as affirmative action, although strict numerical quotas are generally not permissible under the Constitution as currently interpreted.305

The current debate about affirmative action is primarily a discussion about the merits of race-conscious preferential programs. No one is objecting to such actions as wider advertising of available positions, the removal of discriminatory, but otherwise irrelevant, job criteria, or the like. Affirmative action on the basis of race becomes debatable only when it involves racial preferences.

Therefore, because it is the thesis of this Article that race and racial classifications should not be incorporated into legal doctrine as the basis for differential treatment of individuals, this Article will talk about affirmative action only in the context of race-conscious preferential programs. Although this may be an unfair characterization of affirmative action programs, it needs to be understood that the objections raised and discussed herein apply only to programs which classify and treat individuals differently based on their race. A program such as wider advertising directed to particular segments of society is not objectionable because it is not exclusionary. Elimination of discriminatory criteria for admissions or hiring is not exclusionary. In fact, failing to direct advertising which seeks to notify potential candidates or applicants of available opportunities equally to all races or

305. This is the legacy of Bakke. That case declared numerical set-asides to be impermissible, while clearly stating that other types of preferential programs could pass constitutional muster. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307-15 (1978).
retention of discriminatory criteria for admissions or hiring is itself a discriminatory practice which should be eradicated. It is the practice of using race to allocate opportunities which is objectionable, not the fact that one might choose to characterize a particular response to discrimination as "affirmative action."

In other words, problems begin to arise when one looks at programs which utilize race as a basis for allocating training or educational opportunities, or for deciding whom to hire for a limited number of positions or whom to fire when layoffs are required. In such cases, the ultimate decision about whom to train, educate, employ, promote, or fire is based on a characteristic which has no intrinsic relevance and is made significant only because of erroneous and societally harmful beliefs about what race means. When the law itself utilizes such factors in making these types of decisions, the law reinforces the underlying assumption that race, in and of itself, is important. This Article argues that because this assumption is flawed, and because the official sanction of race as an important human characteristic makes it harder to move toward a color-blind society where race does not matter, affirmative action becomes unsupportable even though something must be done to equalize the treatment and position of Blacks in our society.

In order to understand the arguments supporting and criticizing affirmative action and how the concerns raised in this Article relate to those arguments, a general understanding of the history of the law relating to affirmative action programs is necessary. There are many other sources which have documented this history in great depth and detail, and no attempt is made to include a comprehensive history or analysis here. However, in order to provide a framework in which to analyze the necessity or desirability of continuing affirmative action programs designed to achieve racial equality by granting preferential treatment based on race, a brief synopsis of the law in this area follows.

B. The State of the Law Regarding Affirmative Action

Until quite recently, federal efforts to promote affirmative action generally received substantial deference from the courts. For example, the Supreme Court interpreted Title VI\(^\text{306}\) and Title VII\(^\text{307}\) to prohibit not only deliberate racial discrimination but also unintentional discrimination caused by the disparate impact of facially neutral prac-


Because the applicable statutes "standing alone" did not specifically prohibit practices which would have a disparate impact on minorities, the Court authorized enforcement agencies and departments to issue regulations making them illegal or requiring remedial affirmative action. The Supreme Court took this step even though Congress had specifically barred "preferential treatment to any individual or to any group because of [race]."

At various times, affirmative action has been extended to benefit a variety of different groups, leaving White males, many of whom are innocent of any overt discrimination, "to bear the burdens of redressing grievances not of their making." This phenomenon, quickly dubbed "reverse discrimination," involves the perception that White males have been denied equal opportunities as a result of race- or gender-based preferences. It has become a cause celebre for conservative legal commentators and politicians.

In order to understand how various race-based classification schemes designed to satisfy the goal of "affirmative action" have been evaluated by the courts, it is important to understand the constitutional basis for challenges to such schemes. For the state governments, the prohibition against unequal treatment is found in the Fourteenth Amendment to the Constitution, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The limit on federal action is found in the Fifth Amendment, which does not expressly impose the obligation of equal protection. Rather, the Fifth Amendment requires that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Over time, however, the Fifth Amendment has come to be understood as incorporating a guarantee of equal protection. This conclusion was not, however, automatic.

308. Id. at 432.
310. 42 U.S.C. § 2000e-2(j) (1994). The Supreme Court has suggested that the hiring of qualified minorities should be in proportion to the proportion of qualified minorities in the workforce. See Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 448-49 (1986) (plurality opinion). One conservative Justice, however, denounced such a rigid numerical requirement as an "impermissible quota." Id. at 495 (O'Connor, J., concurring in part and dissenting in part). Similar views were expressed by Justices White and Rehnquist and Chief Justice Burger. Id. at 499-500.
312. Id.
313. U.S. Const. amend. XIV, § 1.
314. U.S. Const. amend. V.
In cases where the issue was not race, the view of the Court through the 1940’s was that “[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.”315 The first time the Court evaluated a Fifth Amendment equal protection challenge to a racial classification, it reached a similar conclusion with respect to a wartime curfew imposed only upon Americans of Japanese descent.316 Some months later, the Court also approved an order that completely excluded Japanese-Americans from certain areas.317 While the Court stated that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny,”318 the Court appeared to have no trouble in concluding that the racially discriminatory order then at issue was proper.319

The first time the Court explicitly questioned the notion that the state and federal governments have different obligations regarding the avoidance of racial classifications was in 1954, in Bolling v. Sharpe.320 In Bolling, the Court finally concluded that “[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”321 This has become a well accepted doctrine. 322

The key question therefore is, under both the Fourteenth and Fifth Amendments, what standard must be employed by the courts in reviewing the constitutionality of race-based classification schemes. The Supreme Court first examined the constitutionality of racial classifications against a claim of reverse discrimination in 1978, in Regents of the University of California v. Bakke.323 Bakke involved a White male who would have been admitted to medical school except that “his”
slot was reserved for, and given to, a “less qualified” minority applicant, pursuant to the University’s admission program. A bitterly divided Supreme Court invalidated the admission program in question on the ground that it was impermissible to reserve a fixed number of seats in the entering class for racial and ethnic minorities. However, the Court’s position was that it was permissible to use race-conscious affirmative action under specified circumstances.

The attorneys for the medical school had argued that “strict scrutiny” should apply only to “classifications that disadvantage ‘discrete and insular minorities.’” While there was no single opinion of the Court in the case, Justice Powell’s opinion announcing the Court’s judgment rejected that argument. Justice Powell, joined by Justice White, wrote that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” Justice Powell concluded that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” On the other hand, four Justices in Bakke would have applied a less stringent standard of review to racial classifications “designed to further remedial purposes.”

In the post-Bakke era, the Court has sent out mixed signals about the constitutionality of racial preferences, sometimes approving such measures and sometimes disapproving them. Moreover, the next

324. While one might debate the appropriateness of the Medical School’s admission standards, at the time of Bakke, the determination of which candidates were best qualified depended almost exclusively on test scores. Id. at 273.

325. There were six separate opinions in Bakke. Justice Powell announced the decision of the Court in a plurality opinion. 438 U.S. at 269. Justices Brennan, White, Marshall and Blackmun wrote an opinion, concurring in part and dissenting in part. Id. at 324. Justices White, Marshall and Blackmun also each wrote separately. Id. at 379, 387, 402. Finally, Justice Stevens wrote an opinion, joined by Chief Justice Burger and Justices Stewart and Rehnquist, concurring in part and dissenting in part. Id. at 319-20.

326. Id. at 307. Justice Powell, writing for the Court, required a compelling state interest to justify race-conscious affirmative action. He suggested that having a diverse student body would constitute such an interest, but special admission based solely on race was found to be unconstitutional. Id. at 312-20.

327. Id. at 287-88 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

328. Id. at 289-90.

329. Id. at 291.

330. Id. at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

331. See, e.g., United States v. Paradise, 480 U.S. 149, 185-86 (1987) (upholding court-ordered hiring quota for minorities based upon proof that the Alabama State Police had previously discriminated against Blacks); Fullilove v. Klutznick, 448 U.S. 448, 490 (1980) (upholding congressionally mandated set-asides for minority contractors on the grounds that traditional procurement procedures could perpetuate discrimination); United Steelworkers of Am. v.
several opinions were marked by substantial disagreements among members of the Court, and no clear consensus developed about the appropriate standard of review for race-based classifications.

A number of affirmative actions programs were upheld by the Supreme Court in the following years. For example, the Court upheld a voluntary plan which reserved half of the slots in a training program for Black employees and a program of congressional set-asides reserving certain opportunities for minority-owned businesses. Court orders imposing minority membership goals on a union and a “one-black-for-one-white promotion” scheme were also sustained. Finally, the Court also upheld policies which favored minority applicants in the granting of broadcast licenses.

There were some common themes in these opinions. One of the most important was the issue of whether the affirmative action program had to be remedial in nature, addressing either past or present discrimination or racial imbalances however caused. Several of the programs were sustained on the grounds that the affirmative action programs in question were necessary to remedy either intentional discrimination or existing racial disparities.

Weber, 443 U.S. 193, 209 (1979) (finding that Title VII does not prohibit a private affirmative action plan pursuant to which employer used a quota system for Blacks in its training program until the proportion of Black workers equaled proportion of Blacks in the local work force).

333. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283-84 (1986) (plurality opinion) (invalidating a school board plan that would have required layoffs of Whites to be in same proportion as Blacks on the ground that the measure discriminated against Whites with seniority and could not be upheld under strict scrutiny solely on the grounds that the measure was intended to remedy societal discrimination); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561, 578-80 (1984) (holding that Title VII prohibited a layoff scheme that would have replaced a system of layoffs based on seniority absent proof that the seniority system was intended to discriminate or had to be abandoned in order to provide a remedy to a proven victim of direct discrimination).


335. Fullilove, 448 U.S. at 490.


337. Paradise, 480 U.S. at 153.


339. For example, the remedial nature of the program being challenged in Weber, 443 U.S. at 208-09, was sustained because of the existence of a manifest racial imbalance in the workplace. Similarly, the congressional set-asides which were dealt with in Fullilove v. Klutznick, 448 U.S. at 490-92, were also upheld as being necessary to remedy past discrimination. Noteworthy is the portion of the opinion in which Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, on the grounds that any race-based action designed to “remed[y] the present effects of past racial discrimination” should be upheld if it was “substantially related” to the achievement of an “important governmental objective.” Id. at 518-19. Finally, the promotion policy which was imposed upon the Alabama Department of Public Safety in Paradise, 480 U.S. at 167, 185, was also upheld because of the existence of past and present discrimination by that department.
This was not, however, an entirely consistent pattern. The affirmative action programs in some cases were sustained without any particular emphasis on prior or existing discrimination.\textsuperscript{340} In addition, mixed in with these opinions sustaining affirmative action programs were a number of other opinions which struck down other affirmative action plans.

For example, the Court struck down a plan pursuant to which a school board would have adopted a system which included race-based preference in deciding which teachers to layoff.\textsuperscript{341} Similarly, a program which called for a set aside of thirty percent of city contracts to be awarded to racial and ethnic minorities was also found to be unconstitutional.\textsuperscript{342}

In fact, the most striking pattern which emerged over the years was a pattern of intense disagreement among members of the Court about the proper way in which to evaluate affirmative action programs. This issue produced a record number of opinions. Not only were there an amazing number of affirmative action cases, many of the cases resulted in a number of separate opinions on the constitutional issues. In fact, in many instances the Court was so divided that it could not produce a majority opinion.\textsuperscript{343}

The issue which most troubled the Court was the appropriate standard of review for affirmative action programs. The disagreement started with \textit{Bakke},\textsuperscript{344} in which Powell wrote that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."\textsuperscript{345} At the same time, four Justices in that case would have applied a less stringent standard of review to racial classifications "designed to further remedial purposes."\textsuperscript{346}

In 1979, the Court, in \textit{United Steelworkers of America v. Weber},\textsuperscript{347} specifically upheld a voluntary affirmative action plan adopted by a private employer. By a 5-2 vote, the Court held that Title VII did not

\begin{itemize}
  \item \textsuperscript{340} \textit{See Metro Broadcasting}, 497 U.S. at 547; \textit{Sheet Metal Workers' Int'l}, 478 U.S. at 421.
  \item \textsuperscript{341} \textit{Wygant v. Jackson Bd. of Ed.}, 476 U.S. 267 (1986).
  \item \textsuperscript{342} \textit{City of Richmond v. J.A. Croson Co.}, 488 U.S. 469, 511. (1989).
  \item \textsuperscript{343} \textit{See, e.g., Sheet Metal Workers' Int'l}, 478 U.S. 421 (plurality opinion with separate opinions by Brennan, Powell, O'Connor and Rehnquist); \textit{Wygant}, 476 U.S. 267 (plurality opinion authored by Powell in which Justice White concurred only in the judgment and in which four Justices dissented, in two separate opinions); \textit{Fullilove}, 448 U.S. 448 (separate opinions by Chief Justice Burger and Justices Powell, Marshall, Stewart and Stevens). 
  \item \textsuperscript{344} 438 U.S. 265 (1978).
  \item \textsuperscript{345} \textit{Id.} at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).
  \item \textsuperscript{346} 443 U.S. 193 (1979).
  \item \textsuperscript{347} \textit{Id.} at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).
\end{itemize}
condemn all race-conscious affirmative action plans. Rather, the Court determined that race-conscious plans are permissible if they are designed to remedy a “manifest racial imbalance ... in traditionally segregated job categories.” In addition, the plan is not permitted to “unnecessarily trammel the interests of [other] employees.” The test enunciated in this case is clearly different from traditional formulations of strict scrutiny, but is not easily classified as intermediate or relaxed scrutiny either.

One year later, in *Fullilove v. Klutznick*, the Court again addressed the appropriate standard of review for affirmative action programs without specifically adopting any readily accepted standard of review. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.” Chief Justice Burger was careful, however, to specify that the analysis which had been used by Justice Powell in *Bakke* was not being adopted by him. Instead, his opinion employed a two-part test which required a finding that the objectives were “within the power of Congress” and that the use of racial or ethnic criteria was “a constitutionally permissible means for achieving the congressional objectives.”

Justice Powell wrote separately to express his view that the plurality opinion had essentially applied “strict scrutiny” as described in his *Bakke* opinion. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment, on the grounds that any race-based action designed to “remed[y] the present effects of past racial discrimination” should be upheld if it was “substantially related” to the achievement of an “important governmental objective.” Justice Stewart, joined by then-Justice Rehnquist, dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications and that the program before the Court failed that standard. Justice Stevens also dissented, arguing that “[r]acial classifications are simply too perni-

348. *Id.* at 208.
349. *Id.* at 208-09.
350. *Id.* at 208.
351. 448 U.S. 448 (1980).
352. *Id.* at 491.
353. *Id.* at 492.
354. *Id.* at 473 (emphasis omitted).
355. *Id.* at 496.
356. *Id.* at 518-19 (Marshall, J., concurring). In other words, such classifications should be subject only to what is now referred to as “intermediate scrutiny.”
357. *Id.* at 523 n.1.
cious to permit any but the most exact connection between justification and classification."\textsuperscript{358}

The proper standard of review was also at issue in \textit{Wygant v. Jackson Board of Education}.\textsuperscript{359} In \textit{Wygant}, the plurality opinion appeared to adopt strict scrutiny, inquiring as to whether the layoff policy was "supported by a compelling state purpose and whether the means chosen to accomplish that purpose [were] narrowly tailored."\textsuperscript{360} This view was not, however, espoused by a clear majority of the Court. Justice White concurred only in the judgment,\textsuperscript{361} and four Justices dissented. Three of the dissenting Justices again argued for intermediate scrutiny of remedial race-based government action.\textsuperscript{362}

The views of various members of the Court on the proper standard of review in affirmative action cases were also brought into focus in \textit{United States v. Paradise}.\textsuperscript{363} In that case, Justice Brennan concluded that the governmental interest in remedying past and present discrimination was compelling and that the plan under review was "an effective, temporary, and flexible" method of achieving that objective.\textsuperscript{364} Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, dissented, insisting that the plan should have been judged under strict scrutiny, and that if this standard was applied the plan would fail because it was not "narrowly tailored" to meet the governmental objectives.\textsuperscript{365}

It was not until 1989 that a clear majority developed with regard to the appropriate standard of review for racial classification schemes. In \textit{City of Richmond v. J.A. Croson Co.},\textsuperscript{366} a majority of the Court finally held that race-conscious preferences should be evaluated under strict scrutiny.\textsuperscript{367}

The apparent certainty offered by \textit{Croson} was short lived. One year after \textit{Croson} was decided, the Court complicated matters by deciding \textit{Metro Broadcasting, Inc. v. FCC}\textsuperscript{368} in such a way as to again confuse the issue as to the appropriate standard of review for race-based clas-

\begin{itemize}
  \item \textsuperscript{358} \textit{Id.} at 537.
  \item \textsuperscript{359} 476 U.S. 267 (1986).
  \item \textsuperscript{360} \textit{Id.} at 274.
  \item \textsuperscript{361} \textit{Id.} at 294-95.
  \item \textsuperscript{362} \textit{Id.} at 301-02 (Marshall, J., dissenting).
  \item \textsuperscript{363} 480 U.S. 149 (1987).
  \item \textsuperscript{364} \textit{Id.} at 167, 185.
  \item \textsuperscript{365} \textit{Id.} at 196-97 (O'Connor, J., dissenting).
  \item \textsuperscript{366} 488 U.S. 469 (1989).
  \item \textsuperscript{367} \textit{Id.} at 493-94. Justice Scalia concurred in the judgment stating that he agreed "with Justice O'Connor's conclusion that strict scrutiny must be applied to all governmental classifications by race." \textit{Id.} at 520 (Scalia, J., concurring).
  \item \textsuperscript{368} 497 U.S. 547 (1990).
\end{itemize}
sification schemes. In *Metro Broadcasting*, the Court repudiated the long-held notion that race-based classifications imposed by the Federal Government should be judged by the same standards as similar classifications employed by state governments. Even though *Croson* had just determined that race-based classifications imposed by State governmental units must be evaluated under "strict scrutiny," the *Metro Broadcasting* opinion stated that "benign" federal racial classifications need only satisfy intermediate scrutiny. The broadcast policies at issue in that case were upheld because they served the “important governmental objective of broadcast diversity,” and were “substantially related” to that objective. This result was reached despite a finding by the Court that the FCC policies in question were not intended as a remedy for past discrimination.

This schism between the analysis required when evaluating race-based classification schemes imposed by state and local governmental units and the Federal Government existed until June 12, 1995, when the Court expressly repudiated that part of the *Metro Broadcasting* opinion. In *Adarand Constructors, Inc. v. Pena*, the Court was faced with a challenge to federal laws offering financial incentives for general contractors on government contracts to hire subcontractors controlled by “socially and economically disadvantaged individuals,” a group which presumptively included members of racial minorities. In *Adarand*, a subcontractor who submitted the low bid on a federal highway project was rejected in favor of a small business controlled by “disadvantaged” individuals. The subcontractor’s legal challenge to that determination was that the race-based presumptions included in the subcontractor clauses of the government contracts violated his right to equal protection. The lower courts, obediently following *Metro Broadcasting*, evaluated the race-based classification scheme under intermediate scrutiny and upheld the challenged policies.

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369. 488 U.S. at 493-94.
370. Benign federal racial classifications, the Court said, “even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.” *Metro Broadcasting*, 497 U.S. at 564-65.
371. Id. at 566-67.
372. Id. at 569.
374. Id. at 2103.
375. Id. at 2104.
376. Id.
The Supreme Court reversed, finding that the appropriate standard of review had to be strict scrutiny:

Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that Metro Broadcasting is inconsistent with that holding, it is overruled.

Unfortunately, the Court's opinion gives little guidance as to when race-conscious remedial programs will be deemed to satisfy strict scrutiny. Justice O'Connor does suggest that racial classifications will "seldom" be justified. However, the constitutionality of the remedial program at issue in Adarand was not addressed by the Court, which remanded the matter for a determination by the lower court under the new standard announced in Justice O'Connor's opinion.

Justice O'Connor's opinion does specifically address the notion, originated by Justice Marshall in his concurrence in Fullilove, that strict scrutiny is "strict in theory, but fatal in fact." Citing United States v. Paradise, Justice O'Connor noted that as recently as 1987, the Court had upheld a race-conscious program designed to remedy "pervasive, systematic, and obstinate discriminatory conduct." However, her opinion in Adarand offers no additional guidance on the subject of how strict scrutiny should be applied to race-conscious programs in the future.

Justice Scalia, in his pivotal concurring opinion, would have given clear guidance on the issue of how strict scrutiny should be applied. He would have found that the "government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."

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378. Adarand, 115 S. Ct. at 2118. The opinion of the Court was written by Justice O'Connor. Chief Justice Rehnquist and Justices Kennedy, Thomas and Scalia joined in most of the opinion. Id. at 2101.
379. Id. at 2113.
380. Id. at 2113 (quoting Fullilove v. Klutznick, 448 U.S. 448, 534 (1980) (Stevens, J., dissenting)).
381. Id. at 2118.
382. Justice Thomas also wrote a separate concurrence. 115 S. Ct. 2119.
383. Fullilove, 448 U.S. at 519.
384. Adarand, 115 S. Ct. at 2117.
386. Adarand, 115 S. Ct. at 2117 (quoting Paradise, 480 U.S. at 190).
387. Id. at 2118-19 (Scalia, J., concurring).
388. Id. at 2118.
Justice Thomas concurred in the conclusion that "strict scrutiny applies to all government classifications based on race." Like Scalia, however, Thomas is fundamentally opposed to programs which distribute benefits on the basis of race, regardless of motivation. "In my mind," he wrote, "government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple." Regardless of the lack of certainty as to the proper application of the test, it is finally clear that affirmative action programs which give preferential treatment based on racial classifications are permissible so long as they are supported by a compelling state interest and are narrowly tailored to meet those interests. The question remains as to whether this is a desirable rule, or whether Justices Scalia and Thomas are right in asserting that "benign" discrimination is not a proper way of remedying the evils of past discrimination.

C. Justifications for Affirmative Action

Commentators have advanced three principle justifications for affirmative action programs: to compensate for past discrimination, to correct existing discrimination, and to redistribute society's resources more equitably. A closer examination of these arguments reveals that affirmative action programs which provide for differential treatment based on race have not been particularly successful in remedying the effects of past discrimination, correcting existing problems, or redistributing resources in an equitable fashion. Even worse, too often such programs have been counterproductive and actively harmful to society, including those members of society who affirmative action was designed to assist.

389. Id. at 2119 (Thomas, J., concurring).
390. Id. (footnote omitted).
391. These labels are not original. Other scholars have described the goals of affirmative action as fitting into one or more of these three general objectives. See, e.g., Brest & Oshige, supra note 288, at 856 (suggesting diversity, compensatory and distributive justice as broad rationales for affirmative action in the law school setting); Harris & Narayan, supra note 109, at 14-17 (discussing the compensatory rationale and the goal of a more equal society); Donald P. Judges, Light Beams and Particle Dreams: Rethinking the Individual vs. Group Rights Paradigm in Affirmative Action, 44 U. ARK. L. REV. 1007, 1009-17 (1991) (listing all three justifications for affirmative action programs); Don Munro, Note, The Continuing Evolution of Affirmative Action under Title VII: New Directions After the Civil Rights Act of 1991, 81 VA. L. REV. 565, 580 n.57 (1995) (discussing the compensatory and remedial purposes of affirmative action).

Of course, not all proponents of affirmative action accept each of these justifications. For example, Professors Harris and Narayan are avid supporters of affirmative action, but they disavow the notion that it is or should be viewed as compensatory in nature. See Harris & Narayan, supra note 109, at 14-17.
Admittedly, the goals of affirmative action programs are laudable. There are plenty of valid reasons for providing victims of discrimination with adequate compensation, for eradicating existing patterns of discrimination and the residual disparities in position and power which it has caused, and for seeking a fairer allocation of our limited societal resources. Unfortunately, affirmative action is not the way to achieve these goals, however commendable. In fact, such programs can act as a barrier to achieving racial equality in this country.\(^\text{392}\)

First, it is troubling that years after affirmative action at its most intensive, the plight of Black Americans in general has not improved significantly,\(^\text{393}\) while the attitude of many Whites seems to be that affirmative action has virtually replaced merit as a basis for allocating educational and professional opportunities.\(^\text{394}\) The dramatically negative assumptions which seem so prevalent among some Whites do not seem to be based on a corresponding dramatic improvement in the lives of those who would seem to most need the assistance implicit in

\(^{392}\) The objections to affirmative action raised in this Article are not founded on the belief that no one deserving of special consideration has ever benefited from such programs. Undoubtedly, there are a number of such individuals who have achieved their successes directly or indirectly because of affirmative action programs. Nor is it true to say that affirmative action necessarily means that opportunities in either education or employment are reserved for those who are somehow less worthy or less able than those not benefited by such programs. The objections to affirmative action raised in the Article are more deeply rooted in the general problems inherent in any governmental program which attempts to justify differential treatment based on the race of those involved.

\(^{393}\) Julius Chambers, Protection of Civil Rights: A Constitutional Mandate for the Federal Government, 87 Mich. L. Rev. 1599, 1612 (1989) (noting that both economic and social inequality based upon race still exists in the United States). The grim statistics which back up these claims seem indisputable. Black children are twice as likely as White children to be born prematurely, live in substandard housing, and die within the first year of life. Children's Defense Fund, Key Facts, supra note 107. The same source suggests that more than forty percent of Black children live in poverty. Id.

In fact, the plight of Blacks seems to have worsened in recent years. For example, Blacks have suffered an overall decline in relative income and educational levels in the past decade. See William J. Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy 109-10 (1987) (noting a similar decline in the Sixties, Seventies, and early-Eighties). The disparity between Whites and Blacks is especially troubling. In 1990, the median income for White households was $31,231, while the average income for Black households was a paltry $18,676. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States: 1992 445 tbl. 696 (112th ed. 1992).

\(^{394}\) Professors Harris and Narayan characterize this as the “myth” of preferential treatment. In their view, affirmative action does not come close to overcoming the barriers to success imposed by society on Blacks. Harris & Narayan, supra note 109, at 11-14. Nonetheless, one recent study showed that only thirty-one percent of Whites felt affirmative action was necessary, compared to eighty-one percent of Blacks. Audrey Edwards, Race in America: Report, Fam. Circle, Oct. 10, 1995, at 83, 84. The quotation used to sum up the White perspective was: “Today, the group most discriminated against is white males. . . . We got the message; we made corrections — get on with it.” Id.
the promise of affirmative action. A closer examination of each of the asserted rationales for benign affirmative action seems to reveal a distressing pattern of failed objectives and backlash against the well-motivated attempt to alleviate the lingering effects of societal discrimination against Blacks.

1. Compensating for Past Discrimination and Correcting Existing Discrimination

Attempts have been made to justify affirmative action programs on the basis that they are compensatory in nature and that they are designed to alleviate continuing discrimination. These explanations stem first from the observations that past discrimination has imposed injuries which should now be remedied and that there are continuing patterns of discrimination which need to be addressed. Based on these observations, some supporters of affirmative action have drawn the conclusion that race-conscious programs are the way to effect appropriate compensation for the harms inflicted by past discrimination or to deal with continuing discrimination. Because these two justifications are so closely related, this Article will address them together.

Certainly, it is beyond dispute that there have been terrible incidents of injustice in this country, many of which were perpetrated against individuals on the basis of their race. The imposition of slavery upon Blacks and the genocidal treatment of Native Americans are the most dramatic examples of racial injustice, although there are numerous other incidents of discrimination which have occurred in modern history. The problem with the compensatory rationale for affirmative action programs is not that there has been no injury, not that there is no need or merit to the idea that those who have been injured deserve reparations, and not that discrimination is no longer a problem. Rather, the problem is that affirmative action programs aimed at all members of a particular race are not an appropriate or, as importantly, an effective remedy for those harms.

The grossly unfair and discriminatory treatment of Japanese-Americans during World War II provides a clear illustration of why the compensatory and corrective rationales do not support the use of preferences based on race as an appropriate response to past or continuing inequalities. Admittedly, individuals of Japanese descent who

were unfairly subject to curfews\textsuperscript{396} or excluded from certain areas in California\textsuperscript{397} during World War II suffered injury. A compelling argument can be, and has been, made that they should be compensated for those harms.\textsuperscript{398} However, it is also abundantly clear that the remedy should not be awarded solely on the basis of race, even though the harm was inflicted because of race. First, not all Japanese-Americans were hurt as a result of the discriminatory policies. To treat all Japanese-Americans as deserving of special treatment now for misconduct in the past trivializes the harm actually done to some Japanese-Americans and provides an unearned windfall to many others. Second, assigning a remedy based solely on race provides no basis for determining the degree of harm suffered by particular individuals or the magnitude of the appropriate remedies in particular cases. Compensation should be based on the injury suffered by individuals and, therefore, should be tailored to the circumstances of those actually disadvantaged. This necessitates an individualized approach to remediing discrimination, rather than the group approach inevitably taken if broad racial classifications are used to determine the applicability of preferential programs.

These arguments apply with equal force to affirmative action programs designed to provide special opportunities to Blacks. Clearly, if the discussion is limited to academia and the work place, not all Blacks have been discriminated against to a material degree. Admittedly, virtually all Blacks in our society suffer, to some degree, humiliation and stigmatization inflicted by racists and those who act based on racist assumptions, perhaps even without realizing that they do.\textsuperscript{399} That does not mean that all Blacks are materially disadvantaged with regard to education and employment opportunities. Shelby Steele, for example, has suggested that there are middle-class Blacks, such as his own two children, who “have never experienced racial discrimination, have never been stopped by their race on any path they have chosen

\textsuperscript{396} Such curfews were upheld as constitutional in Hirabayashi v. United States, 320 U.S. 81, 104 (1943).
\textsuperscript{397} Such exclusions were upheld in Korematsu v. United States, 323 U.S. 214, 219 (1944).
\textsuperscript{398} This is, in fact, the conclusion recently reached by the United States Congress. The Civil Liberties Act of 1988 contained an apology to United States citizens and resident aliens of Japanese ancestry who were evacuated, relocated, and interned during World War II, and it provided for $20,000 payments as reparations. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, 906.
\textsuperscript{399} See Duncan, supra note 395, at 516-17 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting): “[I]t is unnecessary in 20th century America to have individual Negroes demonstrate that they have been the victims of racial discrimination; the racism of our society has been so pervasive that none . . . has managed to escape its impact . . . .”).
to follow,” notwithstanding the “racial insensitivity” to which they have been exposed.\textsuperscript{400}

In fact, affirmative action programs have been upheld even absent any finding of discrimination.\textsuperscript{401} If affirmative action is really to be justified on the basis that it is necessary to compensate for or correct existing discrimination, it is clear that the courts have taken the wrong track in affirmative action jurisprudence. This objection could easily be overcome, however, by retargeting affirmative action so that programs would be imposed only in the event of a finding of discrimination. However, even if this were to happen, the notion that affirmative action is an appropriate or desirable mechanism for awarding compensation for or correcting existing discrimination seems problematic.

Notwithstanding the regrettable fact that Blacks in our society are often the victims of negative stereotypes and of unfair patterns of behavior based on such misconceptions, generally speaking, affirmative action programs are not set up to remedy most of the myriad forms of discrimination which continue to exist. Such programs cannot force cabdrivers to stop for the Black pedestrian waiting for a ride; they cannot force shopkeepers to open their doors or provide equal service to Black customers; they cannot force passersby to stop to provide assistance in the event that a Black driver experiences car trouble.\textsuperscript{402} Worst of all, such programs cannot counteract the pervasive negative stereotypes about Blacks, which contribute to the patterns of behavior just described. Rather, they encourage the false and destructive notion that Blacks cannot succeed without special advantages.\textsuperscript{403}


\textsuperscript{401} For example, in United Steelworkers v. Weber, 443 U.S. 193, 209 (1979), the Court upheld a private, voluntary affirmative action plan simply on the basis that Blacks as a group had been historically excluded from the craft trades which would be affected by the plan at issue in the case. Similarly, in Fullilove v. Klutznick, 448 U.S. 448, 490 (1980), the Court upheld a federally imposed affirmative action program designed to provide relief to specifically identified minorities even absent any identifiable victims of past discrimination. Further, in Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971), the Supreme Court held that “good intent or absence of discriminatory intent” was not relevant when employment practices were challenged under Title VII.

\textsuperscript{402} These examples are not entirely random. For example, the picture of a Black man trying in vain to hail a cab in New York City is an image referred to frequently in literature addressing the issue of race. See West, supra note 290, at x.

\textsuperscript{403} It would be impossible to list all of the rebuttals to the notion that affirmative action proves that Blacks cannot succeed without special assistance. One might respond by noting that affirmative action offers marginal, even token assistance when considered in light of the overwhelming obstacles placed in the path of most Blacks. One might respond by noting that many Blacks did not achieve their success because of any affirmative action, but on their own merits. One might respond that too many Whites achieve their positions through unfair advantage (such
So what types of discrimination are race-conscious affirmative action programs generally designed to address? Typically, such programs are designed to assist in the inclusion of minorities in academic or training programs, to make sure that general employment opportunities are available to minorities, to see that minorities are offered certain positions in a defined arena, and to ensure that minorities are awarded a certain proportion of government contracts. Affirmative action is designed to remedy past and present discrimination in these areas, and such remedies are appropriate only to the extent that discrimination in education and employment has affected those afforded the remedy.

Consider the case of affirmative action programs designed to promote the hiring of Blacks into certain fields of endeavor. The problem which existed historically, and to some extent continues to exist, is that large numbers of Blacks were denied employment opportunities because of their race. Some of the evidence concerning the extent to which such discrimination continues is anecdotal, but there have been studies which show that when otherwise equal applicants apply for the same position, the color of one's skin does matter. One such study showed that White applicants received three times as many job offers as equally qualified Blacks. The question is whether it is appropriate to use broad racial classifications as a basis for awarding preferences in the hiring process as a solution to the inequities caused by past discrimination or to eliminate continuing patterns of employment discrimination.

as through family connections and the "good old boy" networks which operate to their exclusive advantage).

It certainly seems true that affirmative action should not be taken as evidence that Blacks can only succeed if they are given special advantages. Not only are the so-called advantages typically insignificant when measured against the disadvantages which Blacks often face, there are a number of Blacks who succeed without any such special assistance. Nonetheless, the evidence suggests that there is in fact considerable backlash against affirmative action, in the form of a widespread belief that Blacks cannot succeed on their own. For a more detailed discussion of such backlash against Blacks as a result of affirmative action, see infra notes 421-26 and accompanying text.

406. See Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) (addressing a program in which no greater percentage of minority employees could be laid off than were currently employed).
There are a number of objections to affirmative action in this context. First, broad racial classifications are likely to result in undeserved windfalls to some. The following example illustrates this problem. Take the case of a young Black woman, from a middle-class background, who was admitted to an elite educational institution as a result of affirmative action programs. As a new graduate, she may be offered employment on the basis of her race notwithstanding the fact that, as a new member of the job force, there is no possibility that she has been the victim of past employment discrimination. This illustration is particularly important because new graduates of elite institutions are likely to be the hottest prospects for firms with affirmative action programs. Thus, the very people such programs are most likely to help are those who are least likely to have been significantly disadvantaged in the past.410

Another problem with affirmative action programs is that they are likely to offer inadequate recompense to those who have suffered actual injury. In reality, most Blacks who were denied equal access to jobs in the past are not going to be in a position to benefit from affirmative action programs designed to reach Blacks today. For the most part, the Blacks who were discriminated against in the past will have moved on. Even where discriminatory practices continue, offering opportunities solely on the basis of race does nothing to guarantee that those who were discriminated against will be the ones hired, promoted, trained or retained. The unfortunate reality is that affirmative action is not well suited to be a remedy for past or existing patterns of discrimination.

It is true that many Blacks, in a sense, suffer from the effects of residual discrimination. The continuing disparity in family incomes perpetuated when Blacks were forced into lower-paying, less-desirable jobs is a particularly significant example of how past discrimination can have a negative impact on persons other than the individuals actually denied a particular job.411 The negative stereotypes which might be attributable to the fact that observers tend to see Blacks in

410. See infra notes 414-21 and accompanying text (discussing how affirmative action helps those who need it least).

411. For example, in 1988, the median income of Black families was only 57% that of Whites. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 450, tbl. 727 (110th ed. 1990). In fact, between 1970 and 1986, the proportion of Black families with incomes of less than $10,000 grew from 28.8% to a staggering 30.2%. Derek T. Dingle, An Agenda for the Black Middle Class, BLACK ENTERPRISE, Nov. 1989, at 53, 55. In 1991, the median income of Black families was $21,423 while that of Whites families was $36,915. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE STATISTICAL ABSTRACT OF THE UNITED STATES: 1992, at 451 (112th ed. 1992) [hereinafter 1992 CENSUS]. In addition while only 10.7% of Whites lived below the poverty line, 31.9% of Blacks lived below that line. Id. at 457.
menial rather than managerial positions can also impact on more people than the individuals actually relegated to menial roles. Does it necessarily follow, however, that because Blacks are stigmatized and many have had to grow up in poverty, the appropriate remedy is to award benefits on the basis of race alone?

The answer to that question must lie in deciding what harms affirmative action is really designed to remedy. In general, when the law speaks of "remedies," it is referring to the need to address a particular harm. The particular harm which is usually identified when one looks at the need for affirmative action programs in employment is that certain individuals were wrongfully excluded from job opportunities in the past solely because of their race. That specific harm is limited to those who were wrongfully excluded and cannot be "remedied" by offering other persons similar opportunities.

If affirmative action is seen as a remedy for disparity in income, why is race used as a basis for awarding preferential treatment? Why is the solution not targeted to the problem, with special opportunities being reserved for individuals who have grown up in low-income homes?

Most evidence suggests that affirmative action programs benefit primarily middle-class Blacks, which means that those programs benefit least those who need the assistance most. Numerous commentators have decried this unfortunate reality. For example, Professor Donald Judges has concluded that "[a]ffirmative action in the workplace, like its counterpart in the school system, has done little or nothing to relieve the plight of the underclass." Others have commented on the fact that affirmative action programs seem geared towards highly skilled professions, which are simply not generally accessible to the

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The problems of the underclass actually go far beyond income alone. In 1986, 45.3% of those behind bars in America were Black. Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 197 (1992). In 1990, the unemployment rate among Blacks was 11.3% compared to 4.1% for Whites, and in every year since 1975, the unemployment rate for Blacks has exceeded 10%. Id. at 103. The average SAT score for Blacks is 737; for Whites it is 933. Id. at 142. The life expectancy at birth for White females in 1989 was 79.2 years, Black females 73.5 years, White males 72.7 years, and Black males 64.8 years. 1992 Census, supra, at 77.

412. For a discussion of how such observations about individual Blacks can spread negative stereotypes about Blacks in general, see infra note 272.

413. For example, Stephen L. Carter suggests that affirmative action is essentially "irrelevant" to millions of Black Americans. Carter, supra note 57, at 7.

414. Donald P. Judges, Bayonets for the Wounded: Constitutional Paradigms and Disadvantaged Neighborhoods, 19 Hastings Const. L.Q. 599, 644-45 (1992); accord America's Wasted Blacks, Economist, Mar. 30, 1991, at 11 ("[T]he real problem is that it [(affirmative action)] reaches mainly those who need it least. The chief beneficiaries of affirmative action are university students and black businessmen, who are the blacks most likely to succeed anyway. It does not touch most poor blacks' lives.").
The failure of affirmative action to reach the poorest individuals is perhaps clearest in the employment context because illiteracy, which is rampant among the most disadvantaged segments of our society, is a virtually absolute bar to consideration. As scholar Cornel West has noted with regret, affirmative action is "neither a major solution of poverty nor a sufficient means to equality."\(^{417}\)

The general failure of affirmative action to address the needs of those Blacks who live in the worst of conditions is, in fact, one of the objections to affirmative action raised by Derrick Bell and some critical race theorists.\(^{419}\) None of these individuals believe that race-bias does not exist or that we should ignore the problems of racial discrimination. Rather, they are all concerned that affirmative action seems to be viewed as a panacea, when in reality it does little to help those who need the most help today.

The fact that affirmative action programs generally do a poor job of targeting those who are in the worst shape has even been commented upon by Supreme Court Justice Stevens, who noted in his dissent in Fullilove v. Klutznick that "those who are the most disadvantaged...\(^{415}\)

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416. It is estimated that nearly forty percent of minority youths are functionally illiterate. See N. Francis, *Equity and Excellence in Education*, in ASSOCIATION OF BLACK FOUNDATION EXECUTIVES CONFERENCE PROCEEDINGS 73 (1985).

417. West, supra note 290, at x.

418. Professor Bell, who reluctantly supports affirmative action as the only game in town, characterizes it as "the latest contrivance the society has created to give blacks the sense of equality while withholding its substance." Derrick Bell, *Xerxes and the Affirmative Action Mys- tique*, 57 GEO. WASH. L. REV. 1595, 1598 (1989); see also DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 140-61 (1987).

419. Indeed, the primary objection to affirmative action which is made by critical race theorists is that affirmative action is ineffective. See Carlos J. Nan, *Adding Salt to the Wound: Affirmative Action and Critical Race Theory*, 12 LAW & INEQ. J. 553 (1994). Richard Delgado complains that affirmative action programs were "designed by others to promote their purposes, not ours." Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model?*, 89 Mich. L. REV. 1222, 1226 (1991). In his opinion, "affirmative action serves as a homeostatic device, assuring that only a small number of women and people of color are hired and promoted." Id. at 1224.
are the least likely to receive any benefit[s] from the special privilege."

While it may be true that affirmative action helped establish the Black middle class, the fact is that such programs today tend to concentrate on those who have already reached that level of success and no longer seem to have as compelling a claim to the need for special consideration. There is little evidence that the underclass benefits significantly from affirmative action programs. The failure of affirmative action to focus on the underclass is compounded by the fact that it diverts attention from the underclass by focusing on strategies which offer the most disadvantaged little hope. While there is nothing inherent in the nature of race-conscious affirmative action programs which would preclude testing other programs, the economic and political reality is that while we retain current affirmative action programs, we are not likely to look at other solutions to racial inequality. Alternatively, if affirmative action is to be justified as a remedy for negative stereotypes, one must ask whether affirmative action is an appropriate vehicle to remedy this problem. Is it not at least as likely that affirmative action programs will perpetuate the very stereotypes about Black inadequacies which one would hope they would remedy? This is the problem of backlash.

Affirmative action programs undeniably foster the notion that Blacks cannot succeed without special privileges. The stigmatizing effects of affirmative action have been commented on by a number of Supreme Court Justices in their opinions on affirmative action.

421. See, e.g., THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 48-53 (1984) ("[I]t is precisely the disadvantaged who suffer most from affirmative action."); WILSON, supra note 393, at vii-19 (challenging liberals to change the way they approach the "ghetto underclass"); Judges, LIGHT BEAMS, supra note 391, at 1045-46 ("The final bitter irony is that affirmative action thus may represent more an accommodation of than a challenge to the status quo.") (emphasis omitted); Judges, supra note 414, at 647-59 (arguing that affirmative action programs create a caste society).
422. Even the most vehement supporters of affirmative action programs are profoundly concerned with the problems of backlash. See Harris & Narayan, supra note 109, at 3 ("In this Article we will focus on the pervasive backlash against race-based affirmative action policies . . . .") (emphasis in original).
423. E.g., Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (describing a FCC policy as "based on the demeaning notion that members of the defined racial groups ascribe to certain 'minority views'"); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) ("Classifications based on race carry a danger of stigmatic harm."); FULLILOVE v. KLUTZNICK, 448 U.S. 448, 545 (1980) (Stevens, J., dissenting) (stating that an affirmative action plan "inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").
ademicians and other commentators have also discussed the problems of backlash and stigmatization caused by affirmative action programs.\textsuperscript{424}

Because of this type of backlash and other problems, affirmative action programs have come to be regarded with hostility and suspicion.\textsuperscript{425} It is too easy to imagine a dejected and angry White job applicant complaining: “I didn’t get the job because it was reserved for some Black.” The clear implication is that the Black candidate was less qualified and only hired because of race. This in turn encourages or permits the false belief that successful Blacks only attained their

\textsuperscript{424} See, e.g., Sowell, \textit{supra} note 421, at 118 (“Among the insidious dangers are the undermining of minority and female self-confidence . . . .”); William Van Alstyne, \textit{Rites of Passage: Race, the Supreme Court, and the Constitution}, 46 U. Chi. L. Rev. 775, 787 n.38 (1979) (stating affirmative action plans “unquestionably impose a racial stigma on those who benefit by them”); Charles Murray, \textit{Affirmative Racism: How Preferential Treatment Works Against Blacks}, \textit{New Republic}, Dec. 31, 1984, at 18, 22 (“Every black who is hired by a white-run organization that hires blacks preferentially has to put up with the knowledge that many of his co-workers believe he was hired because of his race; and he has to put up with the suspicion in his own mind that they might be right.”); see also Nathan Perlmutter, \textit{Testimony of Anti-Defamation League of B’nai B’rith, in Selected Affirmative Action Topics in Employment and Business Set Asides: A Consultation/Hearing of the United States Commission on Civil Rights,} Mar. 6-7, 1985, at 200 (1985) (“Resentment by coworkers, and low expectation[s] by employers act as barriers to meaningful advancement.”); Morris B. Abram, \textit{Affirmative Action: Fair Shakers and Social Engineers}, 99 Harv. L. Rev. 1312, 1322-23 (1986) (recognizing that affirmative action will produce a group of persons who received their position on merit but are viewed as recipients of preference by others and even themselves, and are thus stigmatized); Terry Eastland, \textit{The Case Against Affirmative Action}, 34 Wm. & Mary L. Rev. 33, 41-43 (1992) (arguing that “implied inferiority” is the quality that earns minorities preferential treatment); Thomas G. Gee, \textit{Race-Conscious Remedies}, 9 Harv. J. L. & Pub. Pol’y 63, 67-68 (1986) (noting that quota systems encourage minorities to achieve victim status, not excellence); William B. Reynolds, \textit{Individualism vs. Group Rights: The Legacy of Brown}, 93 Yale L.J. 995, 1003 (1984) (arguing that affirmative action encourages us “to view their advancements not as hard-won achievements, but as conferred benefits”).

position because of their race and not as a result of hard work.\footnote{426} If affirmative action is supposed to combat the negative attitudes which confront Blacks today, it is clearly not an effective solution.

Finally, even when affirmative action programs do happen to match up someone who was improperly discriminated against in the past with specific opportunities made available through affirmative action today, there is no opportunity to make sure that the level of compensation is tied to the magnitude of past discrimination. By using a group-rights focus, the compensatory rationale falls short of justifying affirmative action in hiring.

When it comes to affirmative action programs in education, many of the same objections can be made. Even if one is willing to assume that such programs are effective in addressing the inadequacies of our educational system, the programs seem poorly designed to remedy the problems which Black students face, and they are both over- and under-inclusive. In addition, the problem of backlash also exists in the academic setting.

Another deficiency with the affirmative action solution to racial inequality is that many of the problems with educational systems which are being discussed today do not relate to the type of harms which affirmative action programs are designed to correct. Affirmative action in education is generally geared to admission to institutions of higher learning. Unfortunately, most of the recent criticisms of our educational system, at least insofar as it seems to have failed Black students, are not addressed to the exclusionary policies implemented by such institutions, but rather the inadequate preparation that Black students receive in public school. Complaints relate to the attitudes, sometimes subconscious, of public school teachers toward Blacks, racially insensitive curricular choices,\footnote{427} and the inadequacy of public schools in poorer neighborhoods which are predominantly Black. Affirmative action addresses none of these problems. Instead, affirmative action programs take students who are often inadequately prepared and thrust them into an academic environment where it is happenstance as to whether or not there will be adequate support services which are necessary to remedy the worst of the educational deficiencies which those students have suffered.

\footnote{426} In turn, this creates what has been labeled as "toxic" race relations in the workplace. Steven V. Roberts et al., \textit{Affirmative Action on the Edge}, \textit{U.S. News \\& World Rep.}, Feb. 13, 1995, at 32-33, 35, 37-38, (quoting Sharon Brooks Hodge, a Black writer and broadcaster).

\footnote{427} For example, Professor Brown recites a particularly traumatic experience where he was forced to endure an oral rendition of Mark Twain's "The Adventures of Huckleberry Finn," which includes multiple repetitions of the racial insult "nigger." Brown, \textit{supra} note 46, at 815-16.
The strongest compensatory argument in favor of this type of treatment is that the harms suffered by Black students in our public school system justify special race-conscious admissions programs. The argument is two-fold. First, because the harms of inadequate and insensitive education are inflicted on Blacks in general, the remedy can also be addressed to Blacks in general. Second, because of the failures of public schools to adequately prepare Black students for higher learning, preferential admissions programs are necessary to see that Blacks are not penalized for the public school system's failures.

One response to this argument is to look closely at the question of whether all Blacks really suffer from the problems which plague many Blacks in terms of educational disadvantages, or whether affirmative action targeted to all Blacks is over-inclusive. While many Blacks grow up in poorer neighborhoods and consequently attend poorer schools, this is certainly not universally true. The sons and daughters of middle-class Blacks escape the educational disadvantages imposed by poverty. Similarly, not all Blacks suffer equally from insensitive teachers and curriculum.

For example, in two of the three schools which my son has attended, teachers and administrators have gone out of their way to address issues important to Black Americans, including special topics addressing the contributions of Black Americans, the plight of Blacks in the innercities of this country, and the problems of racism and stereotyping. This is true even in the rural Arkansas school which my son currently attends, even though it has a very small percentage of Black students. Ironically, the one school which seemed to be less than sensitive to issues relevant to Black Americans was a middle school in New Jersey, where thirty percent of the student population was Black. A group of parents, who were concerned that there were no Black teachers in the entire school, set up a meeting with the principal to discuss the problem. Her response was that Black students had an appropriate role model—the hard-working janitor was Black.

Clearly, while incidents like this document the continuing problems in our educational system, such problems do not necessarily translate into a completely inadequate educational experience. For example, my husband and I carefully maintain friendships with a number of Black professionals, including law professors, school teachers, health care workers and others. The failure of one school system to expose

428. There are, of course, other rationales which support the inclusion of Blacks in academic programs, including the need for diversity. These other justifications will be addressed later. See infra notes 432-50 and accompanying text (discussing other rationales for affirmative action programs).
my son (and daughter) to adequate role models has been compensated for by our efforts, and my son’s overall educational experience is no worse than that of his White peers. Moreover, by all of the traditional indicia of educational success, my son is a star. He makes straight A’s, and he consistently scores well above the ninetieth percentile in national tests designed to measure academic performance.

Nonetheless, if current admissions programs continue, when my son applies for college, he will probably be given preference during the admissions process because of his race. This will be in spite of the fact that his education has been as complete as that of any of his White friends. Why then does he deserve special consideration? In fact, why is it assumed that he will need special consideration?

Ironically, those Black students who might have the best case for deserving special consideration in the admissions process are least likely to receive it. Black students in the poorest neighborhoods, who have been forced to attend the poorest schools while avoiding the twin perils of drugs and violence which are often rampant in the neighborhoods in which they live, can legitimately claim that they should receive some special consideration simply by having persevered enough to graduate from high school. Regrettably, these students are the ones least likely to benefit from special admission programs.

Special admission programs are most visible at the more elite institutions, where competition for positions is vigorous. Obviously, in an institution with open enrollment for all high school graduates, there is no need for a special admissions program to guarantee opportunities for minority students. However, the tuition and other expenses at elite institutions are typically very high, and the workload is rigorous. Frankly, the most disadvantaged high school graduates are unlikely to be able to compete for positions at such institutions. Not only are the expenses likely to be more than such students can afford, especially in this era of decreasing student aid, but the level of work required is probably also beyond them because of the inadequate preparation that they have received.

The other side of preferential admissions programs is that people like my son will probably be eligible for special admissions programs even if they do not “deserve” or need the assistance. It is particularly galling to think that, when my son goes to college, it is likely that some of his peers will assume he was admitted under some “special” admissions process and not because of his abilities and hard work. This attitude seems to pervade academia, where the widespread assumption seems to be that most minority students got their position because of special consideration rather than merit.
One other point is worth making in the context of affirmative action in the admission process. It has been suggested that such policies are a fair response to existing admission policies which unfairly advantage White applicants. It is undeniably true that there are admissions programs, particularly at some of the more prestigious educational institutions, which favor certain privileged White applicants. For example, the children of alumni and donors tend to receive preference in the admission process, particularly at the most elite institutions. Such preferences obviously favor wealthier, White applicants to the disadvantage of all others. However, there is a better solution to the inequalities posed by such policies than race-conscious admissions programs. Since family relationships and wealth do not translate to academic ability or promise, they should not be used as factors in the admission process. Eliminating unfair preferences is a far better solution to the problem than race-conscious admissions decisions, which aid only those of the preferred race rather than all of those unfairly excluded by virtue of their failure to have proper family connections.

In the end, it does not seem that there is a particularly strong case for viewing race-conscious admission programs as an appropriate vehicle for compensating for past and present inequalities in education. Not only are most forms of racial prejudice in our educational system unaffected by affirmative action, the programs are not limited to persons actually denied equal educational opportunities as a result of racial inequalities. Moreover, the legacy of racism disproportionately affects those Blacks who are raised in poverty and who attend the poorest schools, and it is those individuals who are least likely to be in a position to benefit from the educational opportunities created by affirmative action. Finally, affirmative action programs tend to reinforce the belief that Blacks cannot make it on their own, without help, as well as the misconception that any Black who succeeds must have been the beneficiary of affirmative action.

The indisputable facts that Blacks have been the historical victims of discrimination, and that the legacy of such discrimination continues in the underrepresentation of Blacks in both academia and major segments of our economy, are insufficient to support the conclusion that affirmative action programs are necessary to compensate the victims of such discrimination. There have to be other ways to remedy discrimination than by implementing discriminatory counter-measures. The old adage that two wrongs do not make a right seems appropriate.

429. See Harris & Narayan, supra note 109, at 33-34.
in this context. "Because race is not a factor indicating anything about the moral worth or persons, race is morally irrelevant to state laws and policies." Rather than continuing to implement and enforce policies which require differential treatment based on race, we ought to be focusing on rules which prohibit discrimination in any form. This would seem to be the approach most closely aligned with the ideal of correcting the past wrongs of racial discrimination. The hope that affirmative action will be a successful response to the problems of discrimination is not borne out by the evidence. Programs fail to reach most of those who need them most, and by diverting attention and resources away from programs which might be targeted to the underclass in our society, affirmative action seems to have outlived its marginal usefulness as a compensatory or corrective tool.

2. Redistributive Justice

Perhaps the most persuasive justification for affirmative action programs which offer preferential treatment to members of favored groups is the notion of redistributive justice. In other words, preferential treatment is justified as one step towards a more just society. Because historical policies have resulted in an unfair and unjust division of resources, we should reallocate those resources more equitably. Affirmative action is touted as one method of achieving this more equitable allocation of resources.

Again, it is beyond question that not only have many members of minority racial groups been the victims of individualized discrimination, on average they are more likely to be among the most chronically disadvantaged members of society. The biggest objection to affirmative action as a solution to the unfair allocation of society's resources is that it is not much of a solution to that problem.

As discussed above, affirmative action programs benefit most those who need it least and divert resources and attention from programs which would focus on those most needing extra assistance. These criticisms go a long way in explaining the problems with using affirmative action as a mechanism for redistributing scarce resources. Of

431. See Nan, supra note 419, at 561-62.
432. See supra note 411 (discussing the fact that the incomes for blacks are generally lower than incomes for whites).
433. See supra notes 414-21 and accompanying text (discussing the fact that affirmative action programs allegedly benefit those who need the programs the least).
434. See supra note 421 and accompanying text (demonstrating that affirmative action programs place a burden on the lower socioeconomic class).
course, the alleged distributive benefits of affirmative action include more than the immediately obvious opening of educational and employment opportunities to underrepresented groups. For example, affirmative action has also been defended as eliminating negative stereotypes, helping to provide positive role models, and increasing diversity. In reality, there is too much evidence that none of these laudable goals are well served by affirmative action.

First, as discussed above, affirmative action programs do not eliminate negative stereotypes. In fact, the reverse is more likely to be true. Authorities discussing the stigmatizing effects of affirmative action programs are legion. Affirmative action stigmatizes by creating and reinforcing the false impression that Blacks and other minorities can succeed only if given special preferences, and that they can be the “best” only when compared to others of their race, not when compared to all others. All too often, even those who achieve success without being given preferential treatment are treated as if their success were attributable not to their own efforts, but rather to the affirmative action programs ostensibly designed to level the playing field and reduce the very stereotypes they actually foster.

The notion that affirmative action programs are likely to provide positive role models is also doubtful. First, affirmative action is likely to reach those from the neighborhoods most in the need of positive role models only rarely. The success achieved by a middle-class Black is not likely to be perceived as generally attainable by Blacks living in the urban ghetto. Only if affirmative action was consistently successful in reaching the poorest communities would it be fair to applaud such programs as giving the neediest positive role models. In order to avoid the impression that there is room only for a token handful of truly disadvantaged Blacks in academia or business, there would have to be a reasonable number of the poorest Blacks succeeding because of affirmative action. It is all too likely that individuals left behind in the inner city slums will have adequate role models only if there are success stories in more than token numbers from among people like

435. See Kennedy, supra note 415, at 1337-41 (critiquing objections to using “motive analysis” as part of a broader policy analysis); see also Duncan, supra note 395, at 525-26 (listing the promotion of minority role models as one widely-recognized advantage of affirmative action); Patricia J. Williams, Comment, Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times, 104 Harv. L. Rev. 525, 544-46 (1990) (suggesting that diversity is a driving force behind affirmative action).

436. See supra notes 421-24 and accompanying text (arguing that affirmative action programs have an adverse impact on minorities).

437. For a ringing condemnation of the “best Black” phenomenon, see Carter, supra note 57, at 7.
them. And unfortunately, affirmative action is not targeted to reach such people in numbers. As discussed earlier, most of the beneficiaries of affirmative action are those who have already achieved a measure of success. Not only does affirmative action focus on the least needy members of disadvantaged groups, it removes attention from the real underclass and, in this way, affirmative action may actually serve to prevent the adoption of programs which would really insure the presence of effective role models.438

Nor is it fair to say that a success story for any Black translates into role models for all Black youth. For example, it is highly doubtful that many poor Black youths desire to accept Supreme Court Justice Clarence Thomas as a role model. While he may have risen to the pinnacle of the legal profession and is a success from any professional perspective, he is also widely viewed as having "sold out" his Black brothers.439 He is not seen as a hero to be emulated, despite his "success."

438. See supra note 421 (arguing that affirmative action programs fail to benefit those people who need the programs the most).

439. Many Blacks condemned Clarence Thomas for his conservative views which were generally viewed as antithetical to Black interests. E.g., Charles R. Lawrence, The Epidemiology of Color-Blindness: Learning to Think and Talk About Race, Again, 15 B.C. THIRD WORLD L.J. 1, 9 (1995) (comparing Clarence Thomas to A. Philip Randolph, Thurgood Marshall and Nolan Richardson, all of whom have evidenced a respect and compassion for those who are Black that Thomas seems to lack); Trevor W. Coleman, Doubting Thomas: Some of Clarence Thomas Former Supporters Feel Betrayed, ETHNIC NEWSWATCH EMERGE, Nov. 30, 1993, at 39, 41 (suggesting that Clarence Thomas was "the worst kind of racist—a black man who hates himself") (quoting Alice Presley); Lena Williams, In a 90's Quest for Black Identity: Intense Doubts and Disagreement, N.Y. TIMES, Nov. 30, 1991, at A1 ("Many blacks questioned the "blackness" of a man who embraces a conservative philosophy and is married to a white woman."). The condemnation was so significant that it led many Blacks to oppose the nomination of Clarence Thomas to the Supreme Court. See Congressional Black Caucus Foundation, In Opposition to Clarence Thomas: Where We Must Stand and Why, in COURT OF APPEAL: THE BLACK COMMUNITY SPEAKS OUT ON THE RACIAL AND SEXUAL POLITICS OF CLARENCE THOMAS VS. ANITA HILL 231-54 (Robert Chrisman & Robert L. Allen eds. 1992); NAACP, The NAACP Position on Clarence Thomas: The NAACP Announces Opposition to Judge Thomas's Nomination, in COURT OF APPEAL: THE BLACK COMMUNITY SPEAKS OUT ON THE RACIAL AND SEXUAL POLITICS OF CLARENCE THOMAS VS. ANITA HILL, at 269-71; Bill Sammon, Nominee Too Far Right: NAACP Leader Opposes Thomas, CLEV. PLAIN DEALER, Sept. 13, 1991, at 3C (quoting a local NAACP chapter head as saying about Thomas that "any black who wants the status quo is not black"); Ronald Walters, Thomas: Estranged from His "Blackness," WASH. POST, July 15, 1991, at A11 (criticizing Thomas' record and views, and noting that Thomas "will be found not to be the 'black' nominee to the court, because 'blackness' ultimately means more than color; it also means a set of values from which Thomas is apparently estranged").

The opposition to the nomination of Clarence Thomas from the Black community was especially surprising in light of the typical patterns of Black solidarity. A. Leon Higginbotham, Jr., Justice Clarence Thomas in Retrospect, 45 HASTINGS L.J. 1405, 1407 (1994) ("It was a significant event when the national delegates of the premier professional bar association of African-Americans, dedicated to the concept of advancing Black lawyers into positions of power, were so
In the end, even if affirmative action programs produce some role models from whom others can derive the belief that they too can succeed, it is a false hope unless the programs do indeed make such opportunities available. When affirmative action does so little to help the underclass most in need of role models and most in need of special attention in order to make opportunities available, the promise of opportunity offered by the success of a few others is a false assurance which is likely to be at least as frustrating as having no obvious role models. To the extent that affirmative action diverts resources from better solutions, or solutions more closely targeted towards those who most need help to overcome the vestiges of past discrimination, it actually serves to increase racial tensions and frustration, because the promise that success is attainable is empty.

Finally, the ideal that affirmative action fosters diversity deserves attention. There is a benefit to be realized from being exposed to diverse viewpoints and perspectives, but the notion that the goal of diversity justifies affirmative action programs is questionable. On a theoretical level, diversity as an ends unto itself cannot be a sufficient justification for differential treatment based on race. Because everyone is in some sense unique, no matter whom one admits to an educational institution or whom one hires, diversity will be enhanced. Perhaps an individual adds to diversity by being left-handed, or Presbyterian, or red-headed, or Libertarian. Diversity becomes a justification for affirmative action based on race only if racial diversity is the desirable result.

If the real intent is to add to the subject population (of students or employees, depending on the context) those who have had to overcome economic adversity, or those who possess a particular political or theoretical perspective, that should be the criteria, instead of the race of the individuals involved. As the first section of this Article attempts to demonstrate, race in and of itself says very little about any particular individual. In fact, this precise comment has been made by some individuals who are themselves members of racial minori-
ties. Racial diversity becomes important if race is a useful proxy for real and relevant characteristics, and presumably if there is no other way to ascertain the actual presence of such characteristics in an individual.

Race has been used as a proxy for having had a “different experience” in our society, based upon the exclusion and subordination of individuals because of their race. This does not mean, however, that every member of the same race will have had the same experiences or the same reactions to those experiences which they do have in common. Some racial and ethnic groups have achieved high levels of economic success notwithstanding prejudice and discriminatory treatment, and some Blacks have achieved success even though Blacks as a group are overrepresented in our nation’s underclass. Similarly, even some Blacks who have risen from the underclass with the aid of affirmative action possess views that most Blacks would find objectionable. The fact is that members of any given racial group experience and react to life differently. That indisputable fact helps explain why even some of the most ardent supporters of affirmative action admit that there is no one voice of color or one perspective shared by those who have lived in our racist society. The type of diversity that is likely to be achieved by using race as a proxy is therefore uncertain.

Moreover, if diversity is the true objective, affirmative action fails to reach those whose experiences are most likely to be different from the White majority. If there is a need to increase the representation of certain viewpoints in either an academic or business setting, it would seem logical that the best way to insure that such viewpoints are expressed, or at least represented, is to seek out individuals who meet

442. See Chen, supra note 51, at 150-51 (asking whether it even makes sense to speak of “Asian-Americans” considering that there is no one uniform Asian culture).
443. “Groups such as the Japanese, Chinese, and West Indian blacks have fared very well in American society despite racial bias against these groups.” Abram, supra note 424, at 1315 (citing Thomas Sowell, The Economics and Politics of Race: An International Perspective 190 (1983)).
444. See supra note 411 and accompanying text (discussing the fact the black's incomes are lower than white's incomes).
445. Clarence Thomas may be the most notable case on point. See supra note 439 (discussing the fact that many black commentators are critical of Justice Thomas).
446. See, e.g., Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 Duke L.J. 705, 728 (“I would deny the existence of a 'black point of view' or a 'black voice' in any essentialist (or racialist) sense.”); Williams, supra note 435, at 535 (“I do not believe that a 'pure' black or feminist or cultural identity of any sort exists . . .”).
447. The poorest Blacks are likely to have had life experiences which are the furthest from mainstream White Americans. It is those Blacks who are least likely to be recruited as a result of affirmative action programs. See supra notes 421-24 and accompanying text.
the particular criteria. Diversity in terms of skin color alone hardly seems important or relevant enough to continue policies which reinforce the societally damaging notion that race is a legitimate basis for treating individuals differently.

Finally, it seems to be dangerous to talk about the need to achieve diversity as a basis for hiring Blacks or others. This is dangerously close to tokenism.\textsuperscript{448} If this is the justification for affirmative action, it could also be a basis for insuring that programs did not include too many representatives of racial or other minorities.\textsuperscript{449}

In the final analysis, the biggest failures of affirmative action seem to be that such programs simply do not achieve their laudable goals, and those advancements that are attributable to such programs come at a terrible cost. Blacks, regardless of their individual abilities and efforts, are labeled affirmative action babies.\textsuperscript{450} White resentment increases as the negative stereotypes about Blacks being unable to make it on their own are reinforced. Racial tensions increase, and the Black underclass is essentially left to struggle in an environment of increased hostility.

I applaud the goal of racial equality. I deplore racial bias and negative stereotypes. Unfortunately, it does not seem to me that affirmative action significantly aids in the former, and there is evidence that it contributes to the latter.

\textbf{D. Is There an Alternative?}

So if we abandon racial-preferences, with what are we left? One of the biggest fears of many supporters of affirmative action is likely to be that if we abandon these programs, we will have nothing to replace them. Such a failure would indeed be tragic.

Blacks in particular continue to be over-represented in the economic underclass of our society. They still suffer the effects of centuries of racial prejudice.\textsuperscript{451} "The United States remains scarred by economic and social inequality based on race. Racial isolation, impoverishment, limited opportunity, and inferior education, medical care, and housing compromise the lives of black Americans today."\textsuperscript{452}

\textsuperscript{448} See Delgado, \textit{ supra} note 419, at 1224 (urging scholars to reject the role model rationale for similar reasons).

\textsuperscript{449} This is another objection to affirmative action programs which has been made by certain critical race theorists. \textit{See supra} note 419.

\textsuperscript{450} This is the lament of Stephen Carter and others. \textit{See Carter, supra} note 57, at 7; Nan, \textit{supra} note 419, at 553.

\textsuperscript{451} Nan, \textit{supra} note 419, at 562 nn. 73-85.

In fact, evidence suggests that the plight of Blacks has worsened in recent years, notwithstanding affirmative action. If affirmative action as it is currently conceived was the only option for attempting to redress these inequities, that would be an exceedingly powerful argument for retaining race-conscious programs, even if they offered only minimal hope of redressing the racial inequities which plague our society. The fact is, however, that we are not limited to affirmative action programs which are based on racial preferences. A growing number of commentators have urged a rethinking of affirmative action along class lines.

While a detailed examination of alternatives to affirmative action in the arenas of education or employment is far beyond the scope of this Article, it is essential that there be other options because it is indisputable that there are tremendous inequities in our society which we must address if we are to continue to grow and thrive. The basic approach which has been urged by so many others is to cease targeting remedial and preferential programs on the basis of race and, instead, to focus on alleviating the effects of growing up or living in the underclass.

While this means that poor Whites as well as poor Blacks may receive special assistance, the entire thesis of this Article is that race per se should not matter. Societal help can be justified for anyone who is trapped in the cycle of poverty.

Nor is a class-based system of aid the only available alternative to race-conscious affirmative action programs. For example, a number of critical race theorists have suggested that one of the principle barriers to the success of minorities is the use of artificial concepts of merit. These scholars maintain that by conditioning access to aca-

453. Id. at 561-62.
454. See, e.g., DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 251-53 (1991) (naming two proposals as “nonracial affirmative action” and “choice without separation”); West, supra note 290, at 64 (suggesting that affirmative action plays the “negative role” of ensuring that discriminatory practices are abated); Judges, supra note 414, at 644-45 (noting that one effect of affirmative action programs is to create a caste society); Kimberly P. Taylor, Note, Affirmative Action for the Poor: A Proposal for Affirmative Action in Higher Education Based on Economics, Not Race, 20 HASTINGS CONST. L.Q. 805, 814-17 (1993) (arguing that current affirmative action programs assume that blacks are economically disadvantaged and proposing that affirmative action programs should only consider the economic status of their beneficiaries); Steven A. Holmes, Mulling the Idea of Affirmative Action for Poor Whites, N.Y. TIMES, Aug. 18, 1991 § 4, at 3 (asserting that poor whites suffer under current affirmative action programs); Richard Kahlenberg, Class Not Race: An Affirmative Action that Works, NEW REPUBLIC, Apr. 3, 1995, at 21 (arguing that affirmative action programs should benefit the lower socioeconomic class, regardless of race).
455. See Daniel A. Farber, The Outmoded Debate over Affirmative Action, 82 CAL. L. REV. 893, 894 (1994) (noting that critical race theory scholars agree that Blacks “could achieve pro-
ademic or educational opportunities on arbitrary or artificial standards which impact disproportionately on minorities, we have perpetuated the exclusion of minorities from opportunities essential for success in our society. Nor are scholars of color the only commentators to have noted the exclusionary effects of selective standards of merit.

The argument over whether current standards of merit are appropriate is particularly vehement in the context of academia. This is so because there is more evidence that admissions criteria are suspect, and because success in academia is often a prerequisite to economic success later in life. In addition to exploring socio-economic status as an alternative to race-based affirmative action programs, it is also likely that progress in our race relations could be made if we paid more attention to suggestions as to how the notion of merit should be modified in making educational and employment opportunities available.

Finally, one other point raised by proponents of affirmative action needs to be addressed. It has been suggested that we do not need to abandon affirmative action based on race to pursue these other alternatives as well. I believe that we do.

There is abundant evidence that affirmative action has produced a backlash of anger against preferential treatment. So long as we con-
continue to focus our attention, our efforts and resources on existing strategies, it has been amply demonstrated that additional programs to remedy past inequities will have little or no chance of success. In an era of economic uncertainty, it is far too unlikely that additional strategies will be explored so long as we are spending so much energy on affirmative action.

Given the evidence that affirmative action has created such resentments and tensions, and that it rarely reaches those who need it most, it is time to try something new. What we have is not working, and neither rhetoric nor wishful thinking can change that.

CONCLUSION

I know that we live in a racist society. All too often, individuals who are identified as “Black” are the targets of hatred and hostility based on nothing more than the color of their skin or the texture of their hair. The question that this Article raises is whether institutionalizing the concept of race is likely to contribute towards a solution to this country’s racial problems. As should be obvious from the tone of this Article, I do not think that this is the correct approach to society’s problems with race.

In concluding, I would like to recite a discussion on racism between two of my friends, one of whom is White and one of whom is Black. My White friend is opposed to affirmative action, primarily on the basis that such programs often benefit most those who have least been affected by the exclusionary and discriminatory policies the affirmative action was purportedly designed to remedy. The example he gave was that of preferential admissions to institutions of higher learning. He argued that a significant percentage of those admitted to such institutions under preferential admissions policies had been raised in a middle-class family and had not been subject to the crushing burdens of poverty imposed on the most disadvantaged members of the group. Why then, he asked, should they be entitled to a preference over any other applicant?

The very moving response by my Black friend was that her children were indeed the product of a middle-class upbringing, but that she doubted very much whether a non-minority child would ever be faced with returning to his car only to find the hate-filled words, “Nigger, go home,” scrawled across the windshield. Her argument, in essence, was that even Black children raised in a middle-class home must face and deal with racism, and that they deserve special consideration in admissions because they must deal with and overcome problems not faced by Whites.
It is a sad fact of life that Black children in America, even those raised in middle-class homes, will have to face hostility not generally directed at their White peers. The problem is that this fact does not justify institutionalizing differential treatment of individuals by the government based on race.

With regard to adoption policies, classifying children based on their race and then erecting barriers to transracial adoptions which disproportionately and tragically impact minority children is profoundly unfair. The unfortunate fact that in today’s world the Black children are likely to have to learn to deal with racism later does not justify making their lives harder by denying them a stable home environment now.

Nor does the fact that Blacks have to live with racism mean that the government should be free to use race as a basis for drawing congressional districts. The very notion that race really does matter is antithetical to the notion that, in an ideal world, we would be judged by the content of our characters rather than the color of our skin.459

Finally, the existence of racism is an insufficient justification for affirmative action. The racism experienced by my friend’s college-aged son is not generally the type of discrimination which affirmative action seeks to or can remedy. Affirmative action programs seek to provide a remedy to those who were systematically excluded from certain types of opportunities because of their race, and in this objective it fails. Affirmative action is not supposed to be the remedy for racist behavior which, while hateful and hurtful, is not exclusionary in nature.

This Article addresses only three specific types of government programs, but the principle announced herein is broader. We should not allow our government to use race as a basis for differentiating between individuals, because treating people differently based on something as superficial as skin color is unfair and unjust. So long as race is treated as being important, it will continue to be important. If we continue to allow federal, state and local governments and government agencies to adopt programs and policies which differentiate among people based on nothing more than their race, we have no hope of achieving a society where individual merit matters instead of skin color—a society where we are each judged on the content of our character.

459. Martin Luther King, Jr., I Have A Dream: Writings and Speeches that Changed the World, in I Have A Dream, 101, 105 (James M. Washington ed., 1986).