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Remedying Societal Discrimination through the Spending Power

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REMEDYING SOCIETAL DISCRIMINATION THROUGH THE SPENDING POWER

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The Supreme Court has long restricted governments' ability to remedy societal discrimination, and this restriction has sharply limited affirmative action efforts in many diverse contexts. In this article, Professor Selmi crafts an argument that would allow governments to justify affirmative action efforts based on a desire to remedy societal discrimination. Professor Selmi builds his argument on a series of cases where the Court has shown great deference to government spending initiatives, such as in the context of federally funded health clinics, government-sponsored art, and highway funds. Under this line of cases, government programs that are tied to the spending power are adjudicated under a rational basis test, a test, Professor Selmi argues, that should permit efforts to remedy societal discrimination.

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INTRODUCTION

The Supreme Court's affirmative action jurisprudence poses a central dilemma: most governmental programs are intended to remedy societal discrimination, while the Supreme Court has consistently held that a desire to remedy societal discrimination provides a constitutionally inadequate basis for race-conscious affirmative action plans.[1] Stated somewhat differently, most governmental affirmative action is intended to remedy someone else's discrimination, but the Court will only allow governments to use race-conscious means to remedy their own discrimination.[2] Consider, for

1. I will discuss the cases in detail in Part I.A, *infra*, but the leading cases are *Shaw v. Hunt*, 517 U.S. 899 (1996) (redistricting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (set-asides); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (employment); and *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (education affirmative action).

2. The Supreme Court has left some theoretical space for governments to remedy private discrimination. *See* Ian Ayres & Frederick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1585 (1998) (arguing that under certain circumstances the government can seek to remedy private discrimination). Lower courts, however, have generally interpreted Supreme Court doctrine to require proof of identified discrimination, committed or participated in by the government before approving affirmative action plans. *See, e.g.*, W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206, 219 (5th Cir. 2000) (requiring "particularized findings of discrimination within its various agencies"); Cohen v. Brown Univ., 101 F.3d 155, 171 (1st Cir. 1996) (stating that "voluntary affirmative action plans cannot be constitutionally justified absent a particularized factual predicate demonstrating the existence of 'identified discrimination' "); Contractors Ass'n v. City of Philadelphia, 91 F.3d 586, 596 (3d Cir. 1996) (concluding that "race-based preferences cannot be justified by reference to past 'societal' discrimination in which the municipality played no material role");

example, the recent case involving the University of Michigan Law School. In that case, the law school defended its affirmative action policy as necessary to remedy societal disadvantages faced by minority applicants rather than as a result of the school's own discrimination, a justification the district court found inadequate to support the program.[3] Contract set-aside programs instituted by many governments are likewise predicated on the need to remedy discrimination within a particular industry, as opposed to discrimination perpetrated by the government itself.[4]

The inability of governments to remedy societal discrimination has sharply limited the efficacy of affirmative action programs. Lacking the power to remedy societal discrimination, a wide range of governmental affirmative action programs have been invalidated, including dozens of contract set-asides and educational programs from elementary schools to universities.[5] It is not too much to suggest

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Hopwood v. Texas, 78 F.3d 932, 950 (5th Cir. 1996) ("[T]he state's use of remedial racial classifications is limited to the harm caused by a specific state actor.").

3. Grutter v. Bollinger, 137 F. Supp. 2d 821, 869 (E.D. Mich. 2001). The district court explained:

> In the present case there has been no evidence, or even an allegation, that the law school or the University of Michigan has engaged in racial discrimination. All of the evidence submitted by the intervenors relates to discrimination on the part of society at large or by entities other than the law school or the University of Michigan. As a matter of federal constitutional law, the law school . . . may not consider the race of applicants in order to compensate for the effects of discrimination by others or by society generally.

Id. At about the same time that the district court struck down the law school's policy, a different district court upheld the University's affirmative action plan as a constitutional means of achieving diversity, and it will be left to the Sixth Circuit to sort out the two cases. *See* Gratz v. Bollinger, 122 F. Supp. 2d 811, 831 (E.D. Mich. 2000).

4. *See, e.g.*, Associated Gen. Contractors v. Drabik, 214 F.3d 730, 740 (6th Cir. 2000) (invalidating Ohio's set-aside program because it was not designed to remedy governmental discrimination), *cert. denied*, 531 U.S. 1148 (2001); Monterey Mech. Co. v. Wilson, 125 F.3d 702, 714 (9th Cir. 1997) (invalidating a California university's set-aside program based on a lack of identified discrimination).

5. In addition to the cases listed in *supra* note 4, see Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 929 (11th Cir. 1997) (invalidating Dade County's contract program); Contractors Ass'n v. City of Philadelphia, 91 F.3d 586, 609–10 (6th Cir. 1996) (invalidating Philadelphia's contract set-aside program as based on insufficient evidence); Ass'n for Fairness in Bus., Inc. v. New Jersey, 82 F. Supp. 2d 353, 354 (D.N.J. 2000) (granting a preliminary injunction against a state set-aside program). For cases invalidating education affirmative action plans at all levels, see *Grutter*, 137 F. Supp. 2d at 869 (striking down the University of Michigan law school plan in part because the plan rested on societal discrimination); Johnson v. Bd. of Regents, 263 F.3d 1234, 1237 (11th Cir. 2001) (invalidating the University of Georgia's affirmative action plan); Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 133 (4th Cir. 1999) (invalidating a public school plan), *cert. denied*, 529 U.S. 1019 (2000); Wessman v. Gittens, 160 F.3d 790, 792 (1st Cir. 1998) (invalidating a Boston school district racial balancing plan), *cert. dismissed*, 529 U.S. 1050 (2000); Taxman v. Bd. of Educ., 91 F.3d 1547, 1549–50 (3d Cir. 1996) (en banc)

that most, if not all, of these cases would have come out differently if governments had the power to remedy societal discrimination. Yet, given the central role the question of societal discrimination has played in the Court's doctrine, scholars have devoted surprisingly little attention to the issue; rather, the Court's prohibition on remedying societal discrimination has generally been accepted without significant challenge.[6]

In this Article, I want to pose a challenge by arguing that the Court is wrong when it states that governments cannot seek to remedy societal discrimination. On the contrary, I contend that the government has the power to remedy societal discrimination through its spending power, a power that has not previously been applied to affirmative action programs even though such programs seek to shape behavior through the distribution of federal funds.[7] I base my argument on a series of cases that are not generally linked to governmental race-conscious affirmative action programs. These cases have held in a variety of contexts that the government is constitutionally permitted to pursue legitimate political and social

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(invalidating the use of affirmative action in layoff determination); *Hopwood*, 78 F.3d at 934 (invalidating the use of race in an admissions program for the University of Texas); Podberesky v. Kirwan, 38 F.3d 147, 151 (4th Cir. 1994) (invalidating the University of Maryland's racially specific scholarships).

6. Many commentators have acknowledged the importance of the limitation but typically do so without much further discussion. *See* T. Alexander Aleinikoff, *A Case for Race Consciousness*, 91 COLUM. L. REV. 1060, 1096 (1991) ("Affirmative action programs . . . may not attempt to remedy the effects of past and present 'societal discrimination.' "); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2341–42 (2000) ("Perhaps the greatest difficulty for affirmative action . . . is the Supreme Court's rejection of 'societal discrimination' as a justification for racial classifications."); Angela P. Harris, *Equality Trouble: Sameness & Difference in Twentieth Century Race Law*, 88 CAL. L. REV. 1923, 2013 (2000) ("The Court has been adamant . . . that the remedy of mere 'societal discrimination' is not a compelling state interest that justifies voluntary affirmative action programs."); Deborah C. Malamud, *Affirmative Action, Diversity and the Black Middle Class*, 68 U. COLO. L. REV. 939, 941 (1997) ("Anyone who has read the Supreme Court cases knows that the Court does not accept the remedying of past or present societal discrimination as an acceptable justification for affirmative action."); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1143 (1997) (noting that the prohibition on remedying societal discrimination has severely "constrain[ed] legislatures from adopting policies designed to reduce race and gender stratification").

7. *See infra* Part II.B. Professor Abner Greene has recently argued that the government should use its means to pursue what the government chooses to define as the "good," rather than remaining neutral on important social and economic questions. *See* Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 2 (2000). I agree with much of his argument but will for the most part eschew normative claims, though they will often be implicit—and sometimes explicit—in my argument.

ends through its spending power, and that the government can attain some ends indirectly through its spending power that it could not accomplish directly.[8] For example, the government has used its spending power to prohibit federal contractors from discussing abortion while working at federally-funded health clinics,[9] to ensure that federal funds are not used to support indecent art,[10] and to achieve a national speed limit[11] as well as a national drinking age.[12] If the government can use its spending power to achieve these political and often controversial goals, then the government should be permitted to use its spending power to eradicate discrimination, including discrimination that is the product of society generally rather than attributable to a particular actor.

The natural rejoinder to this argument is that "race is different,"[13] but as I will demonstrate, constitutionally speaking race is more similar to abortion or even funding for the arts than it is different. After all, abortion is a fundamental right subject to the Court's strict scrutiny,[14] the same legal scrutiny that applies to matters involving race. To the extent that programs seeking to discourage abortions are subject to deferential review when those programs are tied to the spending power, racially-motivated programs intended to remedy societal discrimination should receive the same level of scrutiny.[15] Applying the deferential standard of review that attaches to government funding initiatives to affirmative action programs should lead to upholding plans that would otherwise be invalidated.

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8. *See, e.g.*, NEA v. Finley, 524 U.S. 569, 587–88 (1998) (upholding a federal statute limiting the scope of the NEA's authority to issue grants to artists against First Amendment objections); Rust v. Sullivan, 500 U.S. 173, 203 (1991) (affirming the constitutionality of regulations disallowing the use of federal funds for abortion-related family planning); South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding a federal statute tying federal highway funds to a state's adoption of a drinking age of twenty-one); Harris v. McRae, 448 U.S. 297, 326 (1980) (holding that a state need not fund medically necessary abortions); Maher v. Roe, 432 U.S. 464, 479–80 (1977) (holding that the Equal Protection Clause does not require states participating in the Medicaid program to pay for nontherapeutic abortions for indigent women). These and other cases are discussed in detail in Part II, *infra*.

9. *See Rust*, 500 U.S. at 203.

10. *Finley*, 524 U.S. at 572–73.

11. Nevada v. Skinner, 884 F.2d 445, 454 (9th Cir. 1989).

12. *Dole*, 483 U.S. at 212.

13. *See* Neal Devins, Metro Broadcasting, Inc. v. FCC: *Requiem for a Heavyweight*, 69 TEX. L. REV. 125, 155 (1990) (arguing that "[r]ace is different" from other congressional programs such as farm supports); Christopher Edley, Jr., *Color at Century's End: Race in Law, Policy, and Politics*, 67 FORDHAM L. REV. 939, 948 (1998) (contending that "race is different" when it comes to forms of affirmative action).

14. *See* Planned Parenthood v. Casey, 505 U.S. 833, 851–53 (1992).

15. *See infra*, Part III.A.

Government might, and does, employ a variety of means to remedy societal discrimination, including promoting diversity through its contracting programs, promoting racial integration in housing or education, and other racially motivated, but not race conscious efforts. I specifically suggest that existing government contract set-aside programs should be reconfigured so that the government would provide preferences to contractors based on the diversity of their workforces, rather than, as is currently the case, on the race or ethnicity of the ownership.[16] Restructured in this fashion, the contracting programs can be seen as implementing a governmental policy preference for doing business with companies that have exemplary hiring records—records that help redress the persistence of societal discrimination.[17] In this respect, the programs would be largely indistinguishable from those designed to discourage abortions or to encourage decent art, given that they would be designed to pursue a particular political end.

In addition to reconfiguring the set-aside programs to bring them within the permissible scope of the government's spending power, I will also demonstrate that the government already indirectly works to remedy societal discrimination through Title VI of the Civil Rights Act of 1964,[18] which requires federal contractors to refrain from racial

16. *See infra*, Part III.B.

17. Although my focus will largely be on federal programs because that is how the doctrine regarding the funding cases has largely developed, my argument should apply with equal force to local and state efforts aimed at remedying societal discrimination. As discussed in Part I.A, the Supreme Court applies the same level of review to federal and state affirmative action programs, *see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995), and the Court has likewise acknowledged the state's ability to use its spending power to further its chosen objectives, *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989). There is some possibility that a federal program would be upheld under a less strict form of review than might apply to state programs, largely as a result of the federal government's remedial powers under Section 5 of the Fourteenth Amendment. Indeed, the Court of Appeals for the Tenth Circuit recently upheld a federal set-aside program based on a form of strict scrutiny whereas no state or local program has yet survived a court's strict review, a decision the Supreme Court recently agreed to review. *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1155 (10th Cir. 2000), *cert. granted*, 512 U.S. 1288 (2001). The Supreme Court, however, recently has significantly restricted the government's Section 5 remedial power. *See* Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 442 (2001). Whether the Court will permit a broader realm of federal efforts than it would accept for state or local programs remains to be seen, but my argument does not turn on the federal government's Section 5 powers, and therefore will apply to all governmental efforts to remedy societal discrimination.

18. 42 U.S.C. § 2000d (1994) (Title VI). The federal government also prohibits sex discrimination in education among entities receiving federal financial assistance. *See* 20 U.S.C. § 1681 (1994). There are a number of similarities between Title VI and Title IX,

discrimination and has been construed to reach neutral practices that have adverse racial effects.[19] Disparate impact claims, as these claims are known, are intended primarily to remedy societal discrimination, and I suggest that Title VI can be interpreted through the government's spending power to require the recipients of federal funds to take actions to eliminate the adverse impact of their practices both as a means of remedying societal discrimination and as a condition for receiving those funds. Under this theory, the government can require more of its fund recipients than the Constitution requires,[20] and it can do so with the express purpose of remedying societal discrimination, despite the Supreme Court's frequent proclamations to the contrary.

This Article proceeds in three parts. Part I discusses the Court's current doctrine relating to remedying societal discrimination.[21] In this section, I trace the history of the Court's treatment of societal discrimination, and also indicate how the Court has often vacillated in its approach, even while it has held steadfast to the notion that the government cannot use affirmative action to remedy societal discrimination. In addition, I demonstrate that the standard of review the Court applies to the cases proves critical to the validity of affirmative action plans intended to remedy societal discrimination—programs analyzed under strict scrutiny are invariably invalidated while programs analyzed under a lesser form of review are upheld. Given that the Court has never defined the term societal discrimination, I also define the concept and by doing so emphasize the government's responsibility to address societal discrimination, which is properly seen as involving the cumulative effects of multiple acts, many of which are attributable to the government. In Part II, I craft my argument based on the government funding cases, contending that these cases provide the proper analytical framework for reviewing governmental efforts to remedy societal discrimination—a framework that relies on rationality review rather than strict scrutiny.[22] In Part III, I discuss what that doctrine means

but in this Article I concentrate on race discrimination, for that is the context in which the Court's doctrine relating to societal discrimination has been principally developed.

19. *See* Alexander v. Choate, 469 U.S. 287, 293–94 (1985).

20. By virtue of a long-standing executive order, the Department of Labor requires federal contractors who receive federal contracts that exceed $50,000 to engage in limited affirmative action efforts. *See* Obligations of Contractors and Subcontractors, 41 C.F.R. § 60–1.40 (2001).

21. *See infra* notes 24–146 and accompanying text.

22. *See infra* notes 147–238 and accompanying text.

for the government's efforts to address societal discrimination.[23] In particular, I propose ways in which the existing contract set-aside programs can be reconfigured to focus on the diversity of a firm's workforce rather than its ownership, so that the programs will be reviewed under scrutiny derived from the government funding cases—and survive.

I. UNDERSTANDING SOCIETAL DISCRIMINATION

In this section, I explore the Court's varied treatment of efforts to remedy societal discrimination. In one respect, the Court's attention to societal discrimination has been quite limited, as the Court has never sought to define what it means by the term societal discrimination. Moreover, its explicit discussion of the concept has been confined principally to two cases, which have then been extended to other affirmative action cases without significant discussion.[24] At the same time, the Court has addressed the issue indirectly on a number of occasions, and even though the Court has been quite hostile to the government's explicit efforts to remedy societal discrimination, it has been far more receptive to indirect private and occasional governmental efforts designed to remedy societal discrimination.[25] The first part of this section provides an overview of the Court's treatment of societal discrimination—both directly and indirectly—and in the second part, I define societal discrimination with an intent to sharpen the analytical focus on the question of whether the government can use its spending power to remedy societal discrimination.

A. The Supreme Court's Treatment of Societal Discrimination

1. The Affirmative Action Cases

The Court's first and most important discussion of societal discrimination arose in the famous affirmative action case of *Regents of the University of California v. Bakke*, in which Allan Bakke challenged the preferential admissions policy administered by the medical school at the University of California at Davis.[26] When the

23. *See infra* notes 239–319 and accompanying text.

24. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). I discuss both cases below.

25. See, for example, *infra* Part I.A.2 (discussing disparate impact theory, which, as I explain, is a theory that permits remedying societal discrimination).

26. 438 U.S. 265 (1978). One year earlier the Court upheld a federal statute that provided greater retirement benefits to women than to men. *See* Califano v. Webster, 430

medical school opened in 1968, there were no African-American or Latino students in the class of 100 even though minorities constituted nearly one-third of the state's population.[27] Shortly thereafter the school sought to diversify its class by setting aside a fixed number of places for disadvantaged students, a classification that included applicants who were members of minority groups, as well as others who successfully petitioned for disadvantaged status.[28] Given that the school had no history of its own to explain the lack of minority students, the school sought to justify its policy based on the history of discrimination African Americans and other minorities had experienced in society more generally; in other words, it sought to justify its policy as necessary to remedy the effects of what has come to be labeled societal discrimination. However, in what has become a critical and frequent legal strategy,[29] the school did not document that history of societal discrimination but instead largely assumed it based on the exclusion of minorities from the school's entering class.[30] The absence of minorities in the class, the argument went (and often still goes), was obviously the product of societal discrimination, so obvious that the issue did not require any additional proof or discussion.

In contrast, the Department of Justice (DOJ), and several other amici, all made a concerted effort to document the history of discrimination minorities had encountered in California as a way of explaining why so few minority candidates had applied or been admitted to the state medical schools.[31] Additionally, the United

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U.S. 313, 317–18 (1977). The statute was not justified on the basis that the retirement system had discriminated against women but that the private labor market had disadvantaged women for many years. *Id.* Even though the Court never used the term societal discrimination in its decision, the concept arguably applied.

27. *Bakke*, 438 U.S. at 272 (noting that the original class of one hundred "contained three Asians but no blacks, no Mexican Americans, and no American Indians").

28. *See* Michael Selmi, *The Life of* Bakke*: An Affirmative Action Retrospective*, 87 GEO. L.J. 981, 985 (1999). For a comprehensive discussion of the *Bakke* case, see JOEL DREYFUSS & CHARLES LAWRENCE III, THE BAKKE CASE: THE POLITICS OF INEQUALITY (1979).

29. As I have written previously, one of the difficulties in defending affirmative action plans is that government agencies are often reluctant to admit their own past discrimination, instead preferring to justify plans based on generalized discrimination. *See* Michael Selmi, *Testing for Equality: Merit, Efficiency and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1309 (1995) (noting that "employers are understandably reluctant to present evidence of their own past discrimination in order to justify an affirmative action program").

30. *See* Selmi, *supra* note 28, at 989 (discussing the treatment of discrimination in the Supreme Court briefs).

31. The Justice Department documented the discrimination that had affected minority students both within and outside of California, as well as the discrimination black

States articulated the rationale for allowing the State of California to take affirmative measures to remedy societal discrimination. Contending that it was impractical to restrict a university to remedying its own discrimination, the government argued:

> The principal ... justification [for an affirmative action program] ... is that racial discrimination elsewhere in society makes it difficult fairly to evaluate the abilities and promise of each new applicant without taking his race into account in evaluating his credentials. ... It follows that no institution is limited to rectifying only its own discrimination. If it were, the consequences of discrimination that spilled over from the discriminator to society at large would be irreparable, and the victims of discrimination would be doomed to suffer its consequences without even the prospect of voluntary assistance.[32]

The argument developed in this short passage remains one of the clearest statements regarding the government's responsibility to address discrimination that the government itself did not commit. If the government did not remedy societal discrimination, no one else would.

As is well-known, the *Bakke* case produced a sharply fractured Court, a splintering that was reflected in six complicated opinions, none of which conveyed the sentiment of a Court majority. Among the six opinions, only Justice Powell's opinion directly addressed the question of whether the government could seek to remedy societal discrimination.[33] Recognizing that one of the goals of the special admissions program at the medical school was to "counter[] the

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applicants faced in applying to medical school. *See* Brief for the United States as Amicus Curiae at 42–46, Regents of the Univ. of Cal. V. Bakke, 438 U.S. 265 (1978) (No. 76–811). In addition, the government documented the discrimination black doctors faced in obtaining jobs and joining medical societies. *Id.* at 47–48. The brief filed by three black professional groups—the National Medical Association, the National Bar Association, and the National Association for Equal Opportunity in Higher Education—provided the most extensive discussion of discrimination within the state of California that justified the special admissions program. *See* Selmi, *supra* note 28, at 989.

32. Brief for the United States as Amicus Curiae at 39, *Bakke* (No. 76–811).

33. *Bakke*, 438 U.S. at 306–10 (opinion of Powell, J.). Justice Brennan's opinion, concurring and dissenting, noted that Title VI did not "bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." *Id.* at 328 (Brennan, J., concurring in part and dissenting in part). In his separate opinion, Justice Marshall likewise noted that there was ample precedent "for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination." *Id.* at 400 (Marshall, J., concurring in part and dissenting in part).

effects of societal discrimination," Justice Powell nevertheless found that interest insufficiently compelling to justify infringing the rights of those who did not qualify for the special admissions program.[34] He wrote:

> The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with *Brown*, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.[35]

Justice Powell's argument centered on a concern that permitting the medical school to remedy societal discrimination would allow the school to exercise its unfettered discretion, or its political power, to privilege those it arbitrarily viewed as the victims of societal discrimination. Allowing the program to stand, he argued, would "convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination."[36] Earlier in his opinion, Justice Powell noted that "the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals,"[37] adding that the Court would likely be asked "to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups."[38]

The argument articulated by Justice Powell had its genesis in the political debates that had emerged over affirmative action at the time. Professor Keith Bybee has recently placed Justice Powell's opinion in

34. *Id.* at 306 (opinion of Powell, J.).
35. *Id.* at 307 (opinion of Powell, J.).
36. *Id.* at 310 (opinion of Powell, J.).
37. *Id.* at 295 (opinion of Powell, J.).
38. *Id.* at 296–97 (opinion of Powell, J.) (footnote omitted).

context by demonstrating that the Justice's concerns relating to the potential elasticity of societal discrimination were strongly influenced by a distinctive and prominent political theory that was tied to a particular, but by no means universal, understanding of interest group politics.[39] Under this theory, which was reflected in the writings of Richard Posner, among others, discrimination was seen as part of the battle among shifting political alliances, where "[d]iscrimination is no longer located along any single axis; instead it is exercised along a variety of different axes, dictated by the ebb and flow of political rivalry."[40] Yet, as Professor Bybee notes, this theory obscures the historical fact that political alliances do not shift in endless fashion, but more often reflect a biased and relatively stable operation, one in which some groups repeatedly come out ahead of others.[41]

Not only was Justice Powell's argument informed by a particular political theory, but his slippery slope concern—namely that it would be difficult to discern classifications that were properly supported by past discrimination—appears inconsistent with the Supreme Court's own Equal Protection jurisprudence. The Supreme Court has long relied on tiers of scrutiny in the Equal Protection context to evaluate legislative classifications,[42] and it has done so based on the nation's history of discrimination, which has affected groups in distinct and varied ways. Indeed, the Court had not previously suggested that it would be difficult to distinguish the harm those discriminated based on race suffered from discrimination based on other characteristics

39. *See* Keith J. Bybee, *The Political Significance of Legal Ambiguity: The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263, 277 (2000).

40. *Id.* For Judge Posner's argument, see Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 7–19.

41. It is noteworthy that this critique of interest group politics existed in the political science literature at the time *Bakke* was decided, see, for example, William E. Connolly, *The Challenge of Pluralist Theory*, *in* THE BIAS OF PLURALISM 3, 13–26 (William E. Connolly ed., 1969), but Justice Powell appeared either unaware of or unattracted to the critique, preferring instead to ascribe to an older and stronger version of interest group politics. *Bakke*, 438 U.S. at 282–83 (opinion of Powell, J.). The role of interest groups and shifting coalitions continues to occupy a contested place when race is implicated, in particular in the area of voting rights litigation where African Americans and Latinos have often been unable to forge coalitions that would enable the group to elect representatives of their choosing, to use the statutory language. For a discussion of the limits of racial justice in a majoritarian system, see LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994).

42. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995) (applying strict scrutiny); Craig v. Boren, 429 U.S. 190, 204 (1976) (applying heightened scrutiny); Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (applying rational basis review).

such as age,[43] and it seems unusually naive to suggest that allowing affirmative action in the context of race would inevitably lead to affirmative action in a host of other undefined and arbitrary contexts.

Despite its tenuous foundation, Justice Powell's discussion of societal discrimination has been deeply influential. As will be discussed in more detail below, even though no other member of the Court joined his opinion, it continues to guide affirmative action jurisprudence to this day, with his condemnation of societal discrimination having been repeated, generally without comment or challenge, on many occasions over the past twenty-five years.[44] Indeed, as I will show, Justice Powell's opinion has been principally responsible for the way in which the Supreme Court has considered the critical issue of the government's ability to remedy societal discrimination.[45]

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43. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312 (1976) (per curiam) (applying rationality review to an age discrimination claim under the Equal Protection Clause). Federal statutes likewise make clear and consistent distinctions among those who are deserving of protection and those who are not. For example, race, gender, national origin, and religion are commonly included in the various civil rights statutes, whereas age, marital or family status, and similar categories have often been excluded from the scope of a statute's protection. The Fair Housing Act prohibits discrimination based on family status, while Title VII does not, and the Fair Housing Act likewise makes some provisions for age-restricted housing. *See* 42 U.S.C. § 2000e (1994) (Title VII); *id.* § 3607 (Title VIII, Fair Housing Act).

44. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 288 (1986) (O'Connor, J., concurring) (relying on Justice Powell's *Bakke* opinion); Johnson v. Bd. of Regents, 263 F.3d 1234, 1237 (11th Cir. 2001) (invalidating the University of Georgia's affirmative action plan); Associated Gen. Contractors v. City & County of San Francisco, 813 F.2d 922, 930 (9th Cir. 1987) (quoting Justice Powell's opinion); Grutter v. Bollinger, 137 F. Supp. 2d 821, 848 (E.D. Mich. 2001) (relying on Justice Powell's opinion to hold that countering effects of societal discrimination cannot justify a law school affirmative action program).

45. It is frequently noted that no other Justice joined Justice Powell's opinion, see, for example, Cass R. Sunstein, *The Importance of Political Deliberation and Race-Conscious Redistricting: Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1185 (1996) (noting that although influential, Justice Powell's opinion "represented the views of Justice Powell alone"), and much has been made of the Fifth Circuit's determination that *Bakke* is no longer good law. *See* Hopwood v. Texas, 78 F.3d 932, 942–45 (5th Cir. 1996). However, two other appellate courts have recently suggested that Justice Powell's opinion continues to provide the controlling guidance on affirmative action in education. *See* Smith v. Univ. of Wash. Law School, 233 F.3d 1188, 1201 (9th Cir. 2000) (holding that Justice Powell's opinion in *Bakke* offers the best guidance on constitutional standards for an educational affirmative action program), *cert. denied*, 532 U.S. 1051 (2000); Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998) (declining to follow the Fifth Circuit's interpretation). Commentators likewise continue to treat Justice Powell's opinion as influential. *See* Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After* Adarand *and* Shaw, 149 U. PA. L. REV. 1, 34 (2000) (defining Justice Powell's *Bakke* opinion as "the controlling opinion in what at least for now remains the Supreme Court's leading affirmative action case").

In addition to its influence, Justice Powell's discussion is noteworthy because he never defined societal discrimination, other than through negative references and juxtaposition. On several occasions, Justice Powell distinguished societal discrimination from "identified discrimination"[46] and "specific instances of racial discrimination"[47] implying that societal discrimination is defined by the absence of a provable claim. But his argument that societal discrimination could be applied to any group consistent with the interests of political policymakers is especially revealing. From this passage, it appears that Justice Powell may not have considered societal discrimination to be a form of discrimination at all, a fact perhaps reflected in his reference to those who benefited from preferential policies as the "perceived victims of 'societal discrimination.' "[48] While skeptical of societal discrimination, Justice Powell was obviously concerned with the rights of those who could not take advantage of the special admissions program—"who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered."[49] In other words, the beneficiaries of the program were not actual victims of discrimination, while those who were burdened by the program did not necessarily perpetuate discrimination. As should be apparent, these are classic anti-affirmative action arguments that were prominent at the time *Bakke* was decided.[50]

Although Justice Powell's opinion set the groundwork for what would ultimately become the Court's position some years later, Justice Brennan's *Bakke* opinion, which garnered four votes, suggested that a desire to remedy societal discrimination could

46. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978) (opinion of Powell, J.).

47. *Id.* at 307 (opinion of Powell, J.).

48. *Id.* at 310 (opinion of Powell, J.).

49. *Id.* (opinion of Powell, J.).

50. *See, e.g.*, NATHAN GLAZER, AFFIRMATIVE DISCRIMINATION (1975); Posner, *supra* note 40; *see also* Antonin Scalia, *The Disease as Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 152–54 (opposing "racial affirmative action for reasons of both principal and practicality"). Although Justice Powell clearly appeared hostile to the idea of remedying societal discrimination through the quota program at issue in the *Bakke* case, the strength of his hostility was less clear in light of his vote to approve the consideration of race in the admissions process as one factor among many. *Bakke*, 438 U.S. at 318. To be sure, he justified the inclusion of race under the general rubric that universities should be able to create a diverse student body, *id.* at 311–12, but the lack of diversity that necessitated the special admissions program was almost certainly attributable to societal discrimination, a point that was overlooked in Justice Powell's opinion, and which offered universities an opportunity to address societal discrimination that would otherwise have limited the diversity of the class.

provide a constitutionally justifiable basis for affirmative action programs.[51] However, in what was an otherwise lengthy opinion, Justice Brennan treated societal discrimination relatively briefly. He noted that it was appropriate for the University to assume that underrepresentation of minorities in medicine was the "consequence of a background of deliberate, purposeful discrimination against minorities in education and in society generally."[52] But he also concluded that the school's

> articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to Medical School.[53]

Without explicitly stating the standard of review he was applying, Justice Brennan took a critical analytic step in this passage that presaged future doctrinal developments. By labeling the interest of remedying societal discrimination "important," he implied that it would satisfy the Court's intermediate level of scrutiny, though perhaps not its strict standard which generally requires a compelling governmental interest.[54] Indeed, as I discuss below, governmental efforts to remedy societal discrimination have generally been upheld once freed from the Court's strict scrutiny.

The importance of the particular level of judicial scrutiny the Court applied became evident in a case that arose just two years after *Bakke* was decided. In *Fullilove v. Klutznick*,[55] the Supreme Court upheld a federal contract set-aside program without any mention of societal discrimination, even though the desire to remedy societal

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51. *Bakke*, 438 U.S. at 337 (Brennan, J., concurring in part and dissenting in part). Justice Brennan's opinion was joined by Justices White, Blackmun, and Marshall. *Id.* at 324 (Brennan, J., concurring in part and dissenting in part). Justice Marshall's separate opinion, which detailed the need for affirmative action programs in more detail than did Justice Brennan's, reached the same conclusion as Justice Brennan, namely that there was "ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination, without the need for a finding that those benefited were actually victims of that discrimination." *Id.* at 400 (Marshall, J., concurring in the judgment in part and dissenting in part).

52. *Bakke*, 438 U.S. at 370–71 (Brennan, J., concurring in part and dissenting in part).

53. *Id.* at 362 (Brennan, J., concurring in part and dissenting in part).

54. *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982) (applying intermediate scrutiny to gender classification).

55. 448 U.S. 448 (1980). For an extensive discussion of the *Fullilove* case, see Drew S. Days, III, Fullilove, 96 YALE L.J. 453 (1987).

discrimination provided the underlying motive for the government's contracting program. *Fullilove* involved a federal program that required ten percent of federal highway dollars to be distributed to minority contractors.[56] As noted by the Court, the legislative record plainly identified societal discrimination as the program's rationale: "Currently, we more often encounter a business system which is actually racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities."[57] As a result of that societal discrimination, the program sought to direct funds into the minority community to address the demonstrated inequities.[58] These inequities, as detailed in the legislative record, were the product of social and economic forces, and were not directly linked to the actions of the federal government. Yet the Supreme Court upheld the program primarily as a valid effort to eradicate the "present effects of past discrimination,"[59] a phrase that is often used as a synonym for societal discrimination.

As in *Bakke*, the *Fullilove* Court was unable to forge a majority opinion, and in this instance Chief Justice Burger wrote a plurality opinion for two other members of the Court that is notable principally for its obscurity. The plurality eschewed any particular standard of review, concluding instead that "the MBE [(Minority Business Enterprises)] provision would survive judicial review under either 'test' articulated in the several *Bakke* opinions,"[60] and likewise failed to ground the decision in any particular constitutional power, relying instead on the Spending Clause, Commerce Clause, and Section 5 of the Fourteenth Amendment.[61] Although the opinion included no extensive discussion of the issue, *Fullilove* remains the only case where in which the Court connected contract set-aside programs with the spending power by acknowledging Congress's power under the Spending Clause "to further broad policy objectives by conditioning receipt of federal moneys upon compliance with

56. *Fullilove*, 448 U.S. at 454 (plurality opinion).

57. *Id.* at 466 n.48 (plurality opinion) (quoting H.R. REP. NO. 94–1791, at 182 (1977)). In his concurring opinion, Justice Powell cited this language as well, *id.* at 505 (Powell, J., concurring), and he went further to conclude that "the legislative history . . . demonstrates that Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *Id.* at 503 (Powell, J., concurring) (footnote omitted).

58. *Id.* at 459 (plurality opinion).

59. *Id.* at 480 (plurality opinion).

60. *Id.* at 492 (plurality opinion).

61. *Id.* at 473–76 (plurality opinion).

federal statutory and administrative directives."[62] In separate concurring opinions, Justices Powell and Marshall applied their earlier opinions from *Bakke* to uphold the program—Justice Powell under a standard of strict scrutiny, while Justice Marshall applied what was equivalent to an intermediate level of review.[63] Counting up the Justices and putting the different opinions in *Fullilove* together, it appears that at this point in the development of the doctrine a majority of the Supreme Court was willing to allow the federal government to use its funds to remedy societal discrimination.

At the same time, it is not easy to reconcile the Court's treatment of the government's power to remedy societal discrimination in *Fullilove* with the Court's prior discussion in *Bakke*, especially because the *Fullilove* plurality only cursorily mentioned the earlier case. The programs are readily distinguishable, however. One potential difference has already been noted: Congress created a legislative record to support the contracting program addressed in *Fullilove*, whereas the Davis Medical School established its program without the benefit of any legislative or administrative findings. Nevertheless, given that the findings in *Fullilove* did not directly implicate the federal government in the industry's discriminatory practices, the mere presence of a legislative record documenting societal discrimination within the industry should not have overcome Justice Powell's constitutional concerns expressed in his *Bakke* opinion, because the government was not attempting to remedy its own discrimination.[64]

Rather, the more significant difference between the two cases involved the abilities of the federal and state governments to remedy societal discrimination. The plurality decision in *Fullilove* rested in

62. *Id.* at 474 (plurality opinion). In one sense, it might be said that the plurality rested its decision on the Spending Clause, given that the Spending Clause was initially mentioned as the proper constitutional authority. Yet, the plurality then noted that the Spending Clause reaches at least as far as the Commerce Clause, and that insofar as Congress could have "achieved its objectives under the Commerce Clause ... the objectives ... are within the scope of the Spending Power." *Id.* at 476 (plurality opinion).

63. *See id.* at 496 (opinion of Powell, J.) ("I join the [plurality] opinion and write separately to apply the analysis set forth by my opinion in ... *Bakke*."); *id.* at 517 (Marshall, J., concurring) ("My resolution of the constitutional issue in this case is governed by the separate opinion I coauthored in ... *Bakke*."). As in *Bakke*, Justice Powell wrote only for himself, while Justices Brennan and Blackmun joined Justice Marshall's concurring opinion. Justice Stewart filed a dissenting opinion, joined by Justice Rehnquist, which largely repudiated nonremedial race-conscious measures, and Justice Stevens filed a dissenting opinion arguing against remedial affirmative action. *See id.* at 522 (Stewart, J., dissenting); *id.* at 532 (Stevens, J., dissenting).

64. *See supra* text accompanying notes 35–38.

significant part on the federal government's power to remedy discrimination through the Spending Clause as interpreted through the Commerce Clause, the latter involving a power not available to state governments. As a supporting theory, the plurality likewise noted Congress's remedial power under Section 5 of the Fourteenth Amendment,[65] a power that is explicitly reserved for the federal government. This difference in remedial power rendered the federal program subject to a greater level of judicial deference, though as was also true in *Bakke*, the Court failed to reach a consensus on what the appropriate level of judicial scrutiny should be. Commentators have generally interpreted *Fullilove* as applying an intermediate level of scrutiny, and that level of scrutiny appeared critical to the outcome of the case, particularly as the Court's doctrine progressed.[66] At the same time, the Court's failure to address directly the government's role in remedying societal discrimination left the scope of its power largely unsettled, and it was another seven years before the Court again confronted the question of the government's power to remedy societal discrimination.

On this occasion, the Court began to coalesce around a position rejecting societal discrimination as a remedial basis for affirmative action. The case, *Wygant v. Jackson Board of Education*,[67] involved the efforts of a school board to preserve the effects of its recent affirmative action hiring by agreeing to forego seniority-based layoffs

65. *Fullilove*, 448 U.S. at 474–76 (plurality opinion).

66. *See* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 477 (1999) (noting that "the Court took its cue from *Fullilove* . . . and held in *Metro Broadcasting v. FCC* that intermediate scrutiny" was appropriate); J. Edmond Nathanson, *Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict*, 27 WM. & MARY L. REV. 331, 347 (1986) ("In *Fullilove*, the Court reviewed an affirmative action plan under what apparently was an intermediate level of scrutiny."); Laura M. Padilla, *Intersectionality & Positionality: Situating Women of Color in the Affirmative Action Dialogue*, 66 FORDHAM L. REV. 843, 903 n.305 (1997) (defining *Fullilove* as applying an intermediate level of scrutiny). As a number of commentators have pointed out, the plurality opinion in *Fullilove* suggested that the program under consideration could withstand even the Court's strict level of scrutiny, which might suggest that the level of scrutiny was not dispositive at least at the time of the Court's decision. *See, e.g.*, Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 375 (1989) (defining *Fullilove* as having applied strict scrutiny). While it is true that the plurality intimated that the program could be withheld under any standard, it is likewise true that as the Court's doctrine progressed, culminating in its decision in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), the standard of review applied in *Fullilove* became increasingly important and was increasingly treated as equivalent to intermediate review. *See infra* text accompanying notes 87–92.

67. 476 U.S. 267 (1986).

in order to retain a certain percentage of minority faculty members.[68] The school board sought to justify its program on several different grounds, including a desire to remedy societal discrimination.[69] Writing for a plurality of the Court, and applying a test of strict scrutiny, Justice Powell rejected this justification, noting: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[70]

Justice Powell's rationale for this categorical rejection focused on the difficulty of defining societal discrimination with precision, an argument that largely repeated the themes he had developed in his *Bakke* opinion. "Societal discrimination, without more," Justice Powell wrote:

> is too amorphous a basis for imposing a racially classified remedy .... No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[71]

Justice O'Connor, who provided the critical fifth vote to invalidate the layoff plan at issue in *Wygant*, devoted only one sentence of her concurring opinion to the goal of remedying societal discrimination, agreeing with the plurality's conclusion that " 'societal' discrimination, that is, discrimination not traceable to its

68. *Id.* at 272 (plurality opinion).

69. *Id.* at 274 (plurality opinion). There was also, however, evidence of past discrimination as well as evidence that the school board voluntarily agreed to the affirmative action plan to avoid being sued for discrimination. *See id.* at 287 (O'Connor, J., concurring) ("The Michigan Civil Rights Commission determined that the evidence before it supported the allegations of discrimination on the part of the Jackson School Board, though that determination was never reduced to formal findings because the School Board ... voluntarily chose to remedy the perceived violation.").

70. *Id.* at 274 (plurality opinion).

71. *Id.* at 276 (plurality opinion). In a footnote, Justice Powell also made what might be considered a contradictory, but revealing, argument, namely that societal discrimination was too pervasive to serve as the basis for governmental relief and, if allowed, would effectively permit any and all governmental efforts. *See id.* at 278 n.5.

own actions, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny."[72]

Although the Court's discussion of the government's role of remedying societal discrimination was brief, the *Wygant* case established a broad prohibition on the government's remedial power, and the case remains deeply influential and widely cited.[73] Yet, harkening back to the Court's doctrinal reverberations in *Bakke* and *Fullilove*, the very next Term the Court approved a gender-based affirmative action plan that was intended to remedy a manifest imbalance in the agency's workforce, an imbalance attributable to societal discrimination. The case, *Johnson v. Transportation Agency of Santa Clara County*,[74] arose when the agency hired its first female dispatcher in the early 1980s, selecting her over a male employee who had scored modestly higher on the subjective employment examination used to qualify individuals for the position.[75] When the male employee sued under Title VII of the Civil Rights Act of 1964, the agency justified its decision by arguing that it was seeking to address what was labeled a "manifest imbalance" in its workforce, namely the fact that no woman had ever held one of the 238 skilled positions within the agency.[76] Importantly, the agency contended that the imbalance resulted from undefined social forces, rather than from

72. *Id.* at 288 (O'Connor, J., concurring).

73. For cases relying on *Wygant* to the effect that a desire to remedy societal discrimination will not support an affirmative action plan, see, for example, Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 129 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000); Wessmann v. Gittens, 160 F.3d 790, 794 (1st Cir. 1998), *cert. dismissed*, 529 U.S. 1050 (2000); Cohen v. Brown Univ., 101 F.3d 155, 171 (1st Cir. 1996); Middleton v. City of Flint, 92 F.3d 396, 402 (6th Cir. 1996); Taxman v. Bd. of Educ., 91 F.3d 1547, 1560 (3d Cir. 1996); Contractors Ass'n v. City of Philadelphia, 91 F.3d 586, 597 (3d Cir. 1996); Hayes v. N. State Law Enforcement Officers Ass'n, 10 F.3d 207, 217 (4th Cir. 1993); Stuart v. Roache, 951 F.2d 446, 451 (1st Cir. 1991); United States v. Starrett City Assocs., 840 F.2d 1096, 1101–02 (2d Cir. 1988). The *Wygant* case was complicated by the introduction of what is generally referred to as "the role model theory" as one of the school board's justifications for its affirmative action policy. The school board argued that it was necessary to retain minority teachers to provide minority students with appropriate role models, a theory the Court the plurality found particularly troubling in that it seemed to assume that black students could benefit only from having black role models, an argument the Court the plurality perceived as a form of racial stereotyping. *Wygant*, 476 U.S. at 276.

74. 480 U.S. 616 (1987).

75. *Id.* at 623–25. One of the interesting, and often overlooked, aspects of *Johnson* is that the test score differences at issue were trivially different from one another, and not likely to have reflected any significant differences in ability. *See* Selmi, *supra* note 29, at 1252, 1274. The government argued throughout the litigation that the candidates were roughly equivalent in their qualifications. *See* MELVIN I. UROFSKY, A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION 12 (1991).

76. *Johnson*, 480 U.S. at 621.

its own actions.[77] While the Court majority never used the term "societal discrimination" in its opinion, it was plain that Santa Clara County attributed the deficit to societal discrimination and adopted its affirmative action plan as a means to remedy that discrimination.[78] By upholding the agency's decision to take gender into account in the promotional decision, the Court impliedly affirmed the county's power to remedy societal discrimination.[79]

Perhaps to avoid some of the concerns regarding the potential vagueness of the concept of societal discrimination, the Court restricted the government's permissible efforts to those that were intended to remedy a "manifest imbalance" in the workforce, which it further defined to apply to traditionally segregated job categories where an adequate labor force was available.[80] These limitations may have appeased the concerns of Justice Powell, who joined the majority's opinion,[81] but they struck a chord with Justice Scalia, who filed a scathing dissenting opinion. Justice Scalia, who had only recently been appointed to the Court, concluded that "[t]he most significant proposition of law established by today's decision is that racial or sexual discrimination is permitted under Title VII when it is intended to overcome the effect, not of the employer's own discrimination, but of societal attitudes."[82]

Given the absence of any record documenting the agency's own discrimination, Justice Scalia's dissenting opinion seems on the mark, but two aspects of the Johnson case might distinguish it from the earlier decisions. *Johnson* involved a challenge under Title VII rather

77. UROFSKY, *supra* note 75, at 61.

78. The argument the county made was based almost entirely on the lack of women in the positions without any reference to the county's responsibility for the workforce imbalance. *Id.*

79. *Johnson*, 480 U.S. at 621.

80. *Id.* at 632.

81. Justice Brennan wrote the majority opinion for five members of the Court, including Justice Powell. Justice Stevens and O'Connor filed concurring opinions, and Justice Scalia, in his first term on the Court, filed a dissenting opinion. *Id.* at 612.

82. *Id.* at 664 (Scalia, J., dissenting). It seems safe to say that Justice Scalia believed that the primary cause of the workforce imbalance was not discrimination but was rather the product of choice, although choice that was perhaps influenced by societal attitudes. He wrote:

> It is absurd to think that the nationwide failure of road maintenance crews . . . to achieve the Agency's ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to shoulder pick and shovel. It is a "traditionally segregated job category" . . . in the sense that, because of longstanding social attitudes, it has not been regarded *by women themselves* as desirable work.

Id. at 668 (Scalia, J., dissenting).

than the Constitution, and it may be that the remedial power under Title VII is broader than what is permitted under the Constitution. In *Johnson* itself there was some dispute between the majority and dissenting opinions regarding the scope of Title VII, and the majority obliquely suggested that the statute's remedial reach was potentially broader than the Constitution.[83] But this was an issue the Court did not definitively resolve, and more recently lower courts have adopted the position articulated in Justice Scalia's dissent defining the constitutional and statutory standards as equivalent, at least as applied to public employers.[84]

A better understanding of *Johnson* is that a governmental desire to remedy societal discrimination can satisfy the Court's intermediate level of scrutiny. The Supreme Court has long applied an intermediate level of review to gender classifications, under which such a classification will be upheld if it is substantially related to an important governmental objective.[85] This analysis runs up against the fact that the Court does not typically rely on tiers of scrutiny to interpret Title VII,[86] and ultimately it is difficult to know whether the Court was influenced by an intermediate standard of review in upholding the plan at issue in *Johnson*. At the same time, finding that the plan was justified under a lower level of review helps reconcile the Court's doctrine; in particular it helps reconcile the case with *Wygant*,

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83. *See id.* at 627 n.6. In contrast, Justice Scalia argued that Title VII could not permit broader remedial authority than the Constitution allowed. *Id.* at 664–67 (Scalia, J., dissenting).

84. *See, e.g.*, Taxman v. Bd. of Educ., 91 F.3d 1547, 1559–60 (3d Cir. 1996) (treating standards under Title VII and the Equal Protection Clause as the same); Cygnar v. City of Chicago, 865 F.2d 827, 838–40 (7th Cir. 1989) (same); *see also* George Rutherglen & Daniel R. Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. REV. 467 (1988) (arguing that the two standards should be treated similarly). A number of courts have faithfully sought to follow the suggestion in *Johnson* that Title VII and the Equal Protection Clause need not be treated as having the same reach with respect to affirmative action plans. To the extent courts have been able to discern a difference, they tend to focus on the "manifest imbalance" in the workforce, which may be sufficient to justify a plan under Title VII but not the Constitution. *See* Smith v. Va. Commonwealth Univ., 84 F.3d 672, 686 n.4 (4th Cir. 1996) (noting that the existence of a "manifest imbalance" may justify remedial efforts under Title VII).

85. *See* Califano v. Webster, 430 U.S. 313, 316–17 (1977) (applying the standard established in *Boren*); Craig v. Boren, 429 U.S. 190, 204 (1976) (establishing intermediate scrutiny as the appropriate level of review for gender classifications).

86. There are some limited exceptions. For example, race cannot provide the basis for a bona fide occupational qualification defense, *see* 42 U.S.C. § 2000e-2 (1994), and employers have an accommodation defense to a claim based on religious discrimination that is not available for race, gender, or national origin. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 72 (1977) (requiring reasonable accommodation for the religious needs of employees so long as they do not impose "undue hardship").

which was decided only a year earlier and, without a different level of review, is otherwise difficult to square with the Court's holding in *Johnson*.

A reading based on an intermediate level of review is also consistent with the Court's consideration of societal discrimination in more recent cases involving contract set-asides. In *City of Richmond v. J.A. Croson*,[87] the Supreme Court struck down the City of Richmond's contract set-aside plan which required prime contractors to subcontract at least thirty percent of the city's contracts to firms that qualified as minority business enterprises.[88] For the first time in the Court's complicated affirmative action jurisprudence, a majority of the Court applied a strict level of scrutiny to the city's plan, and found that the city had failed to justify the need for its program under that standard.[89] As had been true of all the previous affirmative action cases, Richmond had failed to document its own discrimination to explain why so few of its contracting dollars went to minority contractors, and instead relied on generalized findings of societal discrimination.[90] Returning to the arguments first made by Justice Powell in *Bakke*, the Court rejected the city's justification, noting that "[t]o accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group."[91]

The *Croson* case is widely seen as having solidified the Court's proscription on societal discrimination as a justification for race-conscious affirmative action efforts,[92] yet the Court's opinions were devoid of any analysis relating to societal discrimination beyond what had been traversed in earlier cases. Indeed, just as important as the

87. 488 U.S. 469 (1989).

88. *Id.* at 481, 505 (plurality opinion).

89. *Id.* at 505 (plurality opinion); *id.* at 524–26 (Scalia, J., concurring).

90. *Id.* at 504 (plurality opinion).

91. *Id.* at 505 (plurality opinion).

92. *See, e.g.*, Ayres & Vars, *supra* note 2, at 1584 (noting that after *Croson*, "[i]t is clear that certain forms of 'societal discrimination' do not create a sufficient factual predicate" for governmental affirmative action programs); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 267 (1999) (claiming that "[s]tate and local attempts to remedy 'societal discrimination' have not survived Court scrutiny" after *Croson*); Paul Mishkin, *Foreword: The Making of a Turning Point*—Metro *and* Adarand, 84 CAL. L. REV. 875, 877 (1996) (noting that a majority in *Croson* reaffirmed "*Wygant's* rejection of societal discrimination as a basis for state affirmative action"); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 28 (1995) (concluding that *Croson* held that a desire to remedy societal discrimination will not meet the Court's strict scrutiny).

Court's ban on remedying societal discrimination was Justice O'Connor's recognition that the City of Richmond had the power to remedy private discrimination through its spending power so long as it did so in a manner that was consistent with equal protection mandates. Writing for three members of the Court, Justice O'Connor stated, "As a matter of state law, the City of Richmond has legislative authority over its procurement policies, and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment."[93] Justice O'Connor—as is typical of her race discrimination opinions[94]—failed to articulate what the requisite particularity might be, or under what circumstances she might be willing to uphold race conscious efforts instituted through the government's spending power, choosing instead to leave the issue unresolved and unexplored.[95]

The Court's struggle to define the contours of permissible government actions continued in the following term when the Supreme Court applied an intermediate level of scrutiny to uphold a federal preference program similar in many respects to the program reviewed in *Croson*. The program at issue in *Metro Broadcasting, Inc. v. FCC*[96] provided preferences in distributing broadcast licenses and

93. *Croson*, 488 U.S. at 492 (plurality opinion). The three dissenting Justices likewise agreed that the city had a compelling interest in ensuring that its funds were not used to further discrimination or its effects, though the dissenters chided the plurality for derisively labeling the discrimination that had affected the contracting industry as "mere 'societal discrimination' " rather than as established evidence of past discrimination. *Id.* at 541 (Marshall, J., dissenting).

94. Justice O'Connor has made it a judicial habit to theoretically leave the door open on race-conscious governmental efforts, though she has yet to find a race-conscious plan that she found consistent with the Equal Protection Clause. This has been particularly true of her voting rights decisions where, while joining the Court to invalidate race-conscious districts, she repeatedly claims that she would vote to uphold a district under proper circumstances. *See* Bush v. Vera, 517 U.S. 952, 977 (1996) (plurality opinion) (invalidating a Texas district and noting that "compliance with the results test [of section 2] . . . can be a compelling state interest"); Miller v. Johnson, 515 U.S. 900, 928–29 (1995) (O'Connor, J., concurring) ("Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts . . . even though race may well have been considered in the redistricting process."). In an apparent break from her past record, last Term, Justice O'Connor joined the Court majority to uphold a North Carolina district on the ground that its boundaries were politically rather than racially-motivated. *See* Easley v. Cromartie, 532 U.S. 234, 257 (2001) ("The basic question is whether the legislature drew . . . boundaries because of race *rather than* because of political behavior.").

95. For an excellent attempt to give meaning to Justice O'Connor's suggestion, see Ayres & Vars, *supra* note 2, at 1577.

96. 497 U.S. 547 (1990).

was intended to encourage and enhance minority participation in the broadcasting industry.[97] Rather than relying on societal discrimination to justify the preferences, the program's rationale turned on a controversial argument that promoting minority ownership would likewise promote a diversity of views on the airwaves, which the Federal Communications Commission (FCC) had determined was seriously lacking in many markets.[98] In one of his last opinions for the Court, Justice Brennan applied an intermediate level of review to conclude that increasing broadcast diversity was an important governmental objective that the program was reasonably designed to serve.[99]

Although the Court did not discuss societal discrimination in *Metro Broadcasting*, the majority's opinion rested in significant part on a constitutional concern analogous to a principle informing the government's spending powers. One reason the Court upheld the FCC's preference program was because it has long treated the airwaves as involving a limited public resource that is regulated by the government for the public good.[100] Relying on its past precedent, the Court noted that "[s]afeguarding the public's right to receive a diversity of views . . . is therefore an integral component of the FCC's mission,"[101] and this recognition of the government's power to pursue its own vision of furthering racial justice will prove relevant to applying the government funding cases to remedying societal discrimination.[102]

Nevertheless, the Court's decision in *Metro Broadcasting* had an unusually short shelf life. Following significant changes in Court

97. *Id.* at 560.

98. Without mentioning the term societal discrimination, the Court did note that the " 'effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.' " *Id.* at 566 (quoting H.R. CONF. REP. NO. 97-765, at 43 (1982)).

99. *Metro Broadcasting*, 497 U.S. at 600–01. An aspect of the FCC policy that is often overlooked by its critics is that the program was based on extensive legislative findings that documented the link between minority ownership and a diversity of views. As Justice Brennan noted, "The FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference." *Id.* at 570.

100. *See id.* at 566–67 (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

101. *Id.* at 567.

102. Justice O'Connor's dissenting opinion stressed that the FCC program had not been enacted pursuant to the government's Section 5 powers to enforce the Fourteenth Amendment, and specifically left open the nature of Congress's "considerable latitude" to use its Section 5 powers. *See id.* at 605–06 (O'Connor, J., dissenting). The dissent likewise reiterated its rejection of societal discrimination as a compelling governmental interest. *See id.* at 613–14 (O'Connor, J., dissenting).

membership,[103] the Supreme Court reversed itself five years later by holding in *Adarand Constructors v. Pena* that all governmental racial classifications, federal and state alike, are subject to the Court's strict level of review.[104] Importantly, the *Adarand* case did not alter the essential conclusion of the *Metro Broadcasting* decision that certain objectives might be upheld under an intermediate or rational level of scrutiny but would not survive the Court's strict scrutiny.[105] The Court also left open the possibility, initially raised in *Croson*, that it might uphold governmental efforts designed to remedy private discrimination when it referred to the "unhappy persistence of both the practice and the lingering effects of racial discrimination," noting that the "government is not disqualified from acting in response to it."[106]

This review of the Court's doctrine offers several critical insights into the government's power to remedy societal discrimination. Perhaps most important, it seems beyond question that the Court's level of scrutiny has proved determinative in nearly all of the cases reviewed.[107] Although the Court has equivocated on the proper standard to apply in reviewing federal programs, it has plainly held that programs designed to remedy societal discrimination will not satisfy the Court's strict scrutiny, although the programs may be upheld under a lower level of review. I later argue that when governmental remedial efforts are tied to the spending power they are properly analyzed under a form of rational basis review and therefore should be upheld so long as the programs do not rely on

103. Both *Metro Broadcasting* and *Adarand* were decided by five-member majorities, and by the time *Adarand* was decided, Justices Souter, Thomas, and Ginsburg had replaced Justices Brennan, Marshall, and White. When Justice Brennan retired from the Court, a high-ranking official at the Justice Department reportedly pronounced the death of *Metro Broadcasting*, but it was actually Justice Thomas who cast the deciding vote in *Adarand*, from which Justice Souter dissented.

104. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 235 (1995) ("[R]acial classifications ... must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

105. *See* Charles Fried, Comment, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107, 111–12 (1990) (criticizing *Metro Broadcasting* for using an intermediate level of scrutiny).

106. *Adarand*, 515 U.S. at 237; *see also* Ayres & Vars, *supra* note 2, at 1585 (discussing ways in which government can redress private discrimination).

107. Lower courts have upheld gender-related affirmative action programs under an intermediate level of scrutiny, while invalidating the race-specific aspects of a program. *See* Eng'g Contractors Ass'n v. Metro. Dade County, 122 F.3d 895, 909 (11th Cir. 1997) ("[I]t is clear to us that a gender-conscious affirmative action program can rest safely on something less than the 'strong basis in evidence' required to bear the weight of a race-or-ethnicity-conscious program.").

racial quotas.[108] The Supreme Court has never defined the concept of societal discrimination, even though a proper definition would help explicate what the programs are actually intended to remedy.

Despite the lack of a definition, the Court's concerns regarding societal discrimination—originally articulated by Justice Powell in his *Bakke* opinion—are readily identifiable. When it comes to remedying societal discrimination, the Court is troubled by the possibility that allowing race-based remedies would lead to a slippery remedial slope where a program might be based on attenuated forms of discrimination, and may just as likely be the result of political preferences or power as actual discrimination. In addition, there is a critical subtext to the Court's decisions, alluded to by Justice Powell in *Wygant v. Jackson Board of Education*,[109] namely that given the pervasive influence of societal discrimination, allowing governments to remedy societal discrimination might entail too much affirmative action—too much redistribution of existing resources. This is a concern the Court has expressed on a number of occasions, and one that has helped shape its Equal Protection doctrine, including as it relates to remedying societal discrimination.[110]

2. Societal Discrimination and Disparate Impact Theory

Although societal discrimination is most prominent in the Court's affirmative action jurisprudence, it permeates the Court's entire antidiscrimination doctrine. In its redistricting cases, for example, the Court has acknowledged the role societal discrimination has played in producing polarized voting patterns. The effects of societal discrimination have often necessitated drawing district lines in a way that would provide minority voters with the statutorily required opportunity to elect candidates of their choice consistent with the dictates of the Voting Rights Act.[111] As was true in the affirmative action context, the Court has found societal discrimination to be a constitutionally inadequate basis for taking

108. *See* Part III.A *infra.*

109. 476 U.S. 267, 278 n.5.

110. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 248 (1976) (noting that permitting a constitutional disparate impact challenge would have required intervening in many aspects of the status quo); *see also* Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 322–23 (1997) (discussing cases where the Court has shied away from challenges that would "invalidat[e] an extensive array of social services").

111. *See* Thornburg v. Gingles, 478 U.S. 30, 66–70 (1986) (discussing polarized voting patterns resulting from societal discrimination).

race into account in drawing district lines.[112] The Court has also recognized the role societal discrimination has played in producing and preserving segregated school districts, though increasingly the Court sees such results as the product of private preferences that are disconnected from discrimination.[113]

While the concept of societal discrimination has played a relatively minor role in the voting and education contexts, it has played a strong supporting role in the development of the disparate impact theory as applied to employment discrimination. The Court first recognized the disparate impact theory in *Griggs v. Duke Power Co.*, when the Supreme Court held that an employer may be required to take action to remedy the disparate racial effects of its employment practices even when those effects are not the product of intentional discrimination.[114] At issue in the *Griggs* case was a requirement that workers possess a high school degree and pass two written examinations in order to be assigned outside of the labor department.[115] As a result of the schooling system in North Carolina, where the case arose, far more whites than blacks had high school degrees, and whites also performed substantially better on the written examinations.[116] In approving the disparate impact theory as a valid interpretation of Title VII, the Court explained, "Because they are Negroes, petitioners have long received inferior education in segregated schools."[117] As should be clear, this is nothing other than a recognition of the role societal discrimination had played in producing a discriminatory education system that spilled over into the

112. *See* Shaw v. Hunt, 517 U.S. 899, 904–05 (1996) (invalidating a North Carolina congressional district); Miller v. Johnson, 515 U.S. 900, 921 (1995) (invalidating Georgia's congressional redistricting). As I have noted previously, the redistricting cases resemble affirmative action cases. *See* Selmi, *supra* note 110, at 317 (arguing that "the redistricting cases are . . . akin to affirmative action cases"). The Supreme Court recently reversed a lower court determination that a redrawn North Carolina district had been impermissibly drawn on the basis of race. *See* Easley v. Cromartie, 532 U.S. 234, 257 (2001). The Supreme Court held that the evidence did not support the conclusion that "race, rather than politics, predominantly" explained the district lines. *Id.*

113. This sentiment is particularly prevalent in the Court's recent education cases. *See* Missouri v. Jenkins, 515 U.S. 70, 87–89 (1995) (rejecting the argument that white flight was attributable to segregation); Freeman v. Pitts, 503 U.S. 467, 485 (1992) (attributing continued racial imbalance in schools to demographic shifts); Bd. of Educ. v. Dowell, 498 U.S. 237, 249–50 (1991) (noting that the duty of school districts extends only to taking necessary steps to eliminate de jure segregation).

114. *Griggs*, 401 U.S. 424, 432 (1971).

115. *Id.* at 427–28. The test requirements were imposed the day after Title VII became effective and likely could have been challenged under a theory of intentional discrimination. *See id.* at 427.

116. *Id.* at 428.

117. *Id.* at 430.

workplace. The plaintiffs made no allegation, after all, that the company had in any way contributed to the discriminatory education system, and yet to ensure that tests did not serve as an "artificial, arbitrary, and unnecessary barrier[] to employment" the Court required employers to establish that the disputed employment practice "bear a demonstrable relationship to successful performance of the jobs for which it is used."[118] What the Court left unanswered, however, is why a private employer should be required to take steps to remedy the effects of governmentally supported and imposed segregation, particularly when the Court has largely forbidden governments from taking such action. Indeed, one of the many ironies in the Court's antidiscrimination jurisprudence is that only private entities can remedy what is a distinctly social problem. Part of the reason for this strange turn of events is that neither the Court nor the commentators has adequately defined societal discrimination, an issue to which I now turn.

B. Defining Societal Discrimination

The Court's doctrine as it relates to the government's power to remedy societal discrimination has always been deficient because the Court has never defined the term. Yet, defining the concept of societal discrimination is crucial to understanding the government's desire to take actions to effect its remedy; moreover, how the term is defined may ultimately influence a court's analysis. For example, societal discrimination might be defined as discrimination for which there is no identifiable responsible party, public or private. It might alternatively be defined as discrimination that occurred some time in the past with an identifiable party that is no longer legally culpable because the statute of limitations has run or the effects of the discrimination are now too attenuated to trace.[119] As just noted, disparate results may also be associated with societal discrimination, as might the lingering effects of past discrimination.[120] The term may also serve as a surrogate for identifiable discrimination in the circumstance where a governmental entity is reluctant to admit or

118. *Id.* at 431. The test, with some modifications, has now been codified as part of Title VII. *See* 42 U.S.C. § 2000e-2(k)(1)(A) (1994).

119. As Girardeau Spann has commented, "The connection between past discrimination and present disadvantage, while undeniable in the abstract, is something that is often incapable of direct proof in particular cases, because the diverse effects of past discrimination have generalized throughout the society in ways that are pervasive yet undifferentiated." Spann, *supra* note 92, at 51.

120. *See supra* Part I.A.2.

prove its own discrimination.[121] Finally, as I will suggest below, societal discrimination might best be seen as the cumulative effects of multiple acts and actors—a combination of all the factors identified above—something the government ought to address because no other comprehensive remedy is available. Before settling on a precise definition, it will first be helpful first to identify the definition that lurks behind the Court's jurisprudence.

1. Discrimination in the Air

Based on the way in which the Supreme Court has considered the concept of societal discrimination, it appears the Court's common working definition is also the most obtuse and unhelpful. The Court sees societal discrimination as anything that is not identifiably, or lawfully, attributable to the particular defendant,[122] what amounts to a form of "discrimination in the air" insofar as the discrimination is not tied to any particular culpable party. While acknowledging the presence of discrimination in the abstract, there is no party available to hold accountable. As an analytical concept, discrimination in the air proves rather empty for it begs the important question of how the results that seek to be remedied—the absence of contracting dollars

121. Speaking of Santa Clara County's difficulty in defending its promotion decision in the *Johnson* case, Melvin Urofsky aptly characterizes the dilemma as compelling the county to decide "how to defend a program based on an assumption of prior bias without admitting that the county had, in fact, discriminated against women." UROFSKY, *supra* note 75, at 83 (footnote omitted). The Supreme Court has likewise recognized the difficulty in requiring governments to document their own discrimination. *See* Johnson v. Transp. Agency of Santa Clara County, 480 U.S. 616, 633 (1987) ("A corporation concerned with maximizing return on investment ... is hardly likely to adopt a[n affirmative action] plan if in order to do so it must compile evidence that could be used to subject it to a colorable Title VII suit."); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring) (requiring findings of past discrimination would undermine efforts at ensuring voluntary compliance with antidiscrimination law). In the case of Diane Joyce, there was, in fact, substantial evidence of discrimination. The dispatcher office in which she sought work was described as an old boy network "impenetrable to outsiders," and in 1974, Diane Joyce's first effort to take the road dispatcher test was rebuffed because she lacked road crew experience. *See* UROFSKY, *supra* note 75, at 4–12. That same year Paul Johnson was allowed to take the test despite his lack of experience, and it was this experience as a road dispatcher, discriminatorily denied to Joyce, that he later relied on to argue that he was better qualified for the position that ultimately went to Joyce. *Id.*

122. *See supra* text accompanying notes 31–37, 67–72. By the term "lawfully," I mean to refer to the Court's disparate impact cases where it has never used the term societal discrimination; as a result, it seems fair to suggest that the Court does not believe such cases raise questions relating to societal discrimination, but instead involve a form of discrimination that is at least statutorily chargeable to the particular defendant even if the defendant had little, or nothing, to do with creating the underlying conditions that have contributed to the results in question.

to African Americans, for example—arose and who ought to be held accountable for remedying the disparity. Indeed, in the fashion used by the Court, the term societal discrimination is little more than a legal conclusion, one that means discrimination for which no one is legally responsible.

2. Societal Discrimination as Cumulative Acts

A better approach would seek to unpack the nature of societal discrimination, so as to identify the varied acts that have produced what we can identify as a discriminatory condition that does not have an obvious or direct causal actor. One way to understand this meaning of societal discrimination is to see it as the product of cumulative acts, none of which may suffice as the primary or sole cause, but all of which contribute to producing unequal results or conditions that are racially biased.[123] These practices will likely have both public and private aspects, and some may even be so intertwined that they cannot be easily severable into public or private components. This difficulty illustrates an important limitation on the Court's discrimination doctrine—a doctrine that is not structured to address discrimination that has both public and private components. Although the Court has crafted rules to accommodate discrimination with multiple causes,[124] it has never seen fit to derive an analytical construct for discrimination that is the product of what might be defined as a public-private partnership, but instead typically defines such discrimination as beyond judicial reach.

Consider the case of contract set-asides, which are intended to provide opportunities for minority contractors based on the assumption, and sometimes the proof, that minorities have not been afforded adequate or equal access to the contracting industry.[125] As

123. For an excellent discussion of how cumulative social effects can have a forceful impact on perpetrating gender discrimination, see VIRGINIA VALIAN, WHY SO SLOW? THE ADVANCEMENT OF WOMEN 1–22 (1998).

124. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 249 (1989) (mixed-motive cases in employment discrimination); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284–87 (1977) (mixed-motive case in First Amendment context).

125. For an interesting exploration of the contract set-aside provision in Richmond, see W. AVON DRAKE & ROBERT D. HOLSWORTH, AFFIRMATIVE ACTION AND THE STALLED QUEST FOR BLACK PROGRESS 70–94 (1996). For additional discussions of discrimination in the contracting industry, see Hyman Frankel, *Opportunity Denied! New York State's Study of Racial and Sexual Discrimination Related to Government Contracting*, 26 URB. LAW. 413 (1994); Robert E. Suggs, *Racial Discrimination in Business Transactions*, 42 HASTINGS L.J. 1257 (1991); Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict & Racial Discrimination in Construction*, 19 POL. & SOC'Y 291 (1991).

noted earlier, the critical question underlying the programs is why so few minority contractors have shared in public contracting programs, at least in those cities that have adopted set-aside programs. In Richmond, Virginia, the city at the center of the dispute in the Supreme Court's *Croson* decision, minority contractors obtained less than one percent of city contracts despite constituting more than half of the city's population.[126] Although the numbers were stark and on their own appeared quite probative, it was difficult to identify the cause of the disparities in contract distribution. No evidence was adduced in the case to suggest that minorities were not sufficiently skilled to perform the work that was being contracted out, nor was there any reason to believe, other than by virtue of their underrepresentation, that minorities were uninterested in the contracting jobs. Yet, it was also difficult to prove that the city, or even a particular city contractor, had consciously excluded minorities from the work, at least after the 1970s or early 80s when outright exclusion had receded, and the case largely turned on how the underrepresentation of minorities in the contracting industry should be interpreted—either as evidence of a lack of interest or as a sign of discrimination within the industry.[127]

This dichotomy, however, is a false one. Based on what is known about the contracting industry and the skills required for the jobs, the most likely explanation for the disparity in contract allocation was a complicated web of discrimination. African Americans were not part of the word-of-mouth recruitment process that typically defines the construction business, which often includes many small family businesses.[128] In some instances, minority contractors were likely discouraged from applying or bidding on jobs, and rather than file discrimination complaints, they may have simply moved into other occupations that were less openly hostile to their participation. City contracts were also made available by various personal contacts, which may have ultimately produced a discriminatory distribution system that would be difficult to prove under the intent standard the

126. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 479–80 (noting that the "[p]roponents of the set-aside provision relied on a study which indicated that, while the general population of Richmond was 50% black, only 0.67% of the city's prime construction contracts had been awarded to minority businesses in the 5-year period from 1978 to 1983").

127. *See* Selmi, *supra* note 110, at 281–82 (discussing the inferences that are drawn from underrepresentation).

128. DRAKE & HOLSWORTH, *supra* note 125, at 84 (describing the contacts and networking necessary in the construction business).

Court requires for constitutional and relevant statutory claims but which nevertheless likely skewed the contracting process.[129]

African Americans were also likely at a capital disadvantage in opening their own firms to compete directly for city contracts, a disadvantage that almost certainly can be traced to the long history of segregation in Richmond and elsewhere.[130] Indeed, it would not take much imagination, or documentation, to establish that the government played a significant role in limiting access to the contracting business and perpetuating a system that awarded contracts overwhelmingly to white contractors, and it seems equally clear that the government should have some responsibility for remedying these persistent inequities.[131]

The world of contracting is hardly an isolated example of the government's role in creating and perpetuating societal discrimination. Similar stories can be told for discrimination in voting, education, and housing, though the analysis becomes more complicated outside the commercial realm of contracting because these other areas all involve what courts often see as private preferences that are not easily subject to government regulation. Nevertheless, with respect to voting, it is easily overlooked that the need to include race as an explicit factor in drawing districts arises

129. *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1171 (10th Cir. 2000) ("The government's evidence strongly supports the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms."), *cert. granted*, 532 U.S. 941 (2001), *cert. dismissed*, 534 U.S. 103 (2001).

130. *See* The Compelling Interest for Affirmative Action in Federal Procurement, 61 FED. REG. 26042, 26058 (May 23, 1996) (detailing discrimination in capital markets). *See generally* MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995) (describing disparity in wealth between blacks and whites).

131. The notion that the government had an obligation to undo the past practices provided the underlying rationale for the adoption of construction goals in Richmond. *See* DRAKE AND HOLSWORTH, *supra* note 125, at 68–71. The economic set-aside programs arose after a black majority was elected to the city council and were part of a larger effort to help "shape economic development policy to benefit African Americans" after years of neglect. *See id.* at 70–71. The Supreme Court roundly criticized the Richmond program because, among other things, it included Alaskan Aleuts among the groups that were eligible to participate in the program, and sought to ensure that at least thirty percent of the city's construction funds went to minority contractors. *See Croson*, 488 U.S. at 478. Yet, the definition of disadvantaged groups that the city used was taken directly from the federal program that had been upheld by the Supreme Court in *Fullilove*, and the thirty percent figure was chosen because it represented the midway point between the percentage of contracts that currently were distributed to minority contractors and the percent of the population that was African-American (sixty percent). *See* DRAKE & HOLSWORTH, *supra* note 125, at 81–82. The plan was also adopted after the completion of a study on minority participation in the construction industry. *See id.* at 82.

from the fact that white voters rarely vote for African-American candidates.[132] Some of this unwillingness has to do with the pernicious legacy of governmentally imposed voting restrictions on African Americans, which have direct and indirect effects that continue to influence voting patterns.[133] But some of the animus, though influenced by governmental action, is more clearly attributable to personal beliefs and biases—simple prejudice. Additional factors that may be relevant to the voting context, but that do not directly implicate race, include the advantage incumbents have in elections and financial advantages whites possess due to their personal wealth and ability to attract funds.[134] Although the government would seemingly have a strong and constitutionally permissible incentive to eradicate discriminatory private beliefs,[135] the Court has been reluctant to consider racial redistricting as an acceptable means of achieving that permissible goal.[136]

Education likewise provides a complicated web of motives and causal inquiries. No one would deny the government's role in establishing and maintaining segregated schools, as well as the many and diverse efforts school districts employed to avoid desegregation mandates.[137] It is more difficult, however, to assess responsibility for

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132. The phenomenon of racial bloc voting has been well-documented. *See generally* QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990 (Chandler Davidson & Bernard Grofman eds., 1994). In North Carolina, in 1982 and 1984, more than ninety percent of African Americans voted for the African-American candidate in the two races when they had the opportunity to do so, while eighty-six to eighty-eight percent of whites voted for a white candidate. *See* J. MORGAN KOUSSER, COLORBLIND INJUSTICE 273 (1999). In addition to racial bloc voting, lower voter turnouts and registration among African Americans contributes to the difficulties black candidates have had getting elected, as does the power of incumbency. *See id.* at 259–60 (discussing North Carolina elections).

133. *See, e.g.*, ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY OF RACIAL EQUALITY 88–92 (1996) (discussing obstacles to ending racial bloc voting). Pamela Karlan and Daryl Levinson have suggested that the role the state has played in "creating and perpetuating racial bloc voting" should take these cases "out of the realm of non-remedial 'societal discrimination.' " *See* Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CAL. L. REV. 1201, 1232 n.153 (1996).

134. KOUSSER, *supra* note 132, at 258.

135. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (invalidating a state policy on child custody because it gave effect to private biases). The government can surely seek to change even these private discriminatory beliefs, and has undertaken over the years frequent if ineffective efforts, such as President Clinton's race initiative, which no one would contend was unconstitutional.

136. *See* Melissa L. Saunders, *Reconsidering* Shaw*: The* Miranda *of Race-Conscious Districting*, 109 YALE L.J. 1603, 1604–07 (2000).

137. *See, e.g.*, Green v. County Sch. Bd., 391 U.S. 430, 441–42 (1968) (invalidating a freedom-of-choice plan); Griffin v. County Sch. Bd. of Prince Edward County, 377 U.S.

the failure to achieve any significant degree of desegregation since the early 1970s, although much of that failure must lie at the feet of those who so strongly resisted integration, including many public officials.[138] The primary difficulty in the desegregation cases, particularly those that are still being litigated, is deciding who should bear the responsibility for the fact that so many schools remain segregated.[139] In an insightful dissenting opinion, Justice Souter wondered aloud how it was possible to know, or to determine, whether it was official segregation or the efforts to eliminate segregation that had caused the flight from inner-city schools, which in turn contributes to the severe racial imbalance that still defines many urban schools today.[140] It is unquestionably difficult to answer this query, but the problem that has arisen is that the Court has never asked the question let alone tried to answer it.[141]

Housing offers a similar though surprisingly less well-known story. We often treat housing as reflecting core private beliefs and individual choice,[142] but the government has long been actively

218, 225–27 (1964) (finding that the closing of the public schools conflicted with the Court's mandate in *Brown*).

138. *See* JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY 115–17 (2001) (discussing the important role played by public officials' resistance to desegregation).

139. For a discussion of the current state of desegregation in public schools, see GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION 1–22 (1996). In an important recent case, the Connecticut Supreme Court held that the state had played a significant role in the present segregation of Hartford's schools even though separate schools had not been part of state policy for nearly a hundred years. *See* Sheff v. O'Neill, 678 A.2d 1267, 1274 (Conn. 1996). The Court held that the state had contributed to the current racial makeup of the schools through the use of standardized tests, school attendance, graduation requirements, the use of financial aid, and other means. *Id.* at 1273.

140. *See* Missouri v. Jenkins, 515 U.S. 70, 164 (1995) (Souter, J., dissenting).

141. Others on the Court see it as unrealistic to believe that there are significant lingering effects from the era of segregated schools. Justice Scalia has been most forthright in stating such a position. He has written: "At some time, we must acknowledge that it has become absurd to assume, without any further proof, that violations of the Constitution dating from the days when Lyndon Johnson was President, or earlier, continue to have an appreciable effect upon current operation of schools." Freeman v. Pitts, 503 U.S. 467, 506 (1992) (Scalia, J., concurring).

142. Many of the Court's more recent school desegregation cases reflect this sentiment, expressed most clearly by Justice Thomas: "The continuing 'racial isolation' of schools after de jure segregation has ended may well reflect voluntary housing choices or other private decisions." *Jenkins*, 515 U.S. at 84 (Thomas, J., concurring); *see also Freeman*, 503 U.S. at 495 (1991) (noting that demographics changes are often the real source of racial imbalance, and "[i]t is beyond the authority and beyond the practical ability of the federal courts to try to counteract"); Dowell v. Bd. of Educ., 778 F. Supp. 1144, 1167 (W.D. Okla. 1991) (finding, on remand from the Supreme Court, that "[c]urrent residential segregation in Oklahoma City today is caused by the private choices of blacks and whites").

involved in shaping those choices, often in discriminatory ways. For example, following World War II, government efforts to assist in expanding home ownership among returning veterans included explicit directives to avoid lending to racially diverse areas.[143] Additionally, the government has recently acknowledged the discriminatory patterns in which it built public housing, which effectively ensured that public housing perpetuated, rather than alleviated, segregated housing patterns.[144] The government also helped shape housing choices by subsidizing the building of highways to the suburbs rather than enhancing mass transit systems within the cities, by permitting and often encouraging zoning laws that made it difficult for lower income individuals to purchase or rent housing in the suburbs, and by providing various tax incentives for companies to relocate to the suburbs.[145]

This short history demonstrates that what the Court has labeled societal discrimination is best defined as the product of cumulative acts and forces, some of which directly involve the government and others of which implicate the government more indirectly.[146]

143. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 208 (1985). For a recent discussion of the ways in which the government contributed to segregated housing, particularly in Boston, see Michelle Adams, *The Last Wave of Affirmative Action*, 1998 WIS. L. REV. 1395, 1418–24.

144. *See* Walker v. City of Mesquite, 169 F.3d 973, 976–78 (5th Cir. 1999) (discussing Dallas's discriminatory policy for locating public housing), *cert. denied*, 528 U.S. 1131 (2000); Raso v. Lago, 135 F.3d 11 (1st Cir. 1998) (involving Boston's public housing and 1991 consent decree concerning HUD's failure to ensure equal access to public housing for minority residents).

145. *See* JACKSON, *supra* note 143, at 190–245; *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1847–60 (1994) (discussing the many ways in which public and private associations contributed to racial segregation).

146. A third type of discrimination that might be associated with societal discrimination is the cumulative force of practices that are specific to a particular employer, what is sometimes referred to as institutional racism. *See* BARBARA J. FLAGG, WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW 27–29 (1998); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1726–28 (2000). Within this perspective, an employer or entity's practices are tinged with biases in a variety of ways even though no particular practice may be responsible in a legal sense for the discriminatory results. An employer, for example, might use word-of-mouth recruiting, which will then be compounded by subtle biases in the workplace, the combination of which will lead to sharply fewer opportunities for minorities within the organization. López discusses the judicial appointment of grand jurors in Los Angeles County during the 1960s and 1970s, when judges tended to appoint people with whom they were personally acquainted—a practice that produced, not surprisingly, very few minority grand jurors. *See* López, *supra*, at 1732–43. In contrast to the first two types of discrimination I have discussed, this form of discrimination primarily involves proof problems and I believe is not properly classified as societal discrimination. Indeed, in employment discrimination, Title VII specifically

Described in this way, societal discrimination is a social ill that the government should be able to take steps to eliminate or reduce. Indeed, not only should the government be permitted to remedy societal discrimination, it should be obligated to do so. Because societal discrimination serves no positive function, it is precisely the kind of condition the government should be charged with remedying. In the next two sections, I will suggest that it can do so through its spending power.

II. THE SPENDING POWER

One way the government can meet its obligation to remedy societal discrimination is through the use of its spending power, which traditionally has afforded the government broad discretion to pursue social, economic, and political goals.[147] The government has long sought to shape behavior by attaching various conditions to the distribution of its funds.[148] These conditions have ranged widely, from controlling agricultural production to restricting campaign spending, and have included requirements that government contractors pay prevailing wages to their employees, as well as more mundane issues such as promoting sustainable agriculture through the sale of organic coffee in government cafes.[149] When the government uses its funds to pursue a particular political, social, or economic agenda, courts

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provides for a proof structure to govern circumstances where discriminatory results are the product of employment practices that are "not capable of separation." 42 U.S.C. §§ 2000e–2000g (1994). At the same time, these cases are extremely difficult to prove and may often go unremedied for this reason, but this difficulty alone should not transform the cases into a form of societal discrimination if the concept is to retain any significant meaning.

147. The Spending Clause provides that "the Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. CONST. art. I, § 8, cl. 1.

148. For a comprehensive review of the many cases in which the government has attached conditions to federal spending, see Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987). Rosenthal's article was written just before the Court issued a series of important decisions and thus is now better read for its historical understanding than as an exegesis of existing doctrine.

149. *See, e.g.*, Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 846 (1984) (denying federal assistance to students who had not registered for the draft); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding federal legislation prohibiting the use of medicaid funds for abortions); Buckley v. Valeo, 424 U.S. 1, 143 (1976) (per curiam) (upholding spending restrictions on candidates who receive federal funds); United States v. Butler, 297 U.S. 1, 65–67 (1936) (noting that objectives not within Article I's enumerated powers may be attained through the spending power).

generally have reviewed the programs with considerable judicial deference.[150]

The Supreme Court's doctrine relating to government funding is both lengthy and complicated, and involves three discrete but related areas. First, and for the purposes of my argument most important, are a series of cases involving decisions by the government to fund certain activities to the exclusion of others, cases that are often treated under the general rubric of "government funding cases."[151] Second, some cases implicate what are known as "unconstitutional conditions," where the government conditions a benefit on some particular behavior, such as complying with a loyalty oath or refraining from supporting political candidates as a price for federal funds.[152] These cases are closely related to the first category, but a separate doctrine has developed around the cases that is often—mistakenly I contend—seen as a critical restraint on the government's spending power.[153] Third, the government uses its funds to provide incentives to induce compliance with other legal provisions, for example, by prohibiting entities that receive federal funds from engaging in racial discrimination.[154] In this section, I concentrate my analysis on the first two categories of cases, and I address the third category in the final section of this Article.

From the outset, I should note that I will not attempt anything like a comprehensive review of the Court's doctrine in this area but instead concentrate on a series of cases involving the government's role in various commercial activities, as opposed to situations in which the government places various conditions or restrictions on social welfare benefits, an area that raises an entirely different set of

150. One commentator has recently suggested that the Supreme Court might be preparing for a shift in the near future, at least with respect to conditions imposed on states. *See* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1924–32 (1995). Professor Baker has suggested that the Court might try to reconcile its permissive stance toward government spending with the Court's far more restrictive view of the federal government to dictate terms on states that interfere with traditional state autonomy. *Id.* Since the publication of Professor Baker's article, the Supreme Court has issued a series of decisions holding that individuals cannot sue states for money damages under various federal antidiscrimination statutes, providing some additional support for her argument. *See, e.g.*, Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000) (holding that the ADEA cannot be applied to the states).

151. *See infra* text accompanying notes 156–98.

152. *See* FCC v. League of Women Voters, 468 U.S. 364, 372–73 (1984) (upholding a prohibition on television stations that receive federal funds from supporting political candidates); Speiser v. Randall, 357 U.S. 513, 528–29 (1958) (invalidating the loyalty oath). These cases are discussed in more detail *infra* Part II.C.

153. I discuss the unconstitutional conditions doctrine in Part II.C.

154. *See* 42 U.S.C. § 2000d (1994) (Title VI).

issues that are not directly related to my argument.[155] In particular, I focus on a spate of decisions the Court has issued in the last decade upholding governmental efforts to fund a particular side in controversial areas in pursuit of what the government defines as the public good. I argue that these cases provide the necessary constitutional space for the government to use its spending power to seek to remedy societal discrimination, a goal the government may only accomplish through indirect means tied to federal funding.

A. The Recent Government Funding Cases

1. *Rust v. Sullivan*

As it relates to the goal of remedying societal discrimination, the most important case in this area is *Rust v. Sullivan*, in which the Supreme Court upheld restrictions imposed on health clinics that received federal funding designated for a specific program.[156] At issue in *Rust* were Department of Health and Human Services regulations that limited the ability of health providers receiving federal funds through a program known as Title X to engage in abortion-related activities.[157] The Title X program was introduced in

155. For an overview of the benefits cases, see Lynn A. Baker, *The Prices of Rights: Toward A Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990). The literature involving government funding is enormous, especially in the area of the unconstitutional conditions doctrine, which holds a special appeal for constitutional scholars. For a sampling of the principal works, see David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

156. Rust v. Sullivan, 500 U.S. 173, 177–78 (1991). In many ways, *Rust* was an extension of two earlier Supreme Court decisions that upheld state and federal determinations that Medicaid funds could not be used to pay for most abortions. *See* Harris v. McCrae, 448 U.S. 297, 326–27 (1980); Maher v. Roe, 432 U.S. 464, 480 (1977). In upholding the state decision, the Supreme Court specifically acknowledged the state's latitude to use its funding to pursue permissible political goals, noting that there was "no limitation on the authority of a state to make a value judgment favoring childbirth over abortion, and to implement that judgment by the allocation of public funds." *Maher*, 432 U.S. at 474; *see also Harris*, 448 U.S. at 324–25 (upholding restrictions on access to abortion for indigent women). Equally important, the abortion funding cases set the tone for the Court's deferential review of government funding decisions by applying rationality review to the government restrictions.

157. *Rust*, 500 U.S. at 179 ("[A] Title X project may not provide counseling concerning the use of abortion as a method of family planning, or provide a referral for abortion as a method of family planning.").

the early 1970s to provide family planning to low-income women, and the restrictions challenged in *Rust* were part of the Reagan Administration's efforts to limit the scope of Title X funding to "preventive family-planning" by "clarifying that pregnant women must be referred to appropriate prenatal care services."[158] These restrictions went beyond prohibiting the provision of abortions at the facilities, they also prevented employees of the clinics from discussing abortion with their clients, or from referring them to abortion clinics even when their clients specifically requested a referral.[159]

Given that the Supreme Court had twice previously upheld the government's refusal to fund abortion services,[160] the constitutional challenge in *Rust* centered on the prohibition relating to discussing abortion within a Title X facility.[161] In their First Amendment challenge, the petitioners, doctors and health clinics, argued that the regulations constituted impermissible viewpoint discrimination because they were intended to suppress dangerous ideas, namely the advocacy of abortion.[162] On one level, this argument appeared to be a sure winner, as the regulations were indisputably viewpoint-based, and the Supreme Court's speech doctrine is generally quite hostile to viewpoint discrimination.[163] Indeed, had the restriction not been attached to government funding, it would have been quickly invalidated, as the government could not restrict the messages private doctors and clinics could convey absent the connection to federal funds. Yet, the Court rejected the petitioners' challenge and upheld the regulation, explaining:

> The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest .... In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.[164]

158. *Id.*; *see also* Dorothy E. Roberts, Rust v. Sullivan *and the Control of Knowledge*, 61 GEO. WASH. L. REV. 587, 598–604 (1993) (discussing the history of the regulation).

159. *Rust*, 500 U.S. at 180 ("The Title X project is expressly prohibited from referring a pregnant woman to an abortion provider, even upon specific request.").

160. *See supra* note 156.

161. In its opinion, the Court rejected two other challenges to the regulations as being inconsistent with the legislation. *Rust*, 500 U.S. at 181–90.

162. *Id.* at 192.

163. *See* Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

164. *Rust*, 500 U.S. at 193.

The Court added that the government was free to choose to advance permissible goals when appropriating public funds and was under no obligation to fund competing political or social views.[165]

In its opinion, the Court devoted sparse attention to the question of what goals the government could legitimately pursue through the use of its spending power.[166] In the abortion context, this would now likely turn on whether the regulations constituted an undue burden on a woman's ability to exercise her constitutionally protected right to an abortion, a slightly different test than existed at the time *Rust* was decided.[167] For example, the Court would likely find it impermissible if the government required clients of Title X facilities to agree not to have an abortion as a condition for using the facilities.[168] Similarly, the government could not apply its restrictions beyond the workplace to prevent clinic employees from advocating abortions or counseling individuals on their free time. Even with these restrictions, the breadth of the Court's decision at times recalls Justice Holmes's famous quip in a case involving the termination of a police officer that although an officer "may have a constitutional right to talk politics . . .

165. In what now appears to be an anachronistic analogy, the Court noted that the government may provide funds for the purpose of promoting democracy without appropriating similar funds to support communism. *Id.* at 194.

166. Robert Post has argued that the Court is likely to give the government greater leeway when it is operating in what he defines as managerial domains where the "state organizes its resources so as to achieve specified ends," which are often political in nature. *See* Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164–65 (1996) [hereinafter Post, *Subsidized Speech*]. Post contrasts the managerial domain with the domain of public discourse where certain neutrality requirements restrict governmental actions to a greater extent than they do in the managerial realm. *See id.* at 164; *see also* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1716–17 (1987) (developing his theory on the managerial and public discourse domains). He notes further that "[w]ithin managerial domains . . . ends may be imposed upon persons." Post, *Subsidized Speech*, *supra*, at 164.

167. *See* Planned Parenthood v. Casey, 505 U.S. 833, 884–85 (1992) (holding that a statute that affects the right to abortion will be invalidated only if it imposes an "undue burden" on women seeking abortions). The test devised in *Casey* was, in fact, quite similar to the standard the Court used in its earlier decisions upholding the governments' determination not to provide Medicaid funds for abortions. *See* Harris v. McRae, 448 U.S. 297, 315 (1980) ("The Hyde Amendment . . . places no governmental obstacle in the path of a woman who chooses to terminate her pregnancy.").

168. *See Harris*, 448 U.S. at 317 n.19 ("A substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate pregnancy by abortion."); Sullivan, *supra* note 155, at 1464 (stating that withholding funds from a woman who had an abortion would be impermissible).

he has no constitutional right to be a policeman."[169] But the Court's decision in *Rust* does not go quite so far, and indeed the Court sought to define some additional limits on the manner in which the government disburses its funds.

As will be discussed in more detail below, the most significant limitation on the government's ability to spend falls under what is known as the unconstitutional conditions doctrine, where the government seeks to impose conditions that may violate an individual's constitutional rights.[170] Within its First Amendment jurisprudence, the Court provides greater scrutiny of the governmental efforts to restrict actions that occur in public fora, where the government has a greater obligation to act neutrally than it does when it is simply funding programs intended to further its political agenda.[171] In deciding whether the government impermissibly funds an activity, the Court considers the existence of other outlets for the prohibited activity. In upholding the restriction on abortion counseling, the Court placed substantial weight on the fact that the Title X clinics could establish separate facilities to provide abortion services so long as those facilities were both financially and physically separate from the federally funded clinics.[172]

For the purposes of my argument, three aspects of the decision are worth emphasizing. First, the Court did not subject the regulations to its strict scrutiny, but instead applied what is best

169. McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). Under this view, because no entity or person is obligated to accept federal funds, there can be no complaint regarding the particular strings that are attached to those funds, a view that has attracted varying degrees of allegiance throughout the Court's history. Indeed, Justices Rehnquist and Scalia seem to hold just such a view. *See infra* text accompanying note 216 (discussing the Justices' advocacy of applying rational basis review to governmental use restrictions). For a critical analysis of this position, see Van Alstyne, *supra* note 155, at 1463–64.

170. *See* Part II.C *infra*.

171. *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995) (discussing the government's obligations when public forum is at issue); Perry Ed. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (stating that government has a higher degree of neutrality in a public forum setting).

172. Rust v. Sullivan, 500 U.S. 173, 196 (1991) ("The Title X *grantee* can continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it is simply required to conduct those activities through programs that are separate and independent from the project that receives Title X funds."). The Court was far less concerned with whether establishing a separate facility was actually feasible or would provide any practical services. Assuming the clinic was established to serve the same women who would benefit from Title X funds, the women may never find out about the separate facility given that the Title X clinic was prohibited from referring their clients to an abortion provider. Similarly, the Title X recipient may not have sufficient additional funds to establish a separate clinic.

described as a rational basis review.[173] Under rationality review, the only question the Court considers is whether the governmental restriction is reasonably related to the program's goals, a test that is widely acknowledged to be constitutionally undemanding.[174] Second, the decision clearly establishes that the government—and this principle should apply to federal, state, and local governments—can regulate indirectly using public funds for purposes that it would not be permitted to accomplish directly. Certainly the government could not have prohibited the clinic employees from discussing abortion-related services absent the provision of federal funds. Instead, under its spending power, the government was able to pursue its objective of ensuring that federal funds were not used to support or encourage abortions. Third, there is nothing to suggest that the decision should be limited to the abortion context. This is true even though the case often reads like one of the Court's abortion decisions decided by a bare majority led by the Court's most conservative members. Indeed, although *Rust* has not been widely applied—and the regulations at issue were rescinded shortly after President Clinton took office[175]—it has been extended to other areas.[176]

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173. The Court did not specify the level of review it was applying, although it used language that is often equated with rationality review, noting, for example, that the scope of the project was "permissibly restricted" and that the regulations were "a permissible construction." *Id.* at 199, 203. The Court also relied on its earlier decisions in *Maher* and *Harris*, both of which applied rationality review.

174. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 324–25 (1980) (applying rationality review to uphold a regulation prohibiting medicaid funds to be used for abortions); DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 294–97 (1993) (noting that the Court usually finds a way to uphold legislation under rationality review).

175. *See* Post, *Subsidized Speech*, *supra* note 166, at 168 n.106.

176. In addition to the cases discussed *infra*, see Bd. of Regents v. Southworth, 529 U.S. 217, 229 (2000) (involving distribution of funds by public university); Urofsky v. Gilmore, 216 F.3d 401, 408 n.6 (4th Cir. 2000) (concerning state employee speech), *cert. denied*, 531 U.S. 1070 (2001); Turley v. Police Dep't of the City of New York, 167 F.3d 757, 761 (2d Cir. 1999) (noting that "the government can, without violating the Constitution, selectively fund a program to encourage certain activities"); Hassan v. Wright, 45 F.3d 1063, 1069 (7th Cir. 1995) (citing *Rust* for the proposition that there is no affirmative right to government aid). Just last term, the Supreme Court issued a decision that distinguished *Rust*, in invalidating restrictions that had been placed on the litigation activities of the Legal Services Corporation. *See* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 542–43 (2001). The Court found that the restrictions, which precluded litigation challenges to the recently enacted Welfare Reform Act, were inconsistent with the purposes of the statute and significantly interfered with the role of the judiciary in adjudicating the scope and permissibility of the Act. Interestingly, while the Court distinguished *Rust*, it never cited its decision in *NEA v. Finley*, 524 U.S. 569 (1998), discussed *infra*.

2. The NEA Controversy

An important case extending the principles discussed in *Rust* involved Congress's attempt to impose limits on the distribution of funds by the National Endowment for the Arts (NEA) so as to ensure that the agency's grants would respect general standards of decency. In *National Endowment for the Arts v. Finley*, four artists whose projects were approved by an advisory panel prior to the adoption of the decency clause challenged the regulations after their proposals were subsequently rejected as being inconsistent with standards of decency.[177] The plaintiffs argued that the regulation ran afoul of the First Amendment because it sought to exclude particularly controversial projects from eligibility for public funds.[178]

This case was both much easier and more difficult than *Rust*. When it comes to funding for the arts, the government has wide latitude to choose what projects it wants to fund, yet, at the same time, the regulations were undeniably aimed at suppressing controversial forms of speech, which is one of the core evils the First Amendment seeks to protect against.[179] Although the Government has broad discretion to choose what paintings to hang in its museums, or what projects it wants to subsidize, the controversy arose here because it sought to limit its financial support based on the views expressed by the artists rather than on the artistic merit of the projects, a restriction that might be applied to limit support of art that criticized the government.

In an opinion authored by Justice O'Connor, one of the dissenters in *Rust*, the regulation was upheld for a variety of reasons, but in particular because the Court determined that the government was exercising its discretion to choose among permissible ways to spend its funds.[180] Justice O'Connor explained,

> Although the First Amendment certainly has application in the subsidy context, we note that the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not

177. 524 U.S. 569, 577 (1998).

178. *Id.* at 577–78.

179. *See* Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 104–06 (1998) (discussing the role of viewpoint discrimination in the Court's analysis).

180. *Finley*, 524 U.S. at 587–88.

> infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.[181]

Justice Scalia's concurring opinion would have gone even further by largely exempting funding decisions from judicial scrutiny altogether. Unlike the majority, Justice Scalia, who was joined by Justice Thomas, conceded that the regulation constituted viewpoint discrimination but considered it constitutional nevertheless, observing that "[i]t is the very business of government to favor and disfavor points of view on ... innumerable subjects."[182] This case was particularly easy for Justice Scalia insofar as "[t]hose who wish to create indecent and disrespectful art are as unconstrained now as they were before the enactment of this statute.... [T]hey are merely deprived of the additional satisfaction of having the bourgeoisie taxed to pay for it."[183]

Writing only for himself, Justice Souter made a compelling case in dissent that *Finley* was a more difficult case than the majority's decision intimated. Justice Souter emphasized that unlike *Rust*, the *Finley* case did not involve the government's role as a speaker but instead involved the government's expenditure of funds to support an important public purpose.[184] There was no danger, he suggested, that the art supported by NEA grants would be construed as government art projects, which arguably distinguished the situation from the health clinics at issue in *Rust* where the Title X money plainly funded a government program.[185] When the government merely funds only a portion of a project, viewpoint discrimination becomes more problematic. "After all," Justice Souter wrote, "the whole point of the proviso was to make sure that works like Serrano's ostensibly blasphemous portrayal of Jesus would not be funded, while a reverent treatment conventionally respectful of Christian sensibilities, would not run afoul of the law. Nothing could be more viewpoint based than that."[186]

If taken to an extreme, the Court's decision in *Finley* might be used to support withholding funds from art that was unpatriotic or racist, and the decision does not suggest what constitutional limits might apply to such restrictions. But there do appear to be some limits, at least implicitly. For example, it seems quite likely that the

181. *Id.*
182. *Id.* at 598 (Scalia, J., concurring).
183. *Id.* at 595–96 (Scalia, J., concurring).
184. *Id.* at 611 (Souter, J., dissenting).
185. *Id.* at 611–12 (Souter, J., dissenting).
186. *Id.* at 606 (Souter, J., dissenting) (citations omitted).

Court would invalidate grants that were distributed only to Republican artists, though it might be able to support Republican-inspired art. And without some substantial justification it would likely invalidate a grant program that sought to direct funds solely to African-American artists. On the other hand, the government might be able to withhold funds from racist art under the theory that it does not want to support discrimination or discriminatory messages of any kind; it may also be able to dedicate funds to promoting African-American art based on its message or past neglect.[187] This distinction between funding artists and art will ultimately play an important role in determining how the government can use its funds to pursue the goal of racial equality.

3. The *Rosenberger Case*

Justice Souter based his argument in *Finley* primarily on a case that had been decided between *Rust* and *Finley* involving the distribution of student funds at the University of Virginia. In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court struck down the University's refusal to distribute funds obtained from student fees to religious groups.[188] But the *Rosenberger* case ultimately proves to be an inapt analogy, as the case is more about religion than it is about government funding.[189] The program at issue in *Rosenberger* provided student funds to qualifying student groups but excluded religious—as well as philosophical, political, and several other groups—from receiving funds, ostensibly due to a fear that providing the funds to the religious groups would violate the Establishment Clause.[190] There was no other stated reason for the restriction,[191] and once the Supreme Court held that the Establishment Clause would not be violated by including religious groups among the groups eligible to receive funds there was no credible rationale for the continued restriction. As a result, the University's restriction appeared to result from a desire to disfavor

187. *See* Kreimer, *supra* note 155, at 1338–39, 1374–75 (discussing grants based on political affiliation).

188. 515 U.S. 819, 845–46 (1995).

189. The case also implicates the Court's doctrine relating to public fora, where the government must exercise more care and less discretion in how it distributes its resources. *See id.* at 829 (discussing the limited public forum).

190. *Id.* at 824–25.

191. In the Supreme Court, the university largely abandoned its Establishment Clause argument in favor of arguing that it should be able to "control the use of its public funds." *Id.* at 838. No Justice on the Court appeared to take this move seriously, and they all concentrated on the Establishment Clause argument. *See id.*

religious groups, which amounted to impermissible viewpoint discrimination that was plainly inconsistent with the First Amendment's command of government neutrality toward religion.[192]

The Court in *Rosenberger* sought to distinguish *Rust* by emphasizing the different roles the government played in the two cases. In *Rust*, the government "used private speakers to transmit specific information pertaining to its own program," whereas the program at issue in *Rosenberger* simply facilitated the speech of third parties.[193] It is this language that Justice Souter seized upon in his dissenting opinion in *Finley*. If taken literally, the government's role as speaker would be critical to determining the constitutionality of a government subsidy program, and this distinction arguably should have produced a different result in *Finley*, where the government sought to facilitate the arts but was not acting as a speaker. That said, whatever role the government-as-speaker distinction actually plays in the Court's doctrine, it is not likely to be relevant in the discrimination context where the government can structure its program, and in some instances already has, to support a particular purpose and thereby to send a particular message.

That *Rosenberger* was primarily about religion rather than government funding was confirmed in a more recent decision in which the Court upheld the University of Wisconsin's mandatory student fee program over the complaint of students who objected to some of the purposes to which the funds were put.[194] Writing for a unanimous Court, Justice Kennedy reiterated the core meaning of *Rust* by noting, "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy."[195] The Court noted further that when the government speaks, the issue of viewpoint neutrality does not "come into play."[196]

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192. *Id.* at 832–35 (holding that the statute was impermissibly viewpoint based). In reaching its conclusion, the Supreme Court principally relied on a religion case, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395–96 (1993), which struck down an effort to prohibit religious groups from using school facilities that were otherwise open to the community.

193. *Rosenberger*, 515 U.S. at 833–34; *see also* Legal Serv. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (noting that "the LSC program was designed to facilitate private speech, not to promote a governmental message").

194. Bd. of Regents v. Southworth, 529 U.S. 217, 233–34 (2000).

195. *Id.* at 235.

196. *See id.*; *see also* Good News Club v. Milford Cent. Sch., 121 S. Ct. 2093 (2001) (relying on *Rosenberger* to invalidate a restriction on the use of public schools by religious groups); Gentala v. City of Tucson, 244 F.3d 1065, 1074–78 (9th Cir. 2001) (en banc)

The Court's concern with religion in *Rosenberger* offers guidance on the limitations that are likely to be imposed on the government's efforts to remedy societal discrimination through the spending power. Just as the government cannot exclude religious groups from its general publication funds, the government cannot exclude groups based solely on race when it is exercising its spending powers.[197] Put more simply, the government could no more exclude whites from its contracting program than a state university could exclude religious groups from receiving state funds. But there the religion analogy stops because the First Amendment prohibits the government from promoting religion in a way that the government is not prohibited from promoting racial equality, an issue that will be analyzed shortly.[198]

B. Government Spending in Other Contexts

The cases just discussed are all broadly consistent with a diverse line of cases regulating the government's proprietary activities. The Court has held, for example, that the government can restrict its employees' speech rights in the workplace with respect to speech that does not involve matters of public concern.[199] The Court has likewise

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(applying *Rosenberger* to city funding of a religious activity), *vacated by* 122 S. Ct. 340 (2001).

197. For a recent argument comparing the Court's doctrine relating to religion and race, see Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses*, 2000 SUP. CT. REV. 325, 326–27.

198. The cases just discussed, particularly *Rust* and *Finley*, have elicited stern critical commentary from academics, in large part because the causes promoted in the cases were generally conservative in nature and, as a result, these cases have generally been treated as part of the Court's reactionary political doctrine. For two recent critical reviews of the Court's doctrine, see Steven J. Heyman, *State-Supported Speech*, 1999 WIS. L. REV. 1119, 1121–22; Post, *Subsidized Speech*, *supra* note 166, at 151–52. For additional critiques of *Rust v. Sullivan*, see David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 682–83 (1992) (arguing that the Court's version of the unconstitutional conditions doctrine is deficient); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1726 (1995) (discussing the First Amendment implications of restricting abortion counseling). While I address this issue later in this Article, let me note here that the road to conditional spending need not be a one-way street, as both liberal and conservative governments can attach conditions to their spending.

199. When a government employee is disciplined for speech that involves a matter of public concern, the Court applies a balancing test to determine whether the government was justified in its belief that the speech would interfere with the efficient operation of its business. *See* Rankin v. McPherson, 483 U.S. 378, 384 (1987). Where the speech does not implicate a matter of public concern, there is no First Amendment restriction on the government's ability to regulate employee speech. *See* Waters v. Churchill, 511 U.S. 661, 668 (1994).

freed the government from the constraints of the Commerce Clause when it acts as a participant, or purchaser, in a market as distinct from when it is operating in its role as a market regulator.[200] The federal government has also required states to establish a nationwide speed limit and to set a drinking age as a condition for receiving federal highway funds, two goals the government would likely lack the power to accomplish absent its spending power.[201] In these cases, once the government ties the conditions to government funds, the Court's review has been exceedingly deferential, and the programs are routinely upheld.

1. *South Dakota v. Dole*

The leading case in this area is *South Dakota v. Dole*, where the Supreme Court upheld Congress's decision to withhold a portion of federal highway funds from states that maintained a drinking age under twenty-one.[202] Quoting from the Court's earlier decision in *Fullilove v. Klutznick*,[203] Chief Justice Rehnquist wrote: "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.' "[204] If South Dakota wanted to keep its drinking age at nineteen, all it was required to do was forego some of its allotted federal highway funds.[205]

Yet, Congress was not entirely free to impose conditions on its funds, and much as it sought to do in *Rust v. Sullivan*,[206] the Court established four broad limitations on the government's spending power. First, the spending had to be in pursuit of the general welfare, and the condition had to be stated unambiguously to provide adequate notice to fund recipients.[207] Additionally, the condition had

200. *See* S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 93 (1984) ("Our cases make clear that if a State is acting as a market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.").

201. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding federal highway funds tied to national drinking age); Nevada v. Skinner, 884 F.2d 445, 446 (9th Cir. 1989) (upholding legislation withholding federal funds from states that did not impose a fifty-five mile-per-hour speed limit).

202. *Dole*, 483 U.S. at 211.

203. 448 U.S. 448 (1980).

204. *Dole*, 483 U.S. at 206 (quoting *Fullilove*, 448 U.S. at 474).

205. *See id.* at 211 (noting that "all South Dakota would lose if she adheres to her chosen course as to a suitable minimum drinking age is 5% of the funds").

206. 500 U.S. 173 (1991).

207. *Dole*, 483 U.S. at 207.

to be related in some degree to the projects for which the funds were to be used, and could not violate other constitutional provisions, such as if the government sought to require states to inflict cruel and unusual punishment as a condition for receiving federal funds.[208] None of these limitations, however, stands as a significant barrier to conditional funding. The first two conditions—the pursuit of the general welfare, stated unambiguously—are easily satisfied, and the fourth condition essentially restates the unconstitutional conditions doctrine, an issue that will be discussed in more depth shortly.[209] The Court has likewise failed to treat the third condition—on the relation between the conditions and the underlying project—with anything other than a deferential eye.[210]

Finally, the Court suggested that some conditions might be so coercive as to result in an impermissible level of compulsion, though the Court failed to indicate when such a circumstance might arise.[211] Given that only five percent of federal highway funds were being withheld, it was relatively easy to find a lack of coercion in the South Dakota case, but it is also difficult to know how withholding a higher percentage of highway funds might amount to compulsion. After all, *Rust* involved withholding one hundred percent of the federal government's Title X funds from facilities that encouraged abortions, and the Court never even discussed the possibility that the program was coercive in nature.[212]

2. The *Patronage Cases*

An area where the Court has more closely reviewed governmental actions, and one that ultimately offers the best analogy for the limitations that should guide governmental efforts designed to

208. *Id.* at 207–08.

209. *See infra* Part II.C.

210. This point was highlighted by Justice O'Connor in her dissenting opinion, as she noted that there was no clear link to having a national drinking age and providing federal highway funds. *See Dole*, 483 U.S. at 214 (O'Connor, J., dissenting). Professor Baker has suggested that the Court adopt Justice O'Connor's more restrictive approach so as to align the spending power decisions with the Court's more recent state sovereignty cases. *See* Baker, *supra* note 150, at 1962–63.

211. *Dole*, 483 U.S. at 211 ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.' ") (citing Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

212. The government's legislation mandating a fifty-five miles-per-hour speed limit withheld ninety-five percent of federal funds from noncomplying states but was nevertheless upheld. *See* Nevada v. Skinner, 884 F.2d 445, 454 (9th Cir. 1989) (concluding that the possibility of coercion did not affect the outcome of the case).

remedy societal discrimination, involves various patronage practices exercised by political officeholders. Patronage practices have a long history as a traditional means of distributing governmental largesse. Yet in a consistent line of cases over the last twenty-five years, the Court has restricted patronage practices to the jobs in which political affiliation is determined to be important to the functioning of the position.[213] With only a few exceptions, the Court has stated that an individual's political affiliation, which is treated as existing at the core of the First Amendment, should not determine whether a government employee is able to retain or secure a government job or contract.[214] Importantly, this prohibition does not stem from either history or constitutional text, as patronage practices have long been a part of politics, and it was not until the Court stepped up its review in the 1970s that the practices were thrown into constitutional doubt.[215] Rather, the Court's focus has been on insulating individuals from political pressures in their employment, pressures the Court identifies as inimical to justice and fairness in modern employment practices.

The political patronage cases have notably raised the ire of Justices Scalia and Rehnquist, the two most avid supporters of the government's discretionary spending power. These Justices, who are occasionally joined in their opinions by other conservative Justices, would apply a lenient rational basis review to restrictions applied to governmental employment practices,[216] a fact that may indicate their

213. *See* Rutan v. Republican Party of Ill., 497 U.S. 62, 78 (1990) ("Under our sustained precedent, conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."); Branti v. Finkel, 445 U.S. 507, 518 (1980) (holding that the government can take account of political affiliation only when "party affiliation is an appropriate requirement for the effective performance of the public office involved"). For an overview of the patronage cases, see Cynthia Grant Bowman, *The Law of Patronage at a Crossroads*, 12 J.L. & POL. 341 (1996).

214. *See* O'Hare v. City of Northlake, 518 U.S. 712, 714–15 (1996) (applying political affiliation cases to independent contractors); *Rutan*, 497 U.S. at 80 (restricting patronage practices in promotions and transfers); Elrod v. Burns, 427 U.S. 347, 372 (1976) (plurality opinion) (restricting elected Sheriff's ability to replace sheriff deputies based on party affiliation); *see also* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 477 (1995) (invalidating a government ban on honoraria for speeches and publications by government employees).

215. The history and importance of political patronage is detailed in Justice Scalia's dissenting opinion in *Rutan*, 497 U.S. at 104–10 (Scalia, J., dissenting).

216. *Id.* at 98 ("When dealing with its own employees, the government may not act in a manner that is 'patently arbitrary or discriminatory,' but its regulations are valid if they bear a 'rational connection' to the governmental end sought to be served.") (citations omitted). Justice Scalia, generally joined by Chief Justice Rehnquist, has dissented from all of the government patronage cases decided during his tenure on the Court. *See, e.g.*,

potential receptivity to allowing the government to use its funds to remedy societal discrimination. But this line of cases again provides some indication of the limits on the government's powers, just as the patronage cases provide a bright line rule to protect important political concepts embodied in the First Amendment. I will suggest that a similar principle should direct the courts' analysis of governmental efforts to remedy societal discrimination.

C. *The Unconstitutional Conditions Doctrine*

As we have seen, the government's discretion to use its spending power is exceptionally broad, though not unlimited. The government funding cases suggest that the primary restriction on the government's ability to use its spending power involves what is known as the unconstitutional conditions doctrine, a doctrine that prohibits the government from requiring individuals, or entities, to forego or violate constitutional rights in order to receive federal funds.[217] The doctrine, which has been applied most vigorously in the First Amendment context, has been the subject of a torrent of scholarly criticism and has been aptly described by various commentators as either incoherent, insignificant, or both.[218] To give but one example of the doctrine's incoherency, all of the cases already discussed—especially *Rust* and *Finley*—could be classified as unconstitutional conditions cases, insofar as the challenge in each of the cases was premised on a purported constitutional violation. Indeed, in both *Rust* and *Finley* the unconstitutional conditions doctrine was raised explicitly either in the Court's opinion or in the parties' briefs, though ultimately the doctrine played no significant role in the Court's determination.[219] These cases are consistent with the way in which the doctrine typically operates, and it is perhaps best to define the doctrine as derivative of the government's spending power with a

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O'Hare, 518 U.S. at 726 (Scalia, J., dissenting); *Nat'l Treasury Employees Union*, 513 U.S. at 489 (Rehnquist, C.J., dissenting).

217. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5.6 (3d ed. 2000).

218. For two forceful arguments that the doctrine is ultimately incoherent, see Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 DENV. U. L. REV. 989, 1005 (1995) (arguing that the unconstitutional conditions doctrine is not amenable to doctrinal reconciliation); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 620–21 (1990) (arguing that the doctrine should be abandoned).

219. This was particularly true in *Finley*, where the Court failed to even discuss the doctrine. *See* Schauer, *supra* note 179, at 104 ("That the principle of unconstitutional conditions is not so much as mentioned in . . . *Finley* is less an oversight than an epitaph.").

limited scope that rarely serves as a serious impediment to governmental action, particularly in recent years.[220] A review of several of the paradigmatic unconstitutional conditions cases will demonstrate that the doctrine's restraint offers little beyond the Court's underlying constitutional doctrine.

The modern unconstitutional conditions doctrine is often traced to the McCarthy era case, *Speiser v. Randall*,[221] where the Supreme Court invalidated a California statute that required veterans to execute a loyalty oath in order to qualify for a property-tax exemption.[222] This case is said to illustrate the unconstitutional conditions doctrine insofar as it held that the state could not require a loyalty oath as a condition for receiving a property-tax exemption.[223] This interpretation, however, misreads an important aspect of the case. While the Supreme Court spoke broadly in *Speiser* in a manner that has since been associated with the unconstitutional conditions doctrine, the decision was actually based on the statute's inadequate procedural safeguards. In particular, the Court was troubled by the fact that the burden of proof to establish fidelity to the oath fell on the person seeking the exemption.[224] The Court devoted little more

220. Based on this understanding, the unconstitutional conditions doctrine is analogous to the common law employment-at-will principle. The employment-at-will principle is often stated broadly, implying that an employer is free to fire an employee for any reason or no reason at all. Historically, the broadly stated rule had more resonance, but even then it was often circumscribed by various other legal obligations. *See* MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 8.1, at 226–28 (2d ed. 1999). Today this broad version of the rule is inaccurate; a more accurate rendition would be that an employer is free to fire an employee for any reason or no reason so long as the employer's action does not violate some other governing legal rule, such as a statute or constitutional provision. Understood in this fashion, the employment-at-will rule provides a background understanding so that there is no independent restraint on an employer's business decision, although the employer must comply with other applicable legal strictures. The unconstitutional conditions doctrine works in the same manner: while the concept itself has no independent content, the government must comply with other constitutional provisions.

221. 357 U.S. 513 (1958).

222. *Id.* at 528–29.

223. Nearly every survey of the unconstitutional conditions doctrine begins with a discussion of *Speiser v. Randall*. *See, e.g.*, Heyman, *supra* note 198, at 1124 (discussing *Speiser*).

224. In an opinion written by Justice Brennan, the Court held:

> [W]hen the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition .... [T]hough the validity of § 19 of Art. XX of the State Constitution be conceded *arguendo*, its enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process.

Speiser, 357 U.S. at 528–29.

than a single sentence to the question whether the government could condition a privilege on the loyalty oath, and instead considered the statute under the particular law that had developed regarding loyalty oaths and political speech more generally.[225] Indeed, the *Speiser* case was complicated by the fact that the Supreme Court had previously upheld several loyalty oaths for government and union jobs.[226] What was different about the statute considered in *Speiser* was the burden imposed on those seeking the exemption, rather than the oath itself. As a result, what the individuals were actually giving up were procedural protections incident to their First Amendment rights rather than the rights themselves.[227]

More recently, the unconstitutional conditions doctrine was invoked in the case of *FCC v. League of Women Voters*,[228] when the government sought to prohibit public broadcasting stations that received federal funds from offering editorials or supporting political candidates.[229] Although the Court upheld the ban against supporting political candidates without significant discussion,[230] it invalidated the editorial proscription because, according to the Court, it was not narrowly tailored to support the asserted interest of protecting the stations from becoming beholden to the government.[231] Additionally, the Court found that because the restriction was not limited to the use of federal funds, which provided only a small portion of the stations' budgets, it was unnecessarily overbroad, extending to the very heart of the First Amendment's protection of political speech.[232]

Like *Speiser*, the *League of Women Voters* case does not present a substantial limitation on the government's use of funds given that the case was decided under the Court's First Amendment doctrine as

225. *Id.* at 529.

226. Although loyalty oaths are often treated as anathema to the First Amendment, the Supreme Court has upheld many such oaths, and most government employees are still administered such an oath today. *See* Cole v. Richardson, 405 U.S. 676, 686–87 (1972) (upholding a Massachusetts loyalty oath and reviewing existing doctrine).

227. *Speiser*, 357 U.S. at 531.

228. 468 U.S. 364 (1984).

229. *Id.* at 366.

230. *Id.* at 382.

231. *Id.* at 398. The government's rationale used to justify the statute was quite peculiar and difficult for the Court to sustain under any substantive form of review. The government argued that the ban on editorials was necessary so that the stations would not seek to curry favor with the government that doled out the funds, suggesting that the stations might be too prone to praise the government in order to obtain federal funds. *Id.* at 384–85. Given that the government rarely seems concerned about receiving too much positive press, this noble objective, which clearly could have been met through less restrictive means, was difficult to take seriously. *See id.* at 392–93.

232. *Id.* at 393–95.

applied to broadcasting, rather than on the government's ability to use its federal funds. This was a point underscored by Justice Rehnquist's strong dissenting opinion, which would have upheld the restriction as rationally related to the government's stated objective.[233] And like *Speiser*, this case directly suppressed speech and therefore presented a particularly strong case for judicial invalidation. In contrast, the Court has upheld a prohibition on lobbying by tax-exempt organizations under the theory that the government was under no obligation to subsidize lobbying.[234] On the surface, this case appears quite similar to the government's ban on editorializing invalidated in *League of Women Voters*, but a majority of the Court distinguished the two situations by noting that the tax-exempt organizations were free to establish separate non-tax-exempt entities to conduct their lobbying, whereas it was practically infeasible for broadcast stations to create separate stations to pursue their editorial interests.[235]

There are a number of additional cases that would demonstrate the limited utility of the unconstitutional conditions doctrine,[236] but these two paradigmatic cases offer significant insight into just how limited the doctrine actually is. Both *Speiser* and the *League of Women Voters* cases were decided under the Court's applicable First Amendment doctrine and received no particular assistance from the unconstitutional conditions doctrine. In other words, these are First Amendment cases, not unconstitutional conditions cases, and there is little to be gained by referring to the doctrine in search of particular

233. *See id.* at 406–07 (Rehnquist, J., dissenting). Cass Sunstein has previously argued that the unconstitutional conditions doctrine rarely adds anything to the Court's existing jurisprudence, particularly in the First Amendment context. *See* Sunstein, *supra* note 218, at 606 ("A welfare program limited to Democrats is unconstitutional because of the First Amendment .... Courts do not need an unconstitutional conditions doctrine in order to make the necessary response.").

234. Regan v. Taxation With Representation, 461 U.S. 540, 545 (1983) (noting that "Congress has merely refused to pay for the lobbying out of public moneys").

235. *League of Women Voters*, 468 U.S. at 400 ("[I]n contrast to the appellee in *Taxation With Representation*, such a station is not able to segregate its activities according to the source of its funding.").

236. Another case that is routinely treated as raising concerns under the unconstitutional conditions doctrine lends itself to a similar analysis. In *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987), the Supreme Court struck down an Arkansas tax that applied to general interest magazines but not to newspapers or religious and sports magazines. *Id.* at 234. The tax, which apparently applied to only three periodicals in the state, was invalidated under what the Court referred to as its doctrine relating to "taxation of the press." *Id.* at 228. This case gives credence to Fred Schauer's claim that the Court is increasingly moving toward an institutionally specific First Amendment doctrine. *See* Schauer, *supra* note 179, at 118–20.

content.[237] Moreover, the Court's concern with what might be described as unconstitutional conditions appears most robust when the governmental restrictions extend beyond the purposes of the funds. For example, the Court would almost certainly invalidate a statute that prohibited artists who received federal grants from creating indecent art, just as the Court would invalidate a statute that prohibited individuals who worked for clinics that received Title X funds from advocating abortion outside of the clinic's work. The Court has likewise protected government employees' political affiliations and speech rights outside of the workplace where the government's interest in the use of its funds is far more tenuous.[238]

Together the government funding cases, in conjunction with the unconstitutional conditions doctrine, provide the government with substantial latitude to shape social and economic policy through its spending power. The question that remains is whether an argument can be crafted from these cases that would allow the government to take greater measures to remedy societal discrimination than the Court has previously permitted, an issue explored in the next section.

III. THE SPENDING POWER AS APPLIED TO RACE

The government funding cases indicate that the government can require more of its fund recipients than the Constitution would otherwise require so long as the conditions are consistent with relevant constitutional strictures. As a practical matter, these cases suggest that the primary proscription on the government's use of funds to further racial equality will lie in the Equal Protection Clause, which to date has provided the primary barrier to government efforts to remedy societal discrimination.[239] Yet, the government funding cases, particularly *Rust v. Sullivan*,[240] likewise suggest that when the government chooses to subsidize activities or chooses to fund one side of a particular controversial issue, the government's action is freed from the typically fatal constraints of the Court's strict scrutiny and is instead subject to a form of rational basis review, under which most

237. *See* Sunstein, *supra* note 218, at 612–18.

238. *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 477 (1995) (invalidating a government ban on honoraria for speeches and publications of government employees).

239. *See* Miller v. Johnson, 515 U.S. 900, 920–28 (1995) (finding that a Georgia district violated the Equal Protection Clause); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507–08 (1989) (invalidating a contract set-aside program on equal protection grounds); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 (1986) (invalidating a layoff plan).

240. 500 U.S. 173 (1991).

programs are upheld.[241] We also saw that in the contract set-aside cases, the standard of review frequently proved critical to determining the outcome when the government sought to take affirmative measures to remedy societal discrimination: strict review proved fatal, while an intermediate review offered more room for remedial governmental efforts.[242]

In this section, I argue that the government funding cases permit the government to take efforts to remedy societal discrimination, so long as the efforts do not rely on race-specific quotas. To illustrate this point, I discuss how the funding cases impact contract set-aside programs, and how those programs might be reconfigured so as to survive the Court's review under the government's spending power even where there is no demonstrated history of discrimination by the particular governmental entity. More specifically, I contend that by restructuring the programs to focus on the diversity of the workforce rather than the race of the owners, and by tying the programs to the government's spending power, courts should uphold the programs under a rational basis review. I also argue that the funding cases can help sustain existing government programs and provide the means by which the government can require federal contractors to remedy practices that have a disparate effect under various spending initiatives, including Title VI of the Civil Rights Act of 1964.

Accordingly, although the government funding cases do not free government programs from judicial scrutiny, they do offer a means by which certain racially-motivated programs can be sustained that would otherwise be invalidated. At the same time, it is important to note that the funding cases provide an imperfect fit for analyzing the programs, in large part because the affirmative action doctrine has developed wholly independent of the government funding line of cases and the Court's antidiscrimination doctrine tends to operate within rigidly defined categories.[243] I therefore argue here by analogy rather than doctrinally.[244]

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241. *See supra* text accompanying notes 173–74.

242. *See supra* text accompanying notes 63–64, 87–102.

243. For an engaging discussion regarding the limits of the Court's doctrine as applied to racial profiling, see Brown v. City of Oneonta, 235 F.3d 769, 779 (2d Cir. 2000) (Calabresi, J., dissenting from denial of *en banc* review).

244. As noted earlier, only *Fullilove* mentioned the government's spending power, though the case was not decided on that basis alone, and Justice O'Connor obliquely alluded to the city's spending power in her *Croson* opinion. *See supra* text accompanying notes 62, 93.

A. *The Contract Set-Asides*

1. Existing Set-Aside Programs and Government Spending

As a prerequisite to analyzing efforts to remedy societal discrimination under the government funding cases, it is first necessary to establish that these cases are relevant in the race discrimination context, and here *Rust v. Sullivan* provides the best analogy. It is by now accepted constitutional mantra that race is different from other constitutional matters,[245] and this principle might suggest that the funding cases are inapposite when the government seeks to use its spending power on matters involving race. Yet, as a constitutional matter, race is more similar to abortion than it is different, and there is no particular reason the Court's rationale in the funding cases should not be extended to racially motivated funding conditions. Outside of the context of government funds, abortion is treated as implicating the fundamental right to privacy that arises from the Due Process Clauses of the Fifth and Fourteenth Amendments, and regulations on abortion have always been subject to a form of strict scrutiny—the same level of scrutiny that applies in the race discrimination context.[246] Although the two tests differ somewhat, the important principle here is that government funding decisions that implicate abortion are not subject to the Court's strict scrutiny, even though direct regulation of abortion would be. This became clear when the Court upheld governmental determinations not to use Medicaid funds to pay for medically necessary abortions,[247] a restriction that would not have survived the Court's strict level of review.[248]

The case for advancing racial equality through the government's spending power is, in fact, much stronger than a desire by the government to promote a distinctive view on abortion. Arguably, under the Constitution, the government should remain neutral with

245. *See* sources cited in *supra* note 13.

246. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876–79 (1992).

247. *See* Harris v. McRae, 448 U.S. 297, 324 (1980) (applying rationality review to federal legislation prohibiting use of Medicaid funds for abortions); Maher v. Roe, 432 U.S. 464, 477 (1977) (upholding state regulation that refused to allow Medicaid funds to be used for abortions, and noting that "[w]e think it abundantly clear that a State is not required to show a compelling interest for its policy choice").

248. Denying poor women the right to obtain a constitutionally protected procedure as a way of pursuing a legitimate governmental objective would not likely be defined as rising to the level of a compelling interest. Surely the government cannot have a compelling interest in denying low-income women their fundamental rights, though it might be rational if the government opts not to pay for such procedures.

respect to abortion, and certainly nothing in the Constitution would compel the government to take a particular side in the abortion debate.[249] The same is not true with racial equality. In this context, the government is commanded to take sides, a principle the Supreme Court has reaffirmed on many occasions.[250] The government has a constitutional duty to eradicate discrimination and to refrain from participating in the private manifestation of racial bias, and its mandate extends far beyond a claim of neutrality on racial discrimination.[251] This mandate extends to all forms of discrimination, not just those caused directly by the government. Nor is it limited to forms of intentional discrimination but it includes discrimination that manifests itself in the form of adverse racial effects or societal discrimination.[252]

This does not mean, however, that the government can use its funds to pursue racial equality in an unrestricted manner or that a court should always defer to the government's political decisions relating to discrimination so long as they are tied to the spending power. As noted earlier, the Equal Protection Clause still stands as a barrier to governmental funding decisions, but it is an Equal Protection Clause that should be interpreted outside of the realm of strict scrutiny. What this means as a practical matter is more difficult to say, as indicated by the discussion of the unconstitutional conditions and governmental funding cases, where no clear doctrinal principle has emerged despite the extensive volume of cases and scholarly literature.[253]

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249. This is true with the caveat that the government is commanded under current doctrine not to establish what amounts to an undue burden on women's right to exercise their fundamental right to an abortion. *See Casey*, 505 U.S. at 884–85.

250. *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574, 599 (1983) (upholding the IRS's decision to deny tax exemption to racially discriminatory schools); Norwood v. Harrison, 413 U.S. 455, 469 (1973) ("[A]lthough the Constitution does not proscribe private bias, it places no value on discrimination.").

251. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989) (holding that the government can seek to remedy its own participation in discrimination); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (holding that private "biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"); *Norwood*, 413 U.S. at 465 ("[I]t is ... axiomatic that a state may not induce, encourage, or promote private persons to accomplish what it is constitutionally forbidden to accomplish.").

252. This can be seen in the government's interpretation of Title VI, which prohibits discrimination by federal contractors and has been interpreted to include a disparate impact component. The statute is discussed *infra*, Part III.B.1.

253. Erwin Chemerinsky makes this point nicely in a lecture delivered at the Cleveland-Marshall Law School regarding governmental content-based choices. *See* Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 200 (1994). Chemerinsky writes:

My own reading of the doctrine is that the political patronage cases provide the best analogy for how the Court ought to analyze governmental spending programs that are intended to remedy societal discrimination. In the political patronage cases, the Court has drawn a blunt line prohibiting the hiring of all but high-level officials based on their political affiliation, and it has done so not because of either history or constitutional text, but because it seems inimical to the Court that ordinary employment decisions should turn on a person's political affiliation.[254] By the same measure, there seems to be widespread agreement that the government could not award government funds—whether for contracts, the arts, or any other matter—based on political affiliation, for example, by funding only Republican contractors or artists, just as they could not restrict funds for abortions to Republican or Democratic women.[255]

This same analysis should apply in the area of awarding contracts or providing government funds on the basis of race. The government clearly cannot provide funds only to African-American or to white contractors, absent proof that the funds were being used as a remedial tool to address identified discrimination. This principle arises from the Court's current antidiscrimination doctrine,[256] and this part of the doctrine would not be altered by incorporating the government funding cases into the analysis. The same would be true with respect to the Court's doctrine prohibiting racial quotas, a principle the Court has restated consistently and frequently.[257] Although the Court has never strictly applied a "colorblind" interpretation of the Fourteenth Amendment outside of several remedial programs where the defendant's discrimination had been well-documented,[258] the Court

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> Increasingly, I came to see that some of the hardest First Amendment issues, the ones most dividing lower courts and perplexing commentators involved instances in which the government had to make content-based choices. The more I looked the more cases and examples I found. Yet, as I read the cases, I found the analysis terribly unsatisfying. All used traditional First Amendment principles and they seemed of little help.

Id. at 200–01.

254. *See supra* text accompanying notes 214–15.

255. *See, e.g.*, Greene, *supra* note 7, at 38–40 (discussing various restrictions on the government's power to shape social and political life).

256. *See Croson*, 488 U.S. at 509–10 (concluding that the government must make specific findings of discriminatory practices before attempting to remedy such practices).

257. *See* Selmi, *supra* note 110, at 344–46.

258. *See* United States v. Paradise, 480 U.S. 149, 166–67 (1987) (upholding a one-black-for-one-white promotion requirement); Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 440–42 (1986) (affirming a requirement that the union establish a twenty-nine percent nonwhite membership goal). The Court has also upheld a voluntary affirmative action plan where the clear racial disparities in hiring had not been attributed

has never upheld a quota tied to race and it has expressed great hostility to the notion that race should be used in such a strong fashion, going so far as to equate race-conscious redistricting to a form of apartheid.[259] Given that the Court's prohibition on racial quotas would continue even if the principles of the government funding cases were applied to government efforts to combat societal discrimination, it is important to note that the Court's proscription on racial quotas does not stem from the level of review the Court applies, but is instead based on the Court's understanding of the essential meaning of the Equal Protection Clause. Racial quotas are antithetical to the Court's interpretation of the Equal Protection Clause because they exclude individuals based on their race, just as making ordinary hiring decisions based on political affiliation is antithetical to core First Amendment values.

This analysis may explain why the government funding cases have not previously been applied to the contract set-aside cases previously. On first blush, it might appear that the contract set-aside cases—especially *Croson* and *Adarand*—should be treated as government funding cases because they involve the government's use of its funds on construction and other business projects. But because the programs have generally been structured in a way that sought to ensure that a fixed percentage of government dollars went to minority contractors, or in the case of *Metro Broadcasting* by creating strong preferences for broadcast licenses, these cases would run afoul of the Court's spending power doctrine to the extent the programs set aside federal dollars, or licenses, for African Americans.[260] Explicitly setting aside dollars based on race represents the kind of program that conflicts with the Equal Protection Clause even where government funding is at issue, because the government cannot award contracts to a particular race simply based on its race.[261]

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to the employer, much like the situation in the *Johnson* case discussed earlier. *See* United Steelworkers v. Weber, 443 U.S. 193, 197–200 (1979).

259. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) ("A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid.").

260. The set-aside program for the City of Richmond established a goal of awarding thirty percent of city contracts to minority contractors, a goal the city was able to meet when the program was in place. *See* DRAKE & HOLSWORTH, *supra* note 125, at 82–83.

261. I should be clear that the Court perceives the set-aside cases as involving quotas, a perception with which I disagree. As noted previously, the contract programs establish goals rather than rigid quotas and those goals are rarely fully satisfied. At the same time, tying the contract programs to the funding cases may provide an interesting challenge for

Before moving to a discussion regarding the role these cases might have on the Court's discrimination doctrine, I want to pause to pursue the question of why cases such as *Rust* and *Finley* have not previously been applied to the affirmative action cases.[262] The most likely reason, I believe, is that the *Rust-Finley* line of cases have largely been regarded as the product of conservative causes and have been treated as hostile to liberal causes such as remedying discrimination.[263] There is obviously some truth to this notion: both *Rosenberger* and *Rust* were decided by five-member majorities that broke down on traditional conservative/liberal lines, and *Rust* and *Finley* were clearly aligned with conservative causes. It is equally clear that the Court likely would have been unwilling to uphold the government regulation at issue in *Rust* if the presumption underlying the program had been reversed—if for example, the government was only willing to allocate funds to health clinics that provided abortion services. But, in light of the Court's decision in *Rust*, it would now be difficult to distinguish programs that expressed different political preferences, and it is a mistake to treat these cases as simply implementing conservative political programs. Indeed, in the Court's recent spate of rulings invalidating federal statutes applied to states on sovereign immunity grounds, the Court has reaffirmed the power of the federal government to require states to waive their sovereign immunity through the spending power.[264] Once the government funding cases are shed of their conservative overtones, it is apparent that the Court has turned over a broad area of discretion to

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the Court. The two strongest proponents of the government's power to use its funds in a largely unrestricted manner are Justices Rehnquist and Scalia, both of whom have yet to identify a governmental condition that they did not find constitutionally permissible. Yet, they are also the strongest opponents of the government's efforts to remedy racial inequality, voting against all such programs that have come before them. Justice Rehnquist was even the lone dissenter in the notorious Bob Jones case. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 612 (1983) (Rehnquist, J., dissenting). It is likely that their antipathy for race-conscious measures would override their apparent sympathy for governmental spending powers, but it would not be an easy opinion to write, and it is certainly possible that so long as the government funds did not seek to institute racial quotas, even these Justices would vote to affirm the government's power.

262. Among commentators, only Owen Fiss and Gerry Spann have noted a possible connection, though neither discussion developed the argument. *See* OWEN M. FISS, THE IRONY OF FREE SPEECH 76 (1996) (suggesting that *Metro Broadcasting* was a product of the Court's constitutional indifference to allocation decisions); Spann, *supra* note 92, at 85–86.

263. For one such treatment, see Heyman, *supra* note 198, at 1128.

264. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999) (noting that Congress can require a waiver of sovereign immunity as a condition for receiving federal funds even though Congress cannot order the waiver directly).

governments to pursue their political objectives through the spending power. These cases are best interpreted as affording judicial deference to the political process, a deference that should extend to efforts designed to remedy societal discrimination.

2. Reconfiguring the Set-Aside Provisions

In order for government set-aside programs to benefit from the government funding cases, the programs would have to be reconfigured to diminish their race consciousness. As noted earlier, despite various provisions in the programs that allowed for waivers or exemptions from the statutory requirements, the Supreme Court typically has treated set-aside programs as involving racial quotas that have not survived the Court's strict level of review.[265] One way the government might create a program that would satisfy the Court's review under the spending power would be to reconfigure the contract set-aside programs to reward employers for having a diverse workforce, rather than by distributing funds based on the race of the owners. Reconfigured in this way, the contract program might give a preference to those employers who have a diverse workforce as measured by current industry standards, or perhaps by relevant zip codes to ensure that an employer is hiring based on the surrounding community labor force. The preference could be in the form of a bid credit so that a contractor who exceeded the industry standards would be entitled to a credit worth up to ten or twenty percent of the contract price, which would typically allow the contractor to underbid its competitors.[266] By providing such a preference, the government would be choosing to deal with a business that takes racial justice seriously, that has demonstrated a sincere commitment to the hiring and advancement of minorities, and that has likewise shown a commitment to eradicating the effects of societal discrimination.

A preference program premised on the diversity of the workforce would differ significantly from most existing governmental set-aside programs. Currently, most government programs provide preferences to contractors based on the ownership of the company, with the typical standard requiring that the company be at least fifty-

265. *See supra* text accompanying notes 89–91.

266. *See* Ian Ayres, *Narrow Tailoring*, 43 UCLA L. REV. 1781, 1809–11 (1996) (discussing bid credits). Both of these measures are distinct from providing a preference to the most diverse workforce of the bidders, which may seem to the Court as if the government is preferring race rather than rewarding employers for having progressive hiring policies.

one percent owned by minority or disadvantaged individuals.[267] These programs serve the dual purpose of overcoming discrimination in the contracting industry, as well as encouraging entrepreneurship. Shifting the focus away from ownership and onto the composition of the workforce would serve slightly different goals of challenging the effects of hiring discrimination and other discriminatory barriers that have hindered entry into the contracting industry.

Changing the focus of the programs would also help address two problems that have long plagued existing set-aside programs. When the ownership of the business triggers the preference, it is not uncommon for entities to affiliate with minorities in order to qualify for a contract or a bid preference.[268] Those who have affiliated in order to assist the company in qualifying for preference programs were often well-known and wealthy individuals, frequently with little actual interest in the underlying project.[269] Within existing programs, there are ways to protect against these difficulties, and the federal transportation program has been altered so as to impose limits on the net worth of the company that can qualify as a disadvantaged business.[270] Nonetheless, having the preference turn on the diversity of the workforce will spread the benefits of the program more broadly and avoid some of the concerns over whether the recipient is truly deserving.[271] Emphasizing workforce diversity as opposed to the nature of the ownership will also avoid concerns regarding the existing statutory presumptions defining members of certain minority groups as "disadvantaged" and therefore eligible for the program's preferences.[272]

If the program were restructured in this way, it is difficult to identify a legitimate constitutional objection. Although the program could be described as race conscious insofar as government benefits

267. This is true of the existing federal contracting program operated under the auspices of the Department of Transportation. *See* 15 U.S.C. § 637(a) (2000); Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs, 49 C.F.R. § 26.69 (2001).

268. For a discussion of the problems that arise over sham corporations, see Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 761, 807 & n.153 (1996).

269. *Id.* at 807.

270. *See* 49 C.F.R. § 26.67(b)(1) (2001) (stating that a net worth exceeding $750,000 defeats the presumption of economic disadvantage).

271. Debate obviously persists on whether those who receive preferences of all sorts are truly deserving of them, and predicating the benefit on workforce diversity will not necessarily resolve that debate.

272. *See* 49 C.F.R. § 26.67(a).

would be tied to the presence of minorities in the workplace,[273] it would not involve a racial quota because it would not guarantee a particular outcome. Similarly, as was true with other government funding programs, this contract set-aside program would not require particular action by the contractor.[274] Instead the government would be making a policy decision, supported by its funds, to choose to deal with the most progressive employers in an industry, as measured by the diversity of the workforce, and a firm would only need to take action to the extent it wanted to participate in the federal program. As a result, the program would largely be indistinguishable from a program that refused to provide funds to abortion providers, or that chose which artists to support based on the content of the art.[275] If a firm did not want to hire a diverse workforce, it would simply have to forego federal funds in the same manner that clinics providing abortions or artists creating indecent art have been required to do.

One notable difference, of course, is that employers or contractors would be rewarded for the racial diversity of their hiring practices, rather than rewarding doctors or artists for their social choices. Race, however, would not be the exclusive requirement: any employer or contractor could qualify for the program by rising above industry averages in obtaining a diverse workforce. Assuming a diverse workforce is a public good, as certainly has been the rhetoric of both the Clinton and George W. Bush Administrations,[276] the

273. *See* Forde-Mazrui, *supra* note 6, at 2333 (contending that ostensibly race-neutral efforts can be described as race-conscious).

274. One way of understanding the Court's concern with what it treats as racial quotas is that individuals or businesses are denied a reasonable opportunity to participate in the process because of their race, a concern that underlies the Court's treatment of traditional affirmative action plans and the more recent racial redistricting cases where the Court is clearly troubled by the fact that the districts are drawn to produce a particular result and generally succeed in doing so. *See* Selmi, *supra* note 110, at 317.

275. *See, e.g.*, Jim C. v. United States, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc) ("The choice is up to the State: either give up federal aid to education, or agree that the Department of Education can be sued under Section 504 [of the Rehabilitation Act]."), *cert. denied*, 533 U.S. 949 (2001); Litman v. George Mason Univ., 186 F.3d 544, 552 (4th Cir. 1999) (requiring a state university to comply with Title IX regulations because "Spending Clause legislation, in contrast to other Article I legislation . . . presents a state with a choice: the state can either comply with certain congressionally mandated conditions in exchange for federal funds or not comply and decline the funds"), *cert. denied*, 528 U.S. 1181 (2000).

276. *See* Gary L. Gregg, II, *Toward A Representational Framework for Presidency Studies*, 29 PRESIDENTIAL STUD. Q. 297, 302 (1999) (noting that President Clinton's commitment to diversity needs to be considered in evaluating his efforts at political representation); Peter Baker, *President Completes Second-Term Team*, WASH. POST, Dec. 21, 1996, at A1 (quoting President Clinton as saying, "I believe that one of my jobs at this moment in history is to demonstrate by the team I put together that no group of people

government should be free to reward those entities that succeed in their pursuit of a common, and legitimate, social goal. The message embodied in such a program would be that the government wants to do business not just with nondiscriminatory employers, which the law already requires, but with progressive employers, a message the government should be free to pursue through its spending powers.[277] Indeed, from this perspective, the program might be seen as involving government speech, where the government has perhaps the broadest authority to pursue its particular policy choices. As noted above, the Supreme Court has suggested that the government is to be held accountable to the electorate for its own speech and advocacy,[278] and here the government's message would be a desire to remedy discrimination broadly defined and to enlist the aid of businesses in that mission, regardless of the owners' race, ethnicity, or political affiliation.

For the program to be upheld, the government would have to establish a reasonable parameter for determining when a contract bonus or preference would be awarded, as well as an explanation for why the funding condition was legitimate and related to the underlying program to which it was attached.[279] On the first element, the government might reward contractors that exceed industry averages by twenty-five percent or some other pertinent benchmark, or the government might choose to deal with the contractor that has established the best hiring practices within the particular industry, as long as its bid fell within an acceptable range. Along these lines, the government could establish a system, similar to the civil service programs that governs much government hiring where an agency is able to hire any of the top three candidates—what is colloquially

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should be excluded from service to our country and that all people are capable of serving. So I have striven to achieve both excellence and diversity"); Ellen Nakashima & Al Kamen, *Bush Official Hails Diversity*, CHI. TRIB., Mar. 31, 2001, § 1, at 10 (comparing the Bush Administration's record on diversity to the Clinton Administration).

277. As discussed shortly, the government already seeks to pursue such a mission through Title VI of the Civil Rights Act of 1964, and Executive Order 11246, both of which impose certain affirmative obligations on the recipient of federal funds, including federal contractors. *See infra* Part III.B.

278. *See* Bd. of Regents v. Southworth, 529 U.S. 217, 235 (2000) ("When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.").

279. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (upholding Congress's indirect encouragement of state action to raise the minimum drinking age).

known as the rule of three.[280] Under this concept, the government would choose the firm with the best hiring record among the top three to five bidders. To the extent that all of the contractors have equal records, no one would be entitled to a contracting preference.[281]

As noted above, to fall within the spending power cases, it would also be necessary to establish that the funding condition is related to the underlying program, a relatively undemanding requirement.[282] Here, the analysis would return to a focus on societal discrimination; the government would argue that it wants to reward those employers who are working to combat societal discrimination by ensuring opportunity for minority employees, and it might also be necessary or desirable to document that societal discrimination had influenced the particular industry in which the funds are being distributed. Within this framework, the contractor need not admit or establish its own past discrimination as a prerequisite to taking affirmative action, nor would the government be obligated to document its role in perpetuating discriminatory patterns within the particular industry. Rather, the government would be using its funds to attack a known problem, and drawing on private businesses to assist in the quest to overcome the effects of societal discrimination, both past and present. This kind of a program would be akin to existing unobjectionable governmental programs that provide awards to employers for their hiring practices,[283] except that the awards would now be monetary in nature, functionally equivalent to a subsidy.

Finding that the programs are related to remedying societal discrimination would also alleviate any concern that the government's

280. *See* Lackhouse v. Merit Sys. Prot. Bd., 773 F.2d 313, 315 (Fed. Cir. 1985) (identifying the federal government's promotion rule as "the rule of three").

281. One caveat should be noted. It is conceivable that an entire industry might be so rife with discrimination that even the best entity within the industry might be one that still was acting unlawfully. Under these circumstances, no one should be entitled to a contracting preference, and indeed, the contractors would be in violation of their nondiscriminatory obligations under existing statutes. *See* 42 U.S.C. § 2000d (1994) (Title VI).

282. The requirement that the funding condition be related to the underlying program has generally been easily satisfied. *See* Engdahl, *supra* note 155, at 62 ("[I]t remains true ... that the Supreme Court has never actually held any spending condition unconstitutional for lack of germaneness.").

283. The Department of Labor provides an annual award to a federal contractor that has "established and instituted comprehensive workforce strategies to ensure equal employment opportunity," a program that was initiated in 1988 under a Republican administration. *See* Department of Labor Division of Management and Administrative Programs, Employment Standards Administration Office of Federal Contract Compliance Programs Directive No. 248, *at* http://www.dol.gov/dol/esa/public/media/reports/ofccp/evedir.htm (last visited Feb. 12, 2002) (on file with the North Carolina Law Review).

spending power might be used to serve contrary purposes. No legitimate rationale exists for a government to reward employers who have an all-white, or nondiverse, workforce, such that a program designed to reward a nondiverse workforce should be invalidated even under a rationality review.[284] Consistent with the purposes of the Fourteenth Amendment, the government's spending power, as related to societal discrimination, would work only in one direction, and while the programs could be abolished by a different government, they could not be used to pursue illegitimate purposes.

This proposition highlights an important potential downside to justifying contracting programs based on the spending power: a different, more conservative, government might prefer contractors that do not have affirmative action plans. While there would be no legitimate purpose in preferring a contractor that did not have a diverse workforce, it is quite possible that a government might prefer to do business with contractors that did not engage in any form of affirmative action. Such a program would likely be constitutional, which may suggest that using the government spending power to remedy societal discrimination may include some political risks. But these are the risks that are attendant to politics and more than anything else might direct lobbying efforts to the political branches, where at least on the federal level, efforts to prevent the repeal of existing affirmative action programs have been quite successful.[285] Similarly, allowing politically progressive governments to use their spending power to enhance minority opportunities will very probably offer more fertile conditions for racial justice than the existing regime

284. One possible complication could arise. Richard Epstein has argued that employers might rationally want a homogenous workforce for purposes of either customer preference or worker solidarity. *See* RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 59–79 (1992). Conceivably, these motives might be treated as rational under the Equal Protection Clause, but because they are premised on a dislike of a particular group, it seems more likely that they would be invalidated as irrational. *See* Romer v. Evans, 517 U.S. 620, 623 (1996) (invalidating a Colorado constitutional amendment prohibiting protection for gays and lesbians under rationality review).

285. Even in what would appear a quite receptive climate, over the last five years Congress has repeatedly refused to legislatively invalidate any existing affirmative action program, and the entrenchment of existing programs may offer some protection from a widespread scale back. *See* James Dao, *Senate Stops Bid to End Road-Work Set-Asides*, N.Y. TIMES, Mar. 7, 1998, at A9 ("In this year's first major test of Federal affirmative action policies, the Senate strongly rejected an effort today to end a two-decade old program."); Jeffrey Rosen, *Damage Control*, NEW YORKER, Feb. 23, 1998, at 58, 60–62 (discussing how universities responded to court decisions so as to preserve efforts to diversify student bodies).

where most current efforts are devoted to fighting to preserve the status quo rather than stretching its boundaries.[286]

Even a reconfigured set-aside program would undoubtedly be subject to constitutional challenges. However, the Equal Protection Clause would not stand as a barrier unless the party challenging the program could establish that the successful contractor was only able to achieve a diverse workforce through unconstitutional means. In some ways this may sound circular: only an unconstitutional program would violate the Equal Protection clause. But what I mean to suggest is that the focus of the inquiry would be on the hiring practices of the contractor, rather than the funding requirements of the program. If the contractor can demonstrate that it used lawful means to achieve a diverse workforce, there would be no argument that the program encouraged or required unconstitutional conduct.[287] It would certainly be wrong to presume that a diverse workforce was the product of unconstitutional actions, or even a product of affirmative action at all.[288]

The Court of Appeals for the D.C. Circuit has arguably reached a contrary conclusion in striking down, on two recent occasions, a preference program administered by the FCC.[289] The initial case involved a challenge to the program by a church that operated a classical music radio station that arose after the FCC determined that the church had failed to comply with the Commission's affirmative action regulations because the church preferred to hire individuals with religious knowledge to work at its radio station, a practice that in this instance had a disparate effect on minorities.[290] The court invalidated the government's regulations arguing that "[t]he regulations pressure stations to maintain a workforce that mirrors the racial breakdown of their 'metropolitan statistical area' " and "[a]s such, they can and surely will result in individuals being granted a

286. In an engaging book, Mark Tushnet has recently argued that we ought to take the Constitution away from the courts and place it more solidly in the political realm. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

287. Restructuring the program to focus on the diversity of the workforce might also render the challenges more limited, focusing on the particular recipient of the funds rather than on the program itself, assuming there are constitutional means for achieving a diverse workforce. Thus, if a challenge were successful, it should result in voiding only a particular contract, rather than the program itself.

288. For a lengthy discussion of various forms of affirmative action and how their structure determines their constitutionality, see Shuford v. Ala. State Bd. of Educ., 897 F. Supp. 1535, 1551–56 (M.D. Ala. 1995).

289. *See* MD/DC/DE Broadcasters Ass'n v. FCC, 236 F.3d 13, 23 (D.C. Cir. 2001); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 356 (D.C. Cir. 1998).

290. *Lutheran Church-Missouri Synod*, 141 F.3d at 346–48.

preference because of their race.[291] Such a preference, the court held, was facially unconstitutional.

The court premised its conclusion, however, on the erroneous notion that a diverse workforce is inevitably the product of unconstitutional preferences, rather than an aggressive recruitment drive or other practices that tend to draw in minority employees in one way or another—whether by transportation subsidies or by charitable giving to minority communities.[292] It is indeed unfortunate when an appellate court presumes that a diverse workforce can only be obtained unconstitutionally, and contrarily, that an all-white workforce is to be treated as a natural byproduct of legitimate hiring.[293]

Yet, even a court inclined to follow the D.C. Circuit's reasoning need not invalidate the reconfigured contract set-aside program described above. The program administered by the FCC did not involve the government's spending power, but was instead an exercise in regulatory power, a power, as noted earlier, that involves an important limited resource that the Court has endeavored to see is broadly distributed.[294] Moreover, the FCC's program was premised on the rationale of promoting diversity in programming, a rationale that had earlier generated so much controversy in the Supreme Court's decision in *Metro Broadcasting*.[295] Accordingly, even if the case is seen as well-grounded, it should not affect the analysis under the spending power.

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291. *Id.* at 352–54. More recently, the D.C. Circuit invalidated one option (option B) broadcast stations had to satisfy the FCC's regulations, an option that required affirmative recruitment efforts. *See MD/DC/DE Broadcasters*, 236 F.3d at 21 ("Option B places pressure upon each broadcaster to recruit minorities without a predicate finding that the particular broadcaster discriminated in the past or reasonably could be expected to do so in the future.").

292. The court's decision in *Lutheran Church-Missouri Synod* produced a stinging dissent from Chief Judge Edwards on the court's decision not to grant en banc review. He specifically contested the court's determination to apply strict scrutiny to the FCC program, noting:

> The regulations in no way draw any kind of racial classification. They plainly do not "oblige" anyone to exercise any sort of hiring preference. Rather, the regulations merely facilitate the avoidance of unlawful employment discrimination. The regulations "influence" hiring decisions only in the sense that anti-discrimination law generally seeks to influence employers to avoid bias.

Lutheran Church-Missouri Synod, 154 F.3d at 496–97 (Edwards, C.J., dissenting from the denial for suggestions of rehearing en banc).

293. For an analysis of the case, see Adams, *supra* note 143, at 1426–35.

294. *See supra* text accompanying notes 100–02.

295. *See Lutheran Church-Missouri Synod*, 141 F.3d at 354–55; *MD/DC/DE Broadcasters Ass'n*, 236 F.3d at 20–21; *see also supra* text accompanying notes 96–99 (discussing *Metro Broadcasting*).

There remains a question of whether these reconfigured programs would be consistent with the Court's existing Equal Protection doctrine, and, if so, whether applying the government funding cases significantly advances the constitutional argument. It has recently been argued that the Supreme Court should uphold, under existing doctrine, those programs that are racially motivated in the pursuit of permissible governmental objectives,[296] and it is conceivable that the Supreme Court would uphold the restructured set-aside program even without the aid of the government funding cases. But it seems equally likely that the Court would apply strict scrutiny to the programs, treating them as both race conscious and in pursuit of an impermissible goal. Bringing the government funding cases into the analysis would demonstrate that the programs at issue are political programs legitimately structured to further the government's discretion to choose among competing policy goals. The government funding cases, therefore, add an important perspective to the issue and, if applied properly, would offer a more stable constitutional ground on which the programs could rest.

B. Other Means of Remedying Societal Discrimination

Turning to the spending power as an analytical method will likely have its greatest impact in the area of contract set-asides,[297] but there are other ways in which the government might use its funds to combat societal discrimination. In fact, the argument set forth above relating to contract set-aside programs could readily be extended to other areas in which the federal government uses its spending power. The argument developed in this Article, for example, might be applied to universities so that the government would provide additional funds to those that have especially diverse student populations, as measured by competing universities or the relevant pool of applicants. In this section, I discuss two additional possibilities, one involving an existing governmental program and some additional programs that might be created with the purpose of eradicating societal discrimination.

1. Title VI, the Disparate Impact Theory, and the Spending Clause

Title VI, passed as part of the omnibus Civil Rights Act of 1964, is one of the least known and least enforced of the civil rights statutes,

296. *See, e.g.*, Forde-Mazrui, *supra* note 6, at 2382 (arguing that efforts to remedy racial discrimination and promote diversity are neither racially discriminatory nor suspect, and therefore should not be subject to strict scrutiny).

297. As noted earlier, *see supra* notes 5–6, the inability of the government to remedy societal discrimination has led to the invalidation of dozens of set-aside programs.

though potentially one of the most potent.[298] In the last few years the statute has experienced a surprising renewal of interest primarily as a result of private enforcement actions based on varied and creative litigation strategies.[299] As litigation under Title VI has increased, the statute's scope has faced a number of challenges; in particular, questions have been raised regarding whether the statute includes a disparate impact component.[300]

The spending power cases provide the best means by which the statute can be construed to reach practices that have disparate effects upon racial minorities, which could potentially have a far-reaching impact on the recipients of federal funds. For example, if Title VI encompasses neutral practices that have disparate racial effects, many Universities and colleges may have to reconsider their admissions programs, especially their emphasis on standardized tests as a criterion for admission given that the tests have been demonstrated to have a significant disparate impact in many settings.[301]

Title VI prohibits discrimination based on race and national origin by the recipients of federal funds.[302] Since its passage there has been a substantial question whether the statute requires the recipients of federal funds to remedy their practices that have disparate racial

298. 42 U.S.C. § 2000d (1994). For an excellent analysis of the government's limited enforcement efforts under Title VI, see STEPHEN C. HALPERN, ON THE LIMITS OF THE LAW: THE IRONIC LEGACY OF TITLE VI OF THE 1964 CIVIL RIGHTS ACT 304–19 (1995).

299. Title VI litigation currently represents some of the most interesting challenges being litigated in federal courts today. *See, e.g.*, Cureton v. NCAA, 198 F.3d 107, 109 (3d Cir. 1999) (challenging athletic eligibility requirements); Sandoval v. Hagan, 197 F.3d 484, 487 (11th Cir. 1999)) (challenging a state policy of providing drivers' examinations only in English), *rev'd sub nom*, Alexander v. Sandoval, 532 U.S. 275, 279 (2001); Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999) (challenging a city policy of arresting or sending to drug counseling pregnant women who test positive for cocaine), *rev'd*, 532 U.S. 67, 70 (2001); Burton v. City of Belle Glade, 178 F.3d 1175, 1183 (11th Cir. 1999) (challenging a city's failure to annex a housing project); N.Y. Urban League v. New York, 71 F.3d 1031, 1033 (2d Cir. 1995) (per curiam) (challenging an increase in subway fare as disproportionately excluding minorities from the transit system).

300. *See, e.g.*, Powell v. Ridge, 189 F.3d 387, 400 (3d Cir. 1999) (holding that Title VI permits a private right of action to pursue a disparate impact claim). The Supreme Court recently held that Title VI does not permit private parties to bring disparate impact challenges, though the Court did not address the question of whether the federal government can do so. *See Alexander*, 532 U.S. at 280–81.

301. For a discussion regarding the disparate impact of the Law School Admissions Test, see Linda F. Wrightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 33–34 (1997).

302. Title VI reads: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

effects but are not otherwise intentionally discriminatory. The Supreme Court has addressed the issue in a curious and confused manner, holding that while Title VI only prohibits intentional discrimination, the agency regulations implementing the statute can permissibly forbid discrimination based on the disparate effects of the federal contractor's practices.[303] Federal regulations have for many years interpreted the statute to include a disparate impact component,[304] and a large number of the cases currently being filed under Title VI have involved disparate impact challenges.[305] As noted previously, disparate impact challenges are intended primarily to address societal discrimination, so to the extent the government can require its contractors to remedy practices that have a disparate impact on racial minorities, it is effectively requiring those contractors to remedy societal discrimination.

Although the existing regulations have always seemed a bit incongruous, given their apparent inconsistency with the statutory

303. The Supreme Court has addressed the scope of Title VI on five occasions. Initially, in *Lau v. Nichols*, 414 U.S. 563, 568 (1974), the Court held that Title VI encompassed a disparate impact theory, although this holding was later thrown into doubt when the Court construed Title VI to be coextensive with the Fourteenth Amendment, which does not reach disparate impact claims. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (opinion of Powell, J.); *id.* at 328 (opinion of Brennan, White, Marshall, and Blackmun, JJ.). Several years later the Court arrived at a particularly tortured approach best summarized by Justice Powell:

> Only Justices White and Marshall believe that a violation of Title VI may be established by proof of discriminatory effect, and Justice White would recognize only noncompensatory prospective relief for such a violation. Justices Brennan, Blackmun, and Stevens, however, believe that a violation of the *regulations* adopted pursuant to Title VI may be established by proof of discriminatory impact. Thus, a majority of the Court would hold that proof of discriminatory effect suffices to establish liability only when the suit is brought to enforce the regulations rather than the statute itself.

Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring) (citations omitted). Two years later, the Court affirmed this reading by permitting a disparate impact challenge based on implementing regulations. *See* Alexander v. Choate, 469 U.S. 287, 293 (1985) ("[A]ctions having an unjustifiable disparate impact on minorities could be reddressed through agency regulations designed to implement the purposes of Title VI."). Last term, the Court held that private parties could not pursue disparate impact claims under Title VI. *See* Alexander v. Sandoval, 532 U.S. 275, 279 (2001).

304. *See, e.g.*, Nondiscrimination Under Programs Receiving Financial Assistance Through the Department of Education Effectuation of Title VI of the Civil Rights Act of 1964, 34 C.F.R. § 100.3(b)(2) (2001) (prohibiting fund recipients from "utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin").

305. *See* cases cited *supra* notes 299–300 (involving disparate impact challenges). In light of the Court's recent determination that private parties cannot bring disparate impact challenges under Title VI, the onus will fall on the government to pursue these claims.

mandate, the spending clause may help explain why the regulations have generally been treated as presumptively valid even by the Supreme Court itself.[306] When the spending power is introduced into the analysis, it becomes clear that the government can interpret the statutory obligations of Title VI broadly so as to ensure the recipients of federal aid seek to remedy discrimination defined expansively as a means of addressing the national problem of societal discrimination. In this respect, the Title VI regulations closely resemble the regulations upheld in *Rust v. Sullivan*.[307] Just as the government did not want to expend funds in a way that might have supported or encouraged abortions, the government is here ensuring that its funds are not used in a manner that supports discrimination of any kind. As was true in the funding cases more generally, if a potential fund recipient refused to alleviate the adverse effect of its practices, it would be free to refuse the federal funds—just as the health clinics were free to turn away federal funds if they wanted to provide abortion counseling, or just as states could decline highway funds if they thought a national speed limit would unreasonably slow their drivers down.[308]

The government might even go further by requiring federal contractors to address the disparate impact of their practices as a condition of receiving funds, so that a contractor would have to demonstrate that its relevant hiring practices did not have a disparate impact on racial minorities before it received federal funds.[309] This would mark a substantial change from the existing programs where contractors' practices can be challenged only after the funding is provided and would help ensure broad remedial efforts were taken as a condition for receiving federal funds.

The only restriction on the government's ability to construe Title VI to apply to practices that had an adverse impact would be the particular language of the statute. But given that the Supreme Court has interpreted nearly identical language under Title VII—passed at the same time as Title VI—to include a disparate impact cause of action, the government's administrative interpretation of Title VI

306. *See Choate*, 469 U.S. at 299.

307. 500 U.S. 173, 177 (1991). As noted earlier, the regulations at issue in *Rust* were promulgated under the Reagan Administration and were subsequently rescinded by the Clinton Administration, suggesting that an administration has broad discretion to pursue its own policy objectives so long as the interpretation is reasonable.

308. *See supra* notes 202–12 (discussing South Dakota v. Dole, 483 U.S. 203 (1987)).

309. I am grateful to Ian Ayres for this suggestion.

should be deemed a reasonable one.[310] Accordingly, the spending clause provides the underlying explanation for the government's power to require its contractors to remedy societal discrimination in the form of disparate impact claims, or by taking the positive step of requiring contractors to remedy their practices that have a disparate effect as a condition of receiving federal funds.

2. Funding Integration Efforts

A final area where the government could use its spending power to help eradicate societal discrimination would be by funding various integration efforts. These efforts could take many forms; for example, the government might provide additional housing funds to developments that are built in integrated areas, or that help maintain or increase housing integration. Existing cases suggest that government efforts to encourage affirmative outreach or recruitment designed to foster housing integration would likely be upheld so long as the developments did not achieve integration through impermissible racial quotas or resident balances.[311] Indeed, the government currently requires the recipients of federal housing funds to comply with federal housing requirements, which include creating an affirmative marketing program designed to attract minority applicants.[312] The First Circuit Court of Appeals recently rejected a challenge to the program, although the court did not rely on the government's spending power to sustain the program.[313] Under the government's spending power, these programs should clearly be upheld both as a valid means to pursue the legitimate goal of housing integration, and demonstrate further that the government already takes various actions designed to remedy societal discrimination.

The government might also choose to provide funds to civil rights groups to enable them to pursue integration strategies,

310. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) (interpreting Title VII to include disparate impact claims).

311. *Compare* United States v. Starrett City Assocs., 840 F.2d 1096, 1103 (2d Cir. 1988) (invalidating a racial balance program designed to preserve an integrated housing complex), *with* S.-Suburban Hous. Ctr. v. Greater S. Suburban Bd. of Realtors, 935 F.2d 868, 871 (7th Cir. 1991) (upholding race-conscious marketing designed to maintain racially integrated neighborhoods). For a discussion of the constitutionality of mortgage-incentive programs intended to foster integration, see Suja A. Thomas, *Efforts to Integrate Housing: The Legality of Mortgage-Incentive Programs*, 66 N.Y.U. L. REV. 940 (1991).

312. *See* Nondiscrimination in Federally Assisted Programs of the Department of Housing and Urban Development—Effectuation of Title VI of the Civil Rights Act of 1964, 24 C.F.R. §§ 1.5, 5.105, 200.620 (2001).

313. *See* Raso v. Lago, 135 F.3d 11, 17 (1st Cir. 1998) (upholding a marketing program that was a condition of receiving federal housing funds).

including suing discriminatory employers or housing providers. Although the government frequently works on discrimination cases in conjunction with civil rights groups, it has never provided direct funding to these groups, and this practice might offer another means to address societal discrimination.

Integration, to be sure, is not as fashionable a concept today as it once was,[314] but its unfashionable nature should not define its constitutional permissibility. I also believe the idea of integration is not nearly as unfashionable as it may seem;[315] rather, calls for integration today come in a different form under the label of diversity. A diverse student body, which is now generally the calling cry behind affirmative action in higher education,[316] necessarily implies an integrated student body, at least at some level. Relatedly, integration has fallen out of favor largely from the current realization that meaningful integration—either in schools or in housing—now seems out of reach for much of the country, which has understandably produced a good deal of frustration and resentment among civil rights advocates.[317] One important difference worth highlighting between current calls for diversity and past calls for integration is that the latter were often, though not inevitably, based on an assumption of assimilation,[318] whereas today's call for diversity implies preserving different cultures in a mixed culture environment.

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314. For a sampling of the extensive critical commentary, see LEONARD STEINHORN & BARBARA DIGGS-BROWN, BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE (1999); Wendy R. Brown, *The Convergence of Neutrality and Choice: The Limits of the State's Affirmative Duty to Provide Equal Educational Opportunity*, 60 TENN. L. REV. 63 (1992); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

315. *See, e.g.*, John A. Powell, *Living and Learning: Linking Housing and Education*, 80 MINN. L. REV. 749, 791–93 (1996) (advocating an integrationist strategy).

316. *See* Akhil Reed Amar & Neal Kumar Kytal, Bakke*'s Fate*, 43 UCLA L. REV. 1745, 1773–77 (1996) (emphasizing the importance of including students of diverse backgrounds in higher education); Sumi K. Cho, *Multiple Consciousness and the Diversity Dilemma*, 68 U. COLO. L. REV. 1035, 1036–37 (1997) (arguing in favor of diversity as an affirmative action justification); Stephanie M. Wildman, *Integration in the 1980s: The Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625, 1674–76 (1990) (articulating diversity justification).

317. *See* Powell, *supra* note 315, at 785–88 (discussing opposition to integration among current civil rights advocates). For a measured discussion of a limited separation strategy, see BROOKS, *supra* note 133, at 189–97.

318. *See* Johnson, *supra* note 314, at 1469 ("The brand of integration . . . practiced in America merely requires assimilation of African Americans into white culture and does not integrate the cultures and *nomos* of the African-American and white communities into each other.").

Regardless of whether integration is deemed fashionable, the government is certainly free to pursue integration as a social and political strategy, and at least for the near future, it is highly likely that the government will continue to treat integration as the ultimate ideal. Moreover, as was true with the set-aside programs,[319] there can be no argument that a program designed to further integration would later be replaced by a program aimed at increasing segregation. An integration mandate is plainly consistent with the Fourteenth Amendment, if not necessarily mandated by its terms, whereas no contemporary government could conceive of an argument that segregation was legitimately consistent with our constitutional dictates, and it also seems safe to suggest that no government would even try.

CONCLUSION

Government spending can be wielded as an important tool in the effort to eradicate societal discrimination, and if used in the manner described in this Article, may save many existing, and future, programs from judicial invalidation. In this Article, I have demonstrated that the Court's persistent holding that it is impermissible for the government to take affirmative measures to remedy societal discrimination is mistaken. Pursuant to the government's spending power, the government can, and does, take efforts to eradicate the social evil that is often labeled as societal discrimination, just as it can promote decent art or take efforts to encourage women to forego abortions. With respect to its efforts to remedy societal discrimination, the government can reward its government contractors who engage in affirmative action, those contractors that have diverse workforces that exceed industry averages, and even require its contractors to remedy societal discrimination by interpreting its nondiscrimination mandates to include a disparate impact component. I do not mean to suggest that the Supreme Court would uphold all of these efforts, but the government funding cases may provide an important new analytical element to what has otherwise become a tired and losing struggle. Moreover, by focusing on the role societal discrimination has played in the Court's doctrine, it should be clear that the government has a duty to seek its eradication, not just because of the harm it entails, but because of the government's role in creating and perpetuating

319. *See supra* text accompanying notes 260–61.

societal discrimination. Turning to the spending power may just move that cause forward.