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NEGATIVE ACTION AGAINST ASIAN AMERICANS: THE INTERNAL INSTABILITY OF DWORKIN'S DEFENSE OF AFFIRMATIVE ACTION*

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[O]nce race is accepted as a proper factor to consider for purposes of achieving student diversity, it is susceptible to manipulation for restricting entry by members of certain groups. Thus, for example, if a relatively high proportion of Asians would gain admissions to medical school based solely on a competitive admissions process, a state university could limit the number of its Asian medical students under the guise of pursuing a more diverse student body.

—Michael Rosenfeld¹

We've got to brush away arbitrary discrimination And if that means fighting quotas that harm talented Americans like the thousands of Asian students in our universities, then we're going to fight all the way. You know the awful tolls: quotas penalize achievers, and they slam shut opportunity's door.

—George Bush²

Introduction

We may now be witnessing the death of affirmative action.³ Regrettably, the quality of discourse surrounding this significant moment has been poor, especially in the popular media, which affords little more than soundbites to the discussion of complex ideas. Nor has the academy

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** Acting Professor, UCLA School of Law. I thank Laurence Tribe for guidance in the inception of this piece. Thomas Chavez, Margaret Chon, Jörg Decressin, Richard Fallon, Laura Gómez, Cheryl Harris, Thomas Joo, Kenneth Karst, Gerald López, Andrew Mills, Philip Tajitsu Nash, Gary Rowe, and Eugene Volokh provided invaluable comments on earlier drafts. Julia Harumi Mass, funded by a grant from the UCLA Academic Senate, provided helpful research assistance. This piece, my first as *gyosu*, is dedicated to my parents.

¹ MICHAEL ROSENFELD, AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY 170 (1991).

² Larry Liebert, *Demos Mull New Scenario, Bush Focuses on the Prize*, S.F. CHRON., June 20, 1991, at A21.

³ In last term's *Adarand Constructors Co. v. Peña*, 115 S. Ct. 2097 (1995), the Supreme Court adopted strict scrutiny for all governmental racial classifications, remedial and otherwise. *See id.* at 2113. Affirmative action is also being attacked on the legislative front. Currently, several bills before Congress seek to eliminate race and gender preferences in the areas of public and private employment, education, and contracting. For example, Senator Jesse Helms (R-N.C.) has sponsored the "Civil Rights Restoration Act of 1995,"

weighed in with new approaches that do more than rehash worn liberal and conservative lines. Indeed, so much ink has been spilled on affirmative action that saying something new is difficult. Saying something both new and illuminating presents an even greater challenge.

Nonetheless, I hope to offer fresh insight into the discordant complex of ideas and intuitions implicated by preferential treatment for racial minorities.⁴ This Article examines one timely facet⁵ of the affirmative action debate—preferential student admissions into educational institutions.⁶ I explore the tension between traditional liberals' acceptance of preferential admissions for racial minorities and their general rejection of

which would amend the Civil Rights Act of 1964 to make preferential employment or union membership decisions on the basis of race, color, religion, sex, or national origin an unlawful employment practice. S. 26, 104th Cong., 1st Sess. (1995); S. 318, 104th Cong., 1st Sess. (1995); *see also* Act to End Unfair Preferential Treatment, H.R. 1764, 104th Cong., 1st Sess. (1995); Act to End Unfair Preferential Treatment, S. 497, 104th Cong., 1st Sess. (1995); American Action Act of 1995, H.R. 1840, 104th Cong., 1st Sess. (1995). *See generally* Joe Klein, *The End of Affirmative Action*, NEWSWEEK, Feb. 13, 1995, at 36.

If California politics is a bellwether for national politics, then concerns about the death of affirmative action are not paranoid. On July 20, 1995, the Regents of the University of California abolished the use of race-based preferences in student admissions, hiring, and contracting. *See UC Regents, In Historic Vote, Wipe Out Affirmative Action*, L.A. TIMES, July 21, 1995, at A1. In addition, the "California Civil Rights Initiative," which would ban race and gender based preferences in government hiring, contracts, and public education, may qualify for the November 1996 ballot. *See Affirmative Action Debate Halts Meeting of U.C. Regents*, L.A. TIMES, May 19, 1995, at A1.

⁴ In this Article, the phrase "affirmative action" means preferential treatment of individuals on the basis of their membership in a minority racial group. Although public opinion seems to turn decidedly on whether the phrase "affirmative action" or "preferential treatment" is used, *see Gray in the Debate of Color*, WASH. POST, June 5, 1995, at A1, I see no such difference for purposes of legal and philosophical analysis.

When referring to minority racial groups, I use the basic categories employed by universities: White, African American/Black, Latino, Asian American, and Native American. I capitalize the label "White" as I capitalize all other racial categories to emphasize their central similarity: they are all names we have given to the social constructions of race. Finally, I use the term "Asian American" in a way similar to that of universities when they classify students by race for admission purposes. For example, the School of Law at the University of California at Los Angeles uses "Asian American" to include those individuals who identify themselves as "Chinese/Chinese American, Japanese/Japanese American, Korean/Korean American, Pacific Islander, Filipino/Filipino American, Vietnamese, Thai, East Indian/Pakistani, and Other Asian" on a self-reporting basis. UCLA School of Law 1995-1996 Bulletin & Application.

⁵ *See Hopwood v. Texas*, 21 F.3d 603 (W.D. Tex. 1994) (finding compelling interests—in remedying the present effects of past educational discrimination and pursuing diversity—but invalidating the Texas Law School affirmative action program because it was not narrowly tailored); *Podberesky v. Kirwan*, No. 93-2527; 93-2585, 1994 U.S. App. LEXIS (4th Cir. 1994) (invalidating a race-based scholarship because it was not narrowly tailored as a remedy for the present effects of past discrimination).

⁶ I do not distinguish between public institutions, which are state actors, and private institutions, which are not, because private universities that receive federal funds must at least obey the requirements of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-4 (1988 & Supp. V 1993), which incorporates the Fourteenth Amendment's standards for equal protection. *See Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J.). Of course, the regulations promulgated under Title VI may reach

admission ceilings on minorities such as Asian Americans. This tension guides my inquiry out onto broader, more fundamental questions regarding the central meaning of equality and its appropriate implementation in our constitutional jurisprudence. This inquiry takes place on an analytical infrastructure built by Ronald Dworkin.

More specifically, Part I presents Ronald Dworkin's liberal defense of affirmative action in higher education. Dworkin has forcefully argued that because affirmative action does not violate the constitutional rights of Whites, it must be allowed to do the work of promoting racial equality.⁷ Yet, the sword he forges to justify affirmative action has a double edge that cuts unexpectedly against the liberal orthodoxy. Part II explores how Dworkin's theory justifying affirmative action for certain minority groups, consistently applied under plausible empirical conditions, can authorize what I call negative action against Asian Americans.

By negative action, I mean unfavorable treatment based on race, using the treatment of Whites as a basis for comparison. In functional terms, negative action against Asian Americans is in force if a university denies admission to an Asian American who would have been admitted had that person been White.⁸ To be clear, Whites, not any other race, are used as the baseline.⁹ Thus, the fact that an Asian American would have been admitted had she been some other racial minority is irrelevant to the specific question whether negative action against Asian Americans is in place.¹⁰ Finally, just like affirmative action, negative action can be imple-

farther than the statute itself or the Equal Protection Clause. *See* *Guardians v. Civil Service*, 463 U.S. 582, 592–93 (White, J.), 618–24 (Marshall, J., dissenting), 642–43 (Stevens, J., joined by Brennan and Blackmun, JJ., dissenting) (1983).

⁷ I reconstruct Dworkin's defense of affirmative action by examining three consistent but not identical arguments, whose publication dates span a decade. *See* RONALD DWORKIN, *LAW'S EMPIRE* 386–87, 393–97 (1986) [hereinafter DWORKIN, *LAW'S EMPIRE*]; RONALD DWORKIN, *A MATTER OF PRINCIPLE* 293–303 (1985) [hereinafter DWORKIN, *A MATTER OF PRINCIPLE*]; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 223 (1977) [hereinafter DWORKIN, *TAKING RIGHTS SERIOUSLY*].

⁸ In analyzing whether negative action is in force, it is critical to keep every characteristic of the applicant constant except for race. Therefore, if a socioeconomically disadvantaged White were admitted in favor of a wealthy, privileged Asian American, this does not necessarily indicate that negative action is in effect. It may well be that the poor White was preferred not because of race but because of class.

⁹ *See, e.g.*, 42 U.S.C. §§ 1981, 1982 (1988 & Supp. V 1993) (referring to the contracting and property rights of "White" citizens).

¹⁰ Whites are used as the reference baseline for two reasons. First, when discussing policies of preference, one must have some baseline of nonpreferential treatment in order to make sense of the very notion of preference. Second, since the treatment of Whites is used as the baseline to distinguish favorable treatment of racial minorities in affirmative action, clarity recommends using the same baseline for unfavorable treatment of Asian Americans in negative action.

Of course, this is not to say that the issue whether an Asian American would have been admitted had she been some other racial minority is uninteresting from a doctrinal, policy, or ethical perspective. Indeed, renouncing the traditional bipolar analysis of race—White versus non-White (usually Black)—and examining minority-minority interrelations promises to shed great light on controversies such as affirmative action. *See, e.g.*,

mented either by a "hard" system of inflexible, numerical quotas or by a "soft," unquantified, gestalt admissions calculation.¹¹

Dworkin's justification of both affirmative action for racial minorities and negative action against Asian Americans suggests an internal instability within his theory. The instability exists because although traditional liberals are comfortable with the idea of affirmative action, they are uncomfortable with the idea of negative action against Asian Americans.

This instability—which has been recognized, at least implicitly, by university administrators,¹² editorialists,¹³ government officials,¹⁴ legal analysts,¹⁵ and the courts¹⁶—presents a problem of great concern for various constituencies. This instability is important to Asian Americans because it illuminates the regimes of negative action that may now be in place at various educational institutions, from competitive high schools to graduate school departments.¹⁷

TOMAS ALMAGUER, *RACIAL FAULT LINES 2* (1994) (identifying Black/White bipolarism as one problem with current understandings of race).

¹¹ Whether the constitutionality of an affirmative action program should turn on this distinction has been questioned. See, e.g., Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College Diversity-Discretion Model: Paradigm or Pretext*, 1 CARDOZO L. REV. 379, 382–86 (1979).

¹² See Fleming & Pollak, *infra* note 61, at 47; Michael Winerip, *Asian-Americans Question Ivy League's Entry Policies*, N.Y. TIMES, May 30, 1985, at B1, B4 (discussing how Asian Americans have historically not enjoyed preferential admissions at elite colleges as have Blacks, legacies, and athletes).

¹³ See James Gibney, *The Berkeley Squeeze*, NEW REPUBLIC, Apr. 11, 1988, at 15; Harold Johnson, *Model Victims*, NAT'L REV., July 20, 1992, at W7 (suggesting that "doing justice" for Asian Americans requires the dismantling of "reverse discrimination in favor of specially anointed groups"); Andrew Hacker, *Affirmative Action: The New Look*, N.Y. REV. BOOKS, Oct. 12, 1989, at 63, 64 ("Splintering the discussion even further is whether ceilings for Asians result from the expansion of Black and Hispanic admissions, and thus are the result of affirmative action.").

¹⁴ See Carol Innerst, *UC-Berkeley Law School Agrees to Halt Race Quotas*, WASH. TIMES, Sept. 29, 1992, at A7 (quoting Assistant Education Secretary for Civil Rights Michael Williams' acknowledgement that Boalt Law School's admissions program disadvantages some Asian groups).

¹⁵ See Selena Dong, *Too Many Asians: The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995); Frank Wu, *Neither Black nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 276 (1995) ("[I]f it is permissible to harm whites to help blacks, then it is permissible to harm Asian Americans to help whites, isn't it?"); Mari Matsuda, *We Will Not Be Used*, 12 ASIAN L. CAUCUS REP. 1, 6 (July 1990) ("I condemn the voices from my own community that are translating legitimate anger at ceilings on Asian admissions into unthinking opposition to affirmative action floors needed to fight racism.").

¹⁶ *Cf.* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309 n.45 (1978) ("[T]he University is unable to explain its selection of only the four favored groups—Negroes, Mexican-Americans, American Indians, and Asians—for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process.").

¹⁷ See generally Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 61–64 (1994); Grace W. Tsuang, *Assuring Equal*

The instability is also important to those who have a stake in the politics of race-based remedies. Many politicians have started to use admission ceilings on Asian American applicants as an incisive tool to criticize all race-based policies as morally bankrupt.¹⁸ If campaign rhetoric such as former President Bush's¹⁹ and California governor and former presidential hopeful Pete Wilson's²⁰ is "intellectual confusion,"²¹ then it should be exposed as such,²² lest Asian Americans be used as a political

Access of Asian Americans to Highly Selective Universities, 98 YALE L.J. 659, 660-65 (1989) (presenting the evidence of admission ceilings on Asian American admissions). See also Don Nakanishi, *A Quota on Excellence*, in THE ASIAN AMERICAN EDUCATIONAL EXPERIENCE: A SOURCEBOOK FOR TEACHERS AND STUDENTS, 273, 279 ("Every campus that launched its own ad hoc inquiry to examine and resolve this debate—Brown, Princeton, Harvard, Berkeley, and Stanford, among others—has found that Asian/Pacific applicants have stronger group-level academic profiles than other groups.").

Indeed, at prestigious Lowell High School in San Francisco, a peculiar regime of negative action against Asian Americans is explicit. Lowell High School, a competitive-entry, public magnet school, is required by desegregation consent decree to have no single racial group compose more than a set percentage of a given class; in Lowell's case, it is 40%. See *San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 576 F. Supp. 34, 61 (N.D. Cal. 1983). See generally Hannah Nordhaus, *Consent Decree Battle Exposes Rifts in Rights Groups' Agendas*, S.F. RECORDER, Jan. 12, 1995, at 1. Because of this cap, Lowell denies admission to certain Asian Americans (specifically Chinese Americans), who would be admitted if they were White. See Nanette Asimov, *S.F. Schools Sued Over Enrollment Restrictions*, S.F. CHRON., July 12, 1994, at A13; Frank H. Wu, *At Lowell High, Who Is Equal to Whom?*, S.F. CHRON., Sept. 21, 1994, at A23. See generally Dong, *supra* note 15, at 1030-31 (presenting the question of how Asian Americans can simultaneously argue in favor of preferential treatment for some minority groups over Whites and against the sort of discrimination that is occurring at Lowell High School).

A little history adds perspective to the modern problem; the doctrine of "separate but equal" education applied not only to Blacks but also to Asian Americans. See *Gong Lum v. Rice*, 275 U.S. 78 (1927). Not surprisingly, before the 1960s, Asian Americans were de facto excluded from elite universities. See John H. Bunzel & Jeffrey K.D. Au, *The Asian Difference*, in RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY, 455, 460 (Russell Nieli, ed. 1991) [hereinafter Bunzel & Au, *Asian Difference*].

¹⁸ See Gibney, *supra* note 13, at 17 (quoting the remarks of Rep. Dana Rohrbacher (R-Cal.), who compared discrimination against Asian Americans in universities to that against Jews in the 1920s); Benjamin Pimentel, *Asian Americans' Awkward Status*, S.F. CHRON., Aug. 22, 1995, at A1 (quoting the remarks of Joe Gelman, campaign manager for the California Civil Rights Initiative, concerning quotas imposed on Asian American students).

¹⁹ See Liebert, *supra* note 2.

²⁰ Susan Page, *Off and Running, Pete Wilson; A Series of Interviews with Presidential Hopefuls*, NEWSDAY, Aug. 27, 1995, at A38 (quoting Pete Wilson as stating "And when we . . . grant admission to a public university based not upon individual merit but instead upon membership in a racial or ethnic group that is favored under the law, we are sending a terrible signal. That is by definition racial discrimination. It was wrong 35 years ago when the victims were African Americans. It's wrong today when the victims are Asians, Caucasians.").

²¹ See *infra* note 48.

²² See, e.g., Frank Wu, *supra* note 15, at 226 (discussing how the model minority trope pits Asian Americans against other minority groups).

pawn against policies designed to decrease racial prejudice in our country.²³

Having identified this internal instability, in Part III, I reconsider Dworkin's particular conception of the right to equality, which lies at the heart of his affirmative action defense. I argue in favor of an alternate conception of equality based on the degree to which the objective social meaning of a governmental practice is stigmatic. Part IV supports this claim by substituting this alternate conception into Dworkin's affirmative action defense, resolving the internal instability therein.

I. Dworkin's Defense of Affirmative Action

Ronald Dworkin's defense of preferential admissions for racial minorities rests on two assumptions, one theoretical, the other empirical. First, he assumes that the proper theoretical framework with which to analyze affirmative action, and governmental practices generally, involves a qualitative distinction between policies and principles. Typically, government should be free, as a matter of policy, to adopt programs that secure society's general interest, however defined.²⁴ If, however, these programs infringe on important moral or constitutional rights, which are recognized not as a matter of mere policy but as a matter of principle, then these rights trump the otherwise desirable actions.²⁵

Second, Dworkin assumes, for argument's sake, that affirmative action in higher education will produce a net benefit for society. Affirmative action may increase the number of minority professionals uniquely well suited to serve minority needs. It may decrease racial prejudice by increasing social and professional intercourse among individuals of different races in an open-minded, intellectual community.²⁶ It may in the

²³ The affirmative action issue has a history of fragmenting political groups that had previously united on civil rights causes. See Nathan Glazer, *Racial Quotas*, in RACIAL PREFERENCE AND RACIAL JUSTICE: THE NEW AFFIRMATIVE ACTION CONTROVERSY 3, 26 (Russell Nieli, ed. 1991) (noting that among Jewish groups, including the Anti-Defamation League and the American Jewish Congress, none supported Bakke in his suit against affirmative action); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986) (describing how affirmative action splintered the consensus that passed the Civil Rights Act).

²⁴ Dworkin claims that society can define its general interest in one of two principal ways. It could adopt a *utilitarian* model in which the general interest of society will benefit from maximizing preferences. Or, it could adopt an *idealistic* model in which the general interest is achieved not by giving society's members more of what they want but by making society more closely resemble some vision of the ideal community. See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 266, 274. Of course, the utilitarian model can be seen as an element of the set of idealistic models.

²⁵ See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 381. This deontological notion that the violation of an individual's rights can trump an efficient social policy is a fundamental component of liberal political theory. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 3 (1971).

²⁶ See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 7, at 295.

long-term “reduce the degree to which American society is overall a racially conscious society.”²⁷ Whether affirmative action in fact achieves these benefits is, as Dworkin admits, an uncertain empirical question reserved for social science, not jurisprudence.²⁸ Dworkin’s aim, however, is thoroughly jurisprudential: he seeks to secure the theoretical justification of preferential treatment, without which the empirical data, however favorable to preferential policies, would ring hollow. The meat of Dworkin’s argument thus begins only after assuming that affirmative action is causally efficacious in getting America beyond its racial problems.

A. *Illusory Rights*

Under Dworkin’s theoretical framework, affirmative action is assumed to produce net social benefits. Therefore, those disadvantaged by affirmative action—like Allan Bakke, the plaintiff in *Regents of the University of California v. Bakke*²⁹—can challenge affirmative action only if it violates an important moral or constitutional right.³⁰ What could this right be? Dworkin considers four obvious candidates: the right to receive higher education, the right to be judged on merit, the right to be judged as an individual, and the right not to be judged on a characteristic beyond one’s control. He concludes that all four alleged rights are illusory.

First, is there a right to receive a university education? Dworkin concludes that Bakke has no important moral or constitutional right to receive this sort of entitlement.³¹

Second, is there a right to be judged on merit? Dworkin responds to this supposed right by offering the standard deconstruction of “merit.” Merit is not an *a priori* concept that possesses intrinsic meaning.³² Instead, it is a relational concept that derives its meaning only in relation to the goals of a particular job or institution. For example, what consti-

²⁷ *Id.* at 294.

²⁸ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 224. Dworkin adds that it is not the “business of judges, particularly in constitutional cases, to overthrow decisions of other officials because the judges disagree about the efficiency of social policies.” *Id.* at 224; see also *Adarand Constr. Co. v. Peña*, 2097, 2122 n.5 (Stevens, J., dissenting) (“I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make.”); Mark Strasser, *The Invidiousness of Invidiousness: On the Supreme Court’s Affirmative Action Jurisprudence*, 21 HASTINGS CONST. L.Q. 323, 401 (1994).

²⁹ 438 U.S. 265 (1978).

³⁰ See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 7, at 298; see also THOMAS NAGEL, *MORTAL QUESTIONS* 91 (1979) (explaining that if affirmative action is unjust, it is much more difficult to defend on social utilitarian grounds).

³¹ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 225; see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that primary and secondary educations do not implicate fundamental interests).

³² See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 7, at 299 (“There is no combination of abilities and skills and traits that constitutes ‘merit’ in the abstract . . .”).

tutes "merit" for a particle physics team differs radically from "merit" for a professional football team because the goals of these two institutions are different: the former is interested in smashing atoms, the latter in smashing helmets.

Dworkin explains that we consider intelligence as merit when making university admissions decisions because a central purpose of the university is to produce intelligent graduates who benefit society. In other words, considering intelligence to be "merit" is warranted not because doing so properly "reward[s] the clever, but because [it] seem[s] to serve a useful social policy."³³ If, however, a university's goals also include the creation of a less prejudiced society, and if by hypothesis, preferential admission of racial minorities furthers this end, then the color of one's skin *is* meritorious with respect to this particular goal.

Furthermore, a university may legitimately pursue the goal of creating a less prejudiced society. No student applicant has the right to force a university to abandon this goal and to adopt as its exclusive mission the matriculation of applicants who are the most intelligent, however intelligence is measured. Thus, under Dworkin's empirical assumption about the benefits of affirmative action, *race is merit* with respect to the goal of decreasing racial prejudice. Accordingly, Bakke cannot claim that his right to be judged on "merit" was violated.³⁴

Third, is there a right to be judged as a unique individual and not as a member of a class? Dworkin says no.³⁵ Since gathering information is not costless,³⁶ no institution that makes discriminations can afford to treat each individual applicant as *sui generis*. Almost all admission prerequisites—from high school diplomas to minimum standardized test scores to grade point averages—filter applicants on unindividualized bases that suffer from varying degrees of over- and underinclusiveness.³⁷ Yet Dworkin claims, and I believe correctly, that such quotidian mechanisms for screening student applicants hardly seem to violate an important right.³⁸

³³ DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 225; *see also* Kenneth L. Karst & Harold W. Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955, 961–62 (1974) (describing "merit" as a function of social needs).

³⁴ Although not pursued by Dworkin, the notion of deserving the rewards associated with one's merit presents deeper philosophical difficulties. *See, e.g.*, RAWLS, *supra* note 25, at 74.

³⁵ On a superficial reading, one might find a contradiction between Dworkin's stances that (1) there is no right to be judged as an individual and (2) the right to equality is a right that flows directly to the individual and not to any racial group. However, there is nothing inconsistent in claiming that the Equal Protection Clause protects individual rights, not "group rights"—whatever they may be—but that the nature of that protection does not require state actors to treat each individual as unique, whose full human complexity must be considered regardless of the administrative cost.

³⁶ *See generally* THOMAS SOWELL, *KNOWLEDGE AND DECISION* 83–93 (1980) (discussing the nature of sorting and labeling, and the costs and benefits of better information).

³⁷ *See* DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 7, at 299–300.

³⁸ Indeed, being treated as an "individual" might simply mean being treated as a

Fourth, is there a right not to be judged on an immutable characteristic? Dworkin again says no. Despite the appeal of affirming liberation from social and biological contingencies beyond our control, the social practices in our daily lives deny the existence of this right. We always judge and are judged on characteristics that are at least in part beyond our control. Student admissions criteria such as intelligence, age, geographic location of an applicant's home, athletic ability, musical ability, and legacy status are all qualities at least somewhat beyond the applicant's control, sometimes substantially.³⁹ Nevertheless, as Dworkin argues, we feel comfortable, even after reflection, about permitting a university to use at least some of these criteria in deciding whom it accepts, and whom it rejects. If nothing else, this supposed right would be overbroad: being judged on a characteristic beyond our control, while sometimes inappropriate, is not always objectionable. As a result, Dworkin concludes that the proposition that one should not be judged on a quality beyond one's control "has been decisively rejected throughout American law and politics."⁴⁰

B. The Real Right: The Right to Equality

After rejecting these four illusory rights, Dworkin concentrates on what he considers to be the only real right at stake, the individual right to equality, a moral right granted constitutional stature by the Fourteenth Amendment's Equal Protection Clause.⁴¹ For Dworkin, the right to equality—as a general concept embodied in the Constitution—means the right to treatment as an equal.⁴² But Dworkin admits that, as a general concept, the right to equality suffers from an indeterminacy removed only by considering particular conceptions⁴³ of that right.⁴⁴ When the right to

member of one particular *group* as opposed to a different *group*. See Karst & Horowitz, *supra* note 33, at 961.

³⁹ See DWORKIN, A MATTER OF PRINCIPLE, *supra* note 7, at 301.

⁴⁰ DWORKIN, LAW'S EMPIRE, *supra* note 7, at 394; see also Richard H. Fallon, Jr. & Paul C. Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 38 (explaining that distinctions based on immutable characteristics are not normally considered violative of moral rights).

⁴¹ See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 226. From this passage, readers might wonder whether Dworkin conflates morality with law, and thereby elides the difference between moral philosophy and constitutional interpretation. Dworkin would deny making such an elementary error. In fact, it has been argued that Dworkin's theory of jurisprudence in general, and constitutional interpretation in particular, are sophisticated attempts to reconcile the strands of positivism and natural law intertwined in Anglo-American jurisprudence. See Richard H. Fallon, Jr., *Reflections on Dworkin and the Two Faces of Law*, 67 NOTRE DAME L. REV. 553, 553–55 (1992).

⁴² See DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 7, at 226–27.

⁴³ Dworkin distinguishes *concepts* from *conceptions* in the following manner: "At the . . . [concept] level agreement collects around discrete ideas that are uncontroversially employed in all interpretations; at the [conceptions level] the controversy latent in this abstraction is identified and taken up." DWORKIN, LAW'S EMPIRE, *supra* note 7, at 71.

⁴⁴ Cf. Owen M. Fiss, *Groups and the Equal Protection Clause*, in EQUALITY AND

equality is applied to questions of race, competing mediating conceptions arise. In *Law's Empire*, Dworkin discusses three possible conceptions of this right to racial equality: suspect classifications, banned categories, and banned sources.

1. *Suspect Classifications*

The essence of his first conception, suspect classifications, is empirical accuracy. The right to equality is satisfied under this conception as long as the preferences of racial minorities are weighed in the exact same manner as those of the racial majority.⁴⁵ Because of the danger of empirical misperception or selective devaluing of minority interests,⁴⁶ this conception imposes a "hard look" requirement on the judiciary to ensure a fair accounting of minority preferences by legislatures.

The suspect classification conception will bow to an accurately measured majority will, even if, for example, that majority wills state-enforced segregated schools. If, for instance, enough White racists prefer segregated education, then, even if the preferences of racial minorities are accurately tallied under close judicial scrutiny, the racist preferences could well dominate.⁴⁷ Since the suspect classifications conception allows for such tyrannies of the majority, Dworkin quickly concludes that it contravenes modern political and moral intuitions about equality's demands.⁴⁸

2. *Banned Categories*

The second conception considered by Dworkin, banned categories, embodies the colorblind ideal articulated in Justice Harlan's celebrated dissent in *Plessy v. Ferguson*.⁴⁹ This conception supposes that the right to equality confers on individuals the right to prevent government from ever treating people differently based on race, even when such classifications would further the state's general interest.⁵⁰ This categorical ban on racial

PREFERENTIAL TREATMENT 85 (Marshall Cohen et al., eds. 1977) (explaining how the antidiscrimination conception is not the sole mediating conception of the more abstract Equal Protection Clause). Some have also argued that the concept of equality is not only indeterminate but entirely empty. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982). But see Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245 (1983).

⁴⁵ See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 383.

⁴⁶ See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7 (1976) (discussing how race-dependent decisions that appear to be rational may actually be based on assumptions about the differential worth of racial groups).

⁴⁷ See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 383.

⁴⁸ See *id.* at 387.

⁴⁹ 163 U.S. 537 (1896).

⁵⁰ See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 383-84.

distinctions would, of course, prohibit the segregated schooling that the suspect classifications conception could embrace.⁵¹

Dworkin argues that the banned categories conception, while enjoying a bright-line simplicity, must be supported by some principled account of why, among the innumerable ways that people are classified, race should be singled out as a forbidden basis of classification. Dworkin claims that “the only principle available [to justify the banned categories approach] is that people must never be treated differently in virtue of properties beyond their control.”⁵² However, Dworkin has already dismissed this principle as overbroad and illusory.⁵³

3. Banned Sources

Finally, Dworkin considers a conception of equality called banned sources, which holds that “[e]very citizen has a constitutional right that he not suffer disadvantage, at least in the competition for any public benefit, because the race . . . to which he belongs is the object of prejudice or contempt.”⁵⁴ This conception provides that the right to equality bestows on individuals the right to filter out prejudiced preferences from entering society’s determination of its collective interest. Dworkin argues that notions of the public interest in a democratic society depend on people’s preferences; for example, a typical utilitarian conception of the public weal would attempt to maximize the preferences held by all individuals within society.⁵⁵ Prejudiced preferences,⁵⁶ however, are inherently

⁵¹ David Strauss has noted the irony of calling the banned categories approach “colorblind.” In one sense, giving individuals the right to prohibit the state from making any classifications on the basis of race promotes an official obliviousness to race. However, in another, equally meaningful sense, specifically selecting out race as a special taboo characteristic—qualitatively different from age, eye color, blood type, or any other physical characteristic—despite race’s *occasional* usefulness as a proxy for other relevant characteristics is not to be blind to race but to be especially sensitive to it. See David Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 114 (1986).

⁵² *Id.*

⁵³ See *supra* text accompanying notes 39–40 (presenting Dworkin’s views rejecting this supposed right). Indeed, the banned categories conception, in its categorical colorblindness, could lead to absurd results. See Charles Fried, Comment, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 111 n.19 (1990) (“If a criminal gang has an exclusive racial composition, it would be fanatical to require the government to ignore this act in recruiting agents to infiltrate that gang.”).

⁵⁴ DWORKIN, A MATTER OF PRINCIPLE, *supra* note 7, at 300. Another articulation of this conception is “that preferences that are rooted in some form of prejudice against one group can never count in favor of a policy that includes the disadvantage of that group.” See DWORKIN, LAW’S EMPIRE, *supra* note 7, at 384.

⁵⁵ See DWORKIN, LAW’S EMPIRE, *supra* note 7, at 384.

⁵⁶ In his defense of affirmative action, Dworkin does not clearly define what he means by prejudice. In my view, racial prejudice spans a spectrum. At the extreme, there is pure *antipathy* and contempt, which in a utilitarian framework would translate to the negative valuing of minority welfare. Less extreme is prejudice that involves mere *selective*

inconsistent with the very concept of equality because they reject the fundamental ideal that government should accord to each individual, treatment as an equal. Accordingly, the banned sources conception focuses on preferences stained by prejudice and prevents them from tainting the determination of society's general interest.⁵⁷

In contrast to the suspect classifications conception, the banned sources conception would reject state-enforced school segregation justified by prejudiced preferences, no matter how much these preferences actually dominated. And in contrast to the banned categories conception, which Dworkin rejects as arbitrary and inadequately justified, the banned sources conception rests on the principled premise that prejudice is intrinsically incompatible with equality, and therefore, must be barred from infecting any societal cost-benefit analysis. Among the three conceptions of the concept of equality proffered, Dworkin selects the banned sources conception as best.⁵⁸

Under the banned sources conception of the right to equality, Dworkin concludes that affirmative action is constitutionally permissible. Whites, like Allan Bakke, do not suffer disadvantage in competition for a public educational benefit because their race is the object of prejudice. Instead, they suffer disadvantage because an unprejudiced cost-benefit analysis led the Regents of the University of California to adopt an affirmative action program which sought to increase the number of minority medical school students. Since anti-White prejudice did not besmirch the preferences that engendered this affirmative action program, Dworkin concludes that the program did not violate the only real right at stake, the right to equality.⁵⁹

Of course, the reader may disagree with Dworkin's defense of affirmative action and its disposal of Bakke's case. Even Dworkin's two foundational assumptions—the theoretical assumption that individual rights

indifference or unthinking callousness toward the welfare of a particular racial group which, again in a utilitarian scheme, would lead to the undervaluing of minority interests. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* 157 (1980).

Antipathy and selective indifference often cause and thereafter are reinforced by *misperceptions*, in which race is used as an unjustified proxy for individual behavior. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339 (1987) (describing how stereotypes provide a lens through which one sees events, a process that in turn reaffirms stereotypes themselves); THOMAS SOWELL, *MARKETS AND MINORITIES* 19 (1981) (describing a form of economic discrimination in which different transaction terms are offered to individuals because they are perceived differently on the basis of group membership); cf. David Chang, *Discriminatory Impact, Affirmative Action, and Innocent Victims: Judicial Conservatism or Conservative Justices?*, 91 COLUM. L. REV. 790, 793 n.9 (describing racial prejudice as having prescriptive (animus or favoritism) and descriptive (stereotype) modes). I believe Dworkin's banned sources conception would ban preferences tainted by any of the three modes of prejudice identified above: antipathy, selective indifference, or misperception.

⁵⁷ See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 7, at 300–01.

⁵⁸ See DWORKIN, *LAW'S EMPIRE*, *supra* note 7, at 394.

⁵⁹ See DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 7, at 301.

should trump collective strategies, and the empirical assumption that affirmative action produces more benefits than costs—are controversial. For example, many ethical and political theories disavow the liberal precept of “rights as trumps.”⁶⁰ Certainly the empirical claim that affirmative action entails more pluses than minuses has long been contested by people of all races.⁶¹ Many legal theorists have also questioned whether Dworkin’s banned sources conception is a superior interpretation of the Equal Protection Clause than, for example, the banned categories or colorblind conception.⁶²

My purpose, however, is neither to evaluate such criticisms nor to tackle Dworkin’s argument directly.⁶³ Instead, the purpose of this Article is to approach Dworkin’s defense of affirmative action at a slant by considering its application to the problem of admission ceilings on Asian American applicants. As a result, this Article has a restricted audience: it speaks to those who can, at least *arguendo*, accept Dworkin’s basic argument as a convincing, if imperfect, defense of a controversial political practice.

Lest this apologia for Dworkin become profuse, it is important to realize that he provides a cogent justification of affirmative action without embracing theories and assumptions discordant with a substantial portion of the American public. For Dworkin, it is “the worst possible misunder-

⁶⁰ For example, communitarian theories, which reject traditional liberalism’s strong separation between the *right* and the *good*, refuse to see individual rights as absolute vetoes on society’s pursuit of the good. See Michael J. Sandel, *Morality and the Liberal Ideal*, NEW REPUBLIC, May 7, 1984, at 15, 16–17. See generally MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982). From an entirely different perspective, critical legal scholars doubt whether the standard, liberal rights discourse has been efficacious in improving the welfare of subjugated peoples. See, e.g., Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1349–56 (1988) (describing the “New Left” criticism of legal rights discourse).

⁶¹ Compare Macklin Fleming & Louis Pollak, *The Black Quota at Yale Law School*, PUBLIC INTEREST, Spring 1970, at 44, 44–49 (letter of Macklin Fleming) (arguing against affirmative action at law schools) with Kennedy, *supra* note 23, at 1329–34 (arguing for affirmative action).

⁶² See, e.g., ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975) (“The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.”); William Van Alstyne, *Rights of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979) (“[O]ne gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one’s own life—or in the life or practices of one’s government—the differential treatment of other human beings by race.”). For a critique of this banned categories conception, see Neil Gotanda, *A Critique of “Our Constitution Is Color-Blind”*, 47 STAN. L. REV. 1 (1991).

⁶³ For a more direct critique of Dworkin’s argument, see, for example, Luke C. Harris & Uma Narayan, *Affirmative Action and the Myth of Preferential Treatment: A Transformative Critique of the Terms of the Affirmative Action Debate*, 11 HARV. BLACKLETTER L.J. 1, 26–29 (1994).

standing to suppose that affirmative action programs are designed to produce a balkanized America, divided into racial and ethnic subnations.”⁶⁴ He repudiates any notion that minorities are entitled to a proportionate share of social benefits or opportunities.⁶⁵ Rejecting the notion of group rights, Dworkin grounds his argument on the individual’s right to be treated as an equal. Consonantly, he rejects the idea of group guilt, in which White individuals are held legally liable for the wrongs of other Whites who live now or lived in the distant past. Having rejected these assumptions, Dworkin nevertheless is able to offer a vigorous defense of affirmative action. In so doing, he does not merely preach to the choir; instead, he makes a case in favor of affirmative action for those ambivalently straddling the political middle. Therein lies Dworkin’s relevance, if not genius.

II. Dworkin’s Defense and Negative Action Against Asian Americans

According to the 1990 census, Americans of Asian descent constitute approximately three percent of the national population;⁶⁶ however, at certain educational institutions, Asian Americans represent from five to fourteen times that percentage of the student body.⁶⁷ In light of these facts, consider the following hypothetical. Suppose that a university’s admissions formula, based entirely on standardized test scores and high school grade point average, generated a student body over fifty percent Asian American. Inspired by President Clinton’s promise to make his cabinet look like America, the university adopts the “Look Like America” diversity admissions program. This initiative establishes as a minimum target that the percentage of African Americans, Latinos, Asian Americans, and Native Americans in the student body should be their percentage of the national population. Recognizing that admissions slots are finite, the “Look Like America” program also establishes that at a maximum, the student body percentage of any racial group can be no greater than three times its national population percentage. The university adopts this program

⁶⁴ DWORKIN, A MATTER OF PRINCIPLE, *supra* note 7, at 294.

⁶⁵ *See id.* at 297.

⁶⁶ *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990s 13, 15 (1992) [hereinafter CIVIL RIGHTS ISSUES].

⁶⁷ For example, the 1994 entering class of the University of California at Los Angeles consisted of 43.2% Asian Americans. *See* Letter from Don Nakanishi, Director of UCLA Asian American Studies Center, to Faculty Advisory Committee 3 (Oct. 10, 1994). Asian Americans were also the largest racial group of the 1994 entering classes at University of California campuses at Berkeley, Irvine, and Riverside. *See id.* At Stanford, the percentage of Asian Americans in the 1994 entering class is 24%. *See* Stanford University Public Affairs, Stanford Facts (1994) (brochure). Yale’s 1995 incoming class is 16.7% Asian American. *See Undergraduate Admissions and Financial Aid Profile of the Class of 1999*, ALUMNI SCH. COMMITTEE NEWSL. (Alumni Sch. Comm., Yale Univ., New Haven, Conn.), Sept. 1995, at 6–7.

because a utilitarian calculus that credits no prejudiced preferences indicates that the new admissions system will have more social and pedagogical benefits than costs.

Under these circumstances, the hypothetical "Look Like America" program institutes a regime of negative action against Asian Americans: before the program, the student body was fifty percent Asian American; after the program, the student body may contain no more than nine percent. Thus, certain Asian Americans will be denied admission, although given their academic qualifications, they would have been admitted had they been White. How does Dworkin's theory respond to this diversity program?⁶⁸

A. Condition I: Net Benefit

To answer this question, we must be clear on the hypothetical's assumptions. First, the hypothetical asks the reader to assume the truth of Condition I: *Negative action against Asian Americans produces net utilitarian benefit* ("net benefit"). This condition might be true for various reasons. For instance, negative action against Asian Americans could increase the racial diversity of the student body by allowing more spaces for less represented minorities. Also, one way that affirmative action may help decrease prejudice is by increasing the social intercourse among individuals of different races in an open-minded, intellectual community.⁶⁹ If the core of America's race problems stems from the relationship between Whites and Blacks, then having relatively fewer Whites interrelate with Blacks in an open educational environment could hinder the central objective of affirmative action.

The truth of Condition I, however, remains open to serious objections. First, the glib assertion that Asian Americans are "overrepresented" at certain universities is less a description of empirical fact than a value judgment. It presumes that the percentage of Asian Americans at each university should reflect their percentage of the national population. This presumption is suspect.⁷⁰ First, such a baseline fails to consider that one

⁶⁸ As a matter of positive law, negative action specifically directed against Asian Americans is likely illegal because it explicitly disadvantages a racial minority. See Civil Rights Act of 1964, Title VI, § 601, 42 U.S.C. § 2000d (1988); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (invalidating race-specific classifications that explicitly disadvantage racial minorities). See generally Tsuang, *supra* note 17.

⁶⁹ See ELY, *supra* note 56, at 161 ("Increased social intercourse is likely not only to diminish the hostility that often accompanies unfamiliarity, but also to rein somewhat our tendency to stereotype in ways that exaggerate the superiority of those groups to which we belong. The more we get to know people who are different in some ways, the more we will begin to appreciate the ways in which they are not, which is the beginning of political cooperation.") (footnotes omitted).

⁷⁰ Indeed, if we must have a baseline, why should it not be calculated state-by-state?

reason Asian Americans constitute only three percent of the national population is that American immigration law has historically prevented Asian peoples, on a de jure basis, from immigrating into the United States.⁷¹ As such, by adopting Asian Americans' percentage of the national population as the baseline for their percentage of a student body, universities permit the vestiges of past prejudices to diminish opportunities for Asian Americans today.⁷²

Second, for diversity's sake, if a university wishes to increase the number of non-Asian minorities, it can do so without excluding Asian Americans. Nothing requires that there be a fixed percentage of "minority" slots for which all racial minorities must battle in a zero-sum game.⁷³

Third, to the extent that commingling in an educational environment helps eliminate prejudice, such interaction is needed among all races, not solely or even primarily between Whites and Blacks. As the selective devastation of Korean American businesses in the Los Angeles riots made clear,⁷⁴ Asian Americans and other racial minorities do not coexist so

See Paul Ong & Suzanne J. Hee, *Economic Diversity*, in *THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES* 31, 33-34 (Paul Ong ed., 1994) (noting that Los Angeles, San Francisco, Oakland, and New York house nearly 30% of all Asian Pacific Americans); *CIVIL RIGHTS ISSUES*, *supra* note 66, at 15 (presenting data that "[a]lthough only 19 percent of the general U.S. population lived in the West in 1980, 56% of the Asian American population did").

Universities might also establish a baseline as indicated by the racial make-up of the applicant pool. See Don Nakanishi, *supra* note 17, at 280 (explaining how the statistic of 20% Asian Americans in the 1987 Berkeley entering class suggests "overrepresentation" as compared with national or state population, but not as compared with the fact that 30.8% of the applicants to Berkeley were Asian American); cf. David B. Davis, *The Other Zion: American Jews and the Meritocratic Experiment*, *NEW REPUBLIC*, Apr. 12, 1993, at 29, 30 ("Anti-semites have long exploited the notion that representation should be roughly proportional to the general population.").

⁷¹ See generally SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 54-56 (1991) (summarizing discriminatory immigration laws restricting entry of Chinese, Japanese, Koreans, Asian Indians, and Filipinos into the United States). Only after 1965 did the United States eliminate national origin quotas and begin accepting significant numbers of Asian immigrants. See *id.* at 145-46.

⁷² Indeed, any baseline presents the danger of locking in the effects of past discrimination. For example, if the baseline were the racial make-up of high school graduates who applied to a particular university, it may be seen as sanctioning historical discrimination against racial minorities who have lower graduation and application rates in part because of past discrimination. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971).

⁷³ See Matsuda, *supra* note 15, at 6:

When university administrators have secret quotas to keep down Asian admissions, this is because Asians are seen as destroying the predominantly white character of the university. Under this mentality, we can't let in all those Asian over-achievers AND maintain affirmative action for other minority groups. We can't do both because that will mean either that our universities lose their predominantly white character, or that we have to fund more and better universities. To either of those prospects, I say so what?

⁷⁴ See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race*

harmoniously such that further fraternization among people of color would not decrease the prejudice in our midst.⁷⁵

Finally, while another way preferential admissions can help us get beyond racism is by allowing minority individuals to ascend to nonstereotypical positions of leadership,⁷⁶ this goal is not furthered by a program of negative action. As explained above, by definition, negative action forces Asian Americans out for White applicants.

Despite the contestable truth of Condition I, assume for the sake of argument that Condition I holds.

B. Condition II: Purity

My hypothetical also requires the reader to assume the truth of Condition II: *Prejudice did not infect the decision-making process* ("purity"). In other words, in deciding to enact negative action as part of its "Look Like America" program, the university credited no preferences—of its own or of others—tainted by prejudice.⁷⁷ It is not inconceivable that university administrators might adopt a program of negative action against Asian Americans without crediting prejudiced preferences.⁷⁸ Indeed, it is plausible that policy makers might enact the "Look Like America" program due to their sincere, unprejudiced belief in Condition I, the net benefit condition.

The assertion that any policy facially disadvantaging Asian Americans must have been corrupted by prejudice is true only by fiat. Interestingly, Dworkin has claimed that at this historical moment, no evidence could prove Condition II (purity) to be true for a governmental practice specifically disadvantaging American Blacks.⁷⁹ But this irrebuttable presumption, even if justified for Blacks, need not necessarily apply to Asian Americans, whose fate as a racial minority in America differs qualitatively from that of African Americans.⁸⁰

Theory, Post-Structuralism, and Narrative Space, 81 CAL. L. REV. 1242, 1264 & n.104 (1993) (noting selective targeting of Korean American establishments by L.A. rioters).

⁷⁵ See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 889, 912 (1993) (noting interracial conflicts between Asian Americans and other racial minorities).

⁷⁶ See Amici Brief of Columbia University, Harvard University, Stanford University, and the University of Pennsylvania at 13, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) (claiming that an independently compelling goal of affirmative action is "diversifying the leadership of our pluralistic society").

⁷⁷ For detailed explanation of the word "prejudice," see *supra* note 56.

⁷⁸ See Strauss, *supra* note 51, at 109 ("The facts might be such that a government decision maker wholly lacking in any racial bias would rationally choose an explicitly racial criterion as a means of achieving some legitimate objective.")

⁷⁹ See DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 237–38.

⁸⁰ Cf. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 400 (1978) (Marshall, J.) (explaining the unique plight of American Blacks).

Of course, as the truth of Condition I was suspect, so is the truth of Condition II. If a university instituted negative action against Asian Americans, there would be strong reasons to suspect that the decision-making process was influenced by prejudice, at least in the form of selective indifference.⁸¹ It would be telling, for instance, if Asian Americans were selectively targeted whereas other groups similarly overrepresented compared to their national populations were not. For example, groups such as Jews and alumni legacies are "overrepresented" at various universities in the same sense that Asian Americans are.⁸² If the university had failed to analyze whether the net benefit condition, Condition I, might also apply to these other groups, this omission may reveal the sort of selective indifference toward Asian Americans that would signal a violation of the purity condition, Condition II. Nevertheless, again, only for the sake of argument, assume that Condition II is true.

The reader, however, may continue to resist accepting Conditions I (net benefit) and II (purity). But despite my own objections, these conditions are not so fanciful. As evidence, I adduce three examples. The first is affirmative action itself. It is precisely the satisfaction of these two conditions for Whites that justifies indirectly limiting their educational opportunities by granting preferential treatment to non-Whites. It is disingenuous to deny that this is in fact what affirmative action does, since given a finite number of admission slots, a floor on racial minorities constructs a ceiling on Whites.⁸³

One might in turn respond that although Conditions I and II may hold true with respect to practices that disadvantage Whites, they cannot hold with respect to practices that disadvantage racial minorities. But what

⁸¹ See Brest, *supra* note 46; Bunzel & Au, *Asian Difference*, *supra* note 17, at 465-68 (giving examples of Asian American stereotypes used by admissions officers); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 731 (1974):

The fact that a group has repeatedly been disadvantaged in ways that no one could rationally defend should make us suspicious of any legislation that singles out that group for disadvantage. There is reason to suspect that the prejudices which generated the plainly irrational legislation of past eras are also partly responsible for the more facially palatable classifications of the present day.

⁸² See Tsuang, *supra* note 17, at 672 n.92 ("Harvard no longer uses 'overrepresentation' to reduce its 25-33% Jewish student population down to the 3% that Jews represent in the general population, nor does it limit the numbers of alumni children to their overall national representation.")

⁸³ A clarification in nomenclature is warranted here. Such limiting of opportunities for Whites does not qualify as "negative action" within my definition since the treatment of Whites is the very basis for comparison. Of course, even though this limiting of opportunities is not called negative action, it is indisputable that affirmative action programs negatively affect White applicants.

justifies such asymmetry? Consider, as a second example, integration quotas that cap the percentage of racial minorities in public housing complexes to avert “white flight” or racial “tipping.”⁸⁴ Upon equal protection challenges, some courts have approved the use of integration quotas,⁸⁵ implying that such measures satisfied both Conditions I and II. In other words, these courts believed that integration quotas produced a net utilitarian benefit by maintaining the advantages of integrated housing without antipathy or selective indifference toward racial minorities.

As a final illustration, consider educational institutions that have admitted to applying some form of negative action against Asian Americans, such as the graduate mathematics department at the University of California at Los Angeles⁸⁶ or Brown University.⁸⁷ Without examining specific evidence related to these incidents, one could assume that the responsible admissions officers at UCLA and Brown were racists who relished disadvantaging Asian Americans. Alternately, one could assume that although not racists, they were selectively indifferent to the welfare of Asian Americans and thus only guilty of a milder form of prejudice. Yet another possible explanation is that these admissions officers sincerely, if mistakenly, believed that curtailing the admission of Asian Americans would serve various pedagogical and social goals. These examples should persuade even the skeptic that Conditions I and II are at least plausibly true, and thus acceptable for argument’s sake.

C. *The Instability of Dworkin’s Defense*

Under Conditions I and II, Dworkin’s theory justifies negative action against Asian Americans for the same reasons that his theory justifies affirmative action for racial minorities: negative action produces a net utilitarian benefit while not violating the right to equality. In my hypothetical, an Asian American denied admission by the “Look Like America” program could invoke the same four illusory rights that Bakke raised, but Dworkin’s responses would be identical. There is no right to receive

⁸⁴ See generally Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 297 (1974) (advocating a balancing test to determine the validity of integration quotas). See *id.* at 309.

⁸⁵ See, e.g., *Clark v. Board of Educ.*, 705 F.2d 265 (8th Cir. 1983) (approving integration quota in schools); *Parent Ass’n. v. Ambach*, 598 F.2d 705 (2d Cir. 1979) (same); *Otero v. New York City Hous. Auth.*, 484 F.2d 1122 (2d Cir. 1973) (approving housing integration quota).

⁸⁶ See Harold Johnson, *Model Victims*, NAT’L REV., July 20, 1992, at W7 (describing that Department of Education investigators “announced that UCLA had indeed given illegal preference to whites over Asians in admissions to its mathematics grad programs”).

⁸⁷ Brown University adopted a historically determined upper quota for Asian American students. See CIVIL RIGHTS ISSUES, *supra* note 66, at 112. Brown conceded that there was unfairness toward Asian American applicants. See Bunzel & Au, *Asian Difference*, *supra* note 17, at 461; see also Winerip, *supra* note 12, at B1.

university education. There is no right to be judged by merit defined as intelligence alone, however intelligence is defined and measured. There is no right to be judged by standards sensitive to the full complexity and uniqueness of the individual applicant. Finally, there is no right not to be judged on a factor beyond one's control.

Moreover, negative action does not violate the real right at stake, the right to equality, because of Condition II (purity). By hypothesis, prejudice did not infect the decision-making process. Under Condition II, placing an admission ceiling on Asian Americans is no more caused by prejudice than placing an indirect cap on Whites. As innocent Whites are "sacrificed"—to use the term loosely—for the general good because no important moral or constitutional right is at stake, Asian Americans may similarly be "sacrificed" if we assume Conditions I and II to be true. More importantly, when Conditions I and II hold, Asian Americans are asked to bear an even greater burden than Whites since, by definition, negative action involves rejecting individuals of Asian descent who would have been admitted had they been White.

In sum, Dworkin's banned sources conception approves the negative action portion of the "Look Like America" program because, under Conditions I and II, negative action produces net utilitarian benefit under an unprejudiced cost-benefit analysis. This is the internal instability of Dworkin's theory: under plausible empirical conditions, it defends negative action against Asian Americans equally well as affirmative action for other racial minorities.

One way to resolve this instability is to repudiate Dworkin's defense of affirmative action. Those on the political Right might do so by arguing that it founders on an untenable distinction between benign and malign race-based policies.⁸⁸ Conservatives might further contend that allowing Whites to suffer disadvantage based on their race ultimately authorizes race-based discrimination against anyone, even minorities such as Asian Americans. These critics further reproach affirmative action for guaranteeing—despite protests to the contrary—not a liberating equality of opportunity but an oppressive equality of results, based on some inchoate notion of racial entitlement.⁸⁹

Those on the political Left might refute Dworkin's defense of affirmative action in an entirely different manner. Progressives might argue that Dworkin's theory suffers from an internal instability because it justifies affirmative action on only forward-looking "diversity" terms and does not

⁸⁸ See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment).

⁸⁹ See, e.g., Fried, *supra* note 53, at 109–10 n.15; Morris B. Abram, *Commentary, Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1313 (1986) (decrying affirmative action proponents as social engineers who demand an equality of results).

sufficiently comprehend affirmative action as reparations for racism. If it did, it would not falter upon this instability: granting affirmative action to racial minorities is acceptable because people of color are victims of racism; imposing negative action on Asian Americans (to help Whites) is unacceptable because Whites are not victims of racism.

Neither response seems fitting. The Right's position seems wrong as a matter of constitutional interpretation, political morality, and social science. The Left's position is dissatisfying because it relies too heavily on a rhetoric of victim and oppressor groups, which regardless of its merits fails to persuade the political middle. There is, however, another way to resolve the instability. Instead of viewing it as an Achilles' heel in the liberal canon, one can view it as an opportunity, a chance to refine Dworkin's argument in hopes of divining a deeper coherence between our moral intuitions about racial equality and our legal theories. In other words, the internal instability may be viewed as a gateway toward a more "reflective equilibrium."⁹⁰

III. An Alternate Conception of the Right to Equality: Banned Meanings

The internal instability in Dworkin's defense of affirmative action invites inquiry whether his understanding of the right to equality is flawed. To repeat, in Dworkin's theory, at the less specific, less concrete, less controversial *concept* level, the right to equality in the racial context simply requires government to treat individuals as equals regardless of race. At the more concrete yet controversial *conception* level (banned sources), the right to equality prohibits racially prejudiced preferences from entering government's decisions regarding the general good. Thus, under Dworkin's theory, the requirement essential to satisfying the right to equality is Condition II, purity. The question now becomes: Is Dworkin right in thinking that screening out prejudiced preferences ensures one's treatment as an equal? In other words, does purity stand at the heart of equality?

A. *The Banned Meanings Conception*

1. *Foundation*

Many scholars have proffered an alternate vision of equality, which focuses less on whether the state actor holds or credits prejudiced beliefs and more on whether the state action reinforces a system of racial subju-

⁹⁰ See RAWLS, *supra* note 25, at 20–21, 48–50.

gation or caste.⁹¹ A powerful example comes from Kenneth Karst, who argues that at the substantive core of the Equal Protection Clause is the principle of equal citizenship. For Karst, this principle requires that individuals "be treated by the organized society as a respected, responsible, and participating member."⁹² In particular, equal citizenship

presumptively insists that the organized society treat each individual as a person, one who is worthy of respect, one who "belongs." Stated negatively, the principle presumptively forbids the organized society to treat an individual either as a member of an inferior or dependent caste or as a nonparticipant. Accordingly, the principle guards against degradation or the imposition of stigma.⁹³

Such visions of equality are not mere academic musings but instead are well grounded in the Supreme Court's Equal Protection jurisprudence, which suggests that purity, although a principal focus, is only one of multiple foci in the complex moral and legal structure of the right to equality. In fact, when pondering equality, the Court has repeatedly considered a law's social meaning to inquire whether it stigmatized minorities.

The Supreme Court did exactly that in *Strauder v. West Virginia* when it interpreted the Fourteenth Amendment for the first time in the context of race relations.⁹⁴ There, the Court struck down a rule that prohibited Blacks from serving on petit juries. In doing so, the Court explained that the Fourteenth Amendment protects Blacks from "unfriendly legislation . . . implying inferiority in civil society . . ." and that the prohibition was "practically a brand upon them, affixed by the law, an assertion of their inferiority."⁹⁵

⁹¹ See, e.g., CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 338-46 (1993); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1515-21 (2d ed. 1988); OWEN M. FISS, *Groups and the Equal Protection Clause*, in *EQUALITY AND PREFERENTIAL TREATMENT* 85 (Marshall Cohen, Thomas Nagel, & Thomas Scanlon, eds. 1977); Ruth Colker, *Anti-Subordination above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1010 n.18 (1986); Lawrence, *supra* note 56; Todd Rakoff, *Washington v. Davis and the Objective Theory of Contracts*, 29 HARV. C.R.-C.L. L. REV. 63, 70-71 (1994).

⁹² Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977). See generally KENNETH L. KARST, *BELONGING TO AMERICA* (1989) [hereinafter KARST, *BELONGING TO AMERICA*].

⁹³ *Id.* at 6.

⁹⁴ 100 U.S. 303 (1879).

⁹⁵ *Id.* at 308.

Brown v. Board of Education,⁹⁶ the historic case that renounced the “separate but equal” doctrine of *Plessy v. Ferguson*,⁹⁷ stated in unequivocal terms that even if Blacks were provided equal resources objectively measured, separate facilities were “inherently unequal.”⁹⁸ By considering the social meaning of state-enforced segregation, the Court realized that segregation marked Blacks as inferior.⁹⁹ As Laurence Tribe has explained, “[t]he most obvious rationale for the holding in *Brown I* is also the most persuasive. Racial separation by force of law conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed. Its social meaning is that the minority race is inferior.”¹⁰⁰

In *Palmer v. Thompson*,¹⁰¹ the Court approved the closing of public pools that had been recently ordered desegregated. The Court focused its decision on the issue of whether by closing the pools, the government broadcast a stigmatizing social message that Blacks were appropriately objects of antipathy who should not commingle with Whites in public waters. In his concurrence, Justice Blackmun made certain to note that he could not “read into the closing of the pools an official expression of inferiority toward black citizens”¹⁰² Justice White, in dissent, concluded that “shutting down the pools was nothing more or less than an effective expression of official policy that Negroes and whites must not be permitted to mingle together when using the services provided by the city.”¹⁰³ He further explained that “[t]he Equal Protection Clause is a hollow promise if it does not forbid such official denigrations of the race the Fourteenth Amendment was designed to protect.”¹⁰⁴

A final example is Justice Brennan’s opinion in *Bakke v. Regents of the University of California*,¹⁰⁵ in which he advocated intermediate scrutiny for affirmative action programs. Justice Brennan placed stigma at the

⁹⁶ 347 U.S. 483 (1954). *Brown* is commonly understood to have affirmed the “colorblind” principle, Dworkin’s banned categories conception of the right against racial discrimination. But as Professor Randall Kennedy has explained, in the 1950s and 1960s, racial classifications were used to subjugate Blacks. As such, it made strategic sense for civil rights advocates to argue in favor of a colorblind Constitution. Moreover, “initially neither civil rights leaders nor the Supreme Court really knew what racial equality would entail” Kennedy, *supra* note 23, at 1335 n.32. Many scholars now argue that “the concept of race-blindness was simply a proxy for the fundamental demand that racial subjugation be eradicated.” *Id.* at 1335.

⁹⁷ 163 U.S. 537 (1896).

⁹⁸ *Brown*, 347 U.S. at 495.

⁹⁹ See Kennedy, *supra* note 23, at 1341 n.49.

¹⁰⁰ See TRIBE, *supra* note 91, § 16-15, at 1477.

¹⁰¹ 403 U.S. 217 (1971).

¹⁰² *Id.* at 229 (Blackmun, J., concurring).

¹⁰³ *Id.* at 241.

¹⁰⁴ *Id.*

¹⁰⁵ 438 U.S. 265 (1978).

very center of constitutional equality and explained that “[g]overnment may take race into account when it acts not to demean or insult any racial group”¹⁰⁶ Indeed, for Justice Brennan, his “cardinal principle” was that “racial classifications that stigmatize—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more.”¹⁰⁷ Calling for intermediate scrutiny, he concluded that the Court must consider whether affirmative action served an “important and articulated purpose” and whether it “stigmatize[d] any group or . . . single[d] out those least well represented in the political process to bear the brunt of a benign program.”¹⁰⁸

To resolve Dworkin’s internal instability, I propose that his banned sources principle of the right to equality be replaced by this alternate vision of equality, which guards against the imposition of stigma. This alternate conception, which I call *banned meanings*, provides that an individual has the right¹⁰⁹ not to suffer disadvantage from a governmental practice that conveys an objective social meaning of stigma.¹¹⁰

¹⁰⁶ *Id.* at 325 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

¹⁰⁷ *Id.* at 357–58.

¹⁰⁸ *Id.* at 361. The Court has recognized stigma as a dispositive element in many other cases. *See, e.g.,* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 601 (1990) (Stevens, J., concurring); New York City Transit Auth. v. Beazer, 440 U.S. 568, 592 (1979) (upholding employment policy because it implied no “disrespect” for the excluded group); United Jewish Org. v. Carey, 430 U.S. 144, 165 (1977) (upholding state plan which “represented no racial slur or stigma with respect to [W]hites or any other race”).

¹⁰⁹ In using the word “right,” I do not mean to say that this is an absolute right that society categorically may not infringe, in any circumstance, regardless of consequences. Few, if any, such rights exist. As will be made clear shortly, this right is secured by requiring the appropriate level of Equal Protection scrutiny of governmental practices.

¹¹⁰ The banned meanings conception, in its use of an objective social meaning construct, resembles a seminal theory advanced by Charles Lawrence. *See* Lawrence, *supra* note 56. Lawrence argues that current Equal Protection doctrine’s quest to discover conscious racism is fundamentally misconceived because racism exists beneath self-awareness. Since “the ‘cultural meaning’ of an allegedly racially discriminatory act is the best available analogue for, and evidence of, a collective unconscious that we cannot observe directly,” Lawrence proposes a test that would “evaluate governmental conduct to determine whether it conveys a symbolic message to which the culture attaches racial significance. A finding that the culture thinks of an allegedly discriminatory governmental action in racial terms would also constitute a finding regarding the beliefs and motivations of the governmental actors.” *Id.* at 324.

The banned meanings conception differs from Lawrence’s theory in that he uses an objective social meaning approach to ask a different question and then infer a different conclusion. Whereas he asks whether the “cultural meaning” of a challenged practice involves race in *any* sense, I ask more narrowly whether the objective social meaning is that the people burdened are properly the object of prejudice. Whereas Lawrence infers from the fact that the culture attaches racial significance to governmental conduct as evidence of unconscious racism, I infer nothing about the psychological states of state actors. Instead, my inference is moral and political, not psychological. My point is that because transmitting such a message risks treating those burdened not as equals—regard-

2. Exposition

a. Theory

Let me define the three critical elements of this alternate conception. *Stigma* is a mark signifying that the disadvantaged are members of a group worthy of prejudice, in forms ranging from antipathy to selective indifference.¹¹¹ Stigma marks individuals as political or social “outsiders” who do not fully belong in the favored company of equals.¹¹² *Social meaning* is the meaning gleaned by interpreting the governmental practice, its text, history, and implementation in the context of American culture. Finally, “[a] view or form of thought is more *objective* than another if it relies less on the specifics of the individual’s makeup and position in the world, or on the character of the particular type of creature he is.”¹¹³

By referring to an objective standard, I am not suggesting that the social meaning of a government practice can be neutrally, clinically, or uncontroversially gleaned. To the contrary, modern philosophical insights teach that no view is without perspective, and that the first step to achieving greater impartiality in our interpretations is to admit this fact.¹¹⁴ Nor do I suppose that there is a set of objectively correct interpretations floating in metaphysical space that the objective standard uses as a master answer key. By objective, then, I mean to emphasize an intersubjective process, not a noumenal substance.

less of the existence of conscious or unconscious racism—such a practice should be strictly scrutinized.

This banned meanings conception further draws upon ideas articulated by Todd Rakoff. *See* Rakoff, *supra* note 91. Rakoff argues that Equal Protection doctrine’s focus on discriminatory intent is misplaced. When one examines the actual subjective intent of legislators, one finds that the reason they passed any piece of legislation is due to various constituent pressures. Thus, instead of looking at intent, Rakoff suggests looking at the social meaning of an official action, which better gauges the complex of forces in democratic politics that led to the law’s passage. Since different parties may have different subjective understandings of an official action, Rakoff draws from the objective theory of contract interpretation, and “adopts as its arbiter the understanding of the external witness.” *Id.* at 77.

My theory most differs from Rakoff’s in its use of objectivity. I assume that an “objective” view cannot be reached without first empathizing with the various relevant “subjective” views. Rakoff, however, locates objective meaning in some neutral, disinterested perspective—borrowed from the well-established law of contracts—that does not meaningfully involve the perspectives of the particular parties. *See id.* at 85.

¹¹¹ *See supra* note 56.

¹¹² *Cf. Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring) (“Endorsement sends a message to nonadherents that they are *outsiders*, not full members of the political community, and an accompanying message to adherents that they are *insiders*, favored members of the political community.”) (emphasis added).

¹¹³ THOMAS NAGEL, *THE VIEW FROM NOWHERE* 5 (1986) (emphasis added).

¹¹⁴ *See* Sandra Harding, *After the Neutrality Ideal: Science, Politics, and “Strong Objectivity,”* 59 SOC. RES. 567, 570 (1992); Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 74–75 (1987).

In order for a view to be more objective than another, it must depend less on the particulars of the individual who is doing the viewing. The best way to detach a view from the particular viewer is to require the viewer to look from multiple perspectives, thereby decreasing the likelihood that the predilections and biases of any one perspective will dominate.¹¹⁵ Accordingly, gleaning an "objective" social meaning involves a two-step methodology. In the first step, the judge must place herself figuratively into the perspective of each party to the litigation and interpret the social meaning of the governmental practice from that perspective.¹¹⁶ In so doing, the judge must remain sensitive to the emphases placed by each perspective on certain details of the challenged practice or on its place in the context of American culture. Only then can the judge move to the second step of weighing the competing perspectives against one another.

In the first step, an objective methodology must always consider the perspective of the plaintiff for two reasons.¹¹⁷ First, the objective social meaning of a governmental practice, by definition, is not dictated entirely by the perspective of the state actor who implemented it. Justice O'Connor has acknowledged just this conceptual point in *Lynch v. Donnelly*,¹¹⁸ an Establishment Clause crèche case, in which she explained that "some portion of the audience will inevitably receive a message determined by the 'objective' content of the statement, and some portion will inevitably receive the intended message."¹¹⁹ The only reason to distinguish between an "objective" message and an "intended" message is if sometimes these two messages differ. Communicative acts can convey unintended meanings due to a variety of factors, including the perspectives of those who interpret them.¹²⁰ Certainly, learning that the speaker did not intend to demean affects the meaning of the message: sometimes, between friends,

¹¹⁵ See Harding, *supra* note 114, at 570-72.

¹¹⁶ Cf. Lynne N. Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574, 1579 (1987) ("[Empathy is] understanding the experience or situation of another, both affectively and cognitively, often achieved by imagining oneself to be in the position of the other.").

¹¹⁷ Cf. Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1010 n.18 (1986) (advocating an antisubordination conception of equal protection that focuses on what minority groups hear, not on what government intends). Colker argues that although open, illicit motivation by the government may be sufficient to invalidate the law under an antisubordination principle, it is not always necessary. See *id.*

¹¹⁸ 465 U.S. 668 (1984).

¹¹⁹ *Id.* at 690 (O'Connor, J., concurring).

¹²⁰ See *id.* ("The meaning of a statement to its audience depends both on the intention of the speaker and on the 'objective' meaning of the statement in the community."); cf. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632-33 (1943) ("A person gets from a symbol the meaning he puts into it . . ."); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 533 (1986) (noting that the meaning of symbol depends on the interpretive community).

the stigmatic value of even notorious slurs is nil.¹²¹ Although “[m]otivation . . . always matters in determining the meaning of a policy, . . . it is not all that matters.”¹²²

Further, requiring a self-critical consideration of the plaintiff’s perspective decreases the chances of repeating the Supreme Court’s error in *Plessy v. Ferguson*.¹²³ In *Plessy*, the Court refused to give any weight to the fact that for Blacks, “the social meaning of segregation is the putting of the Negro in a position of walled-off inferiority.”¹²⁴ Instead, the Court cavalierly blamed Blacks for being too sensitive, for seeing what was not there.¹²⁵

Moving to the second step of the objective methodology, the judge must use the empathic insights generated in the first step to scrutinize the various social meanings and test them for blindspots, insensitivities, and oversensitivities.¹²⁶ Since legal precedents help construct the social backdrop in which we understand governmental practices, the judge’s scrutiny will be guided not only by stare decisis, but also by moments in legal history that generated similar disputes over the meaning of governmental acts.¹²⁷ Further, the judge must synthesize the social meanings produced in the first step in light of a fundamental moral insight: the meaning of a governmental practice matters,¹²⁸ and for the state to treat individuals as equals, it should not institute burdensome practices that objectively stigmatize. Thus, while the point of the first step of the banned meanings methodology is empathy, the point of this second step is to reconstitute

¹²¹ See Kennedy, *supra* note 23, at n.49 (describing the difference in reactions of a Black person to being called “nigger” by a Black friend or by a White stranger).

¹²² See *id.* at 1341; Lawrence, *supra* note 56, at 352 (“If stigmatizing actions injure by virtue of the meaning society gives them, then it should be apparent that the evil intent of their authors, while perhaps sufficient, is not necessary to the infliction of the injury.”); cf. DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 58 (arguing that intention provides at least the formal structure for interpretive claims). But see Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 294 (1987) (arguing in the establishment context that the objective meaning of a governmental practice depends solely on the subjective intent of lawmakers).

¹²³ 163 U.S. 537 (1896).

¹²⁴ Charles Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960).

¹²⁵ See *Plessy*, 163 U.S. at 551 (1896) (arguing that if a badge of inferiority attaches to Blacks, it is not due to the act itself, but to their interpretation of it).

¹²⁶ See Henderson, *supra* note 116, at 1576 (“Empathy aids both processes of discovery—the procedure by which a judge or other legal decisionmaker reaches a conclusion—and processes of justification—the procedure used by a judge or other decisionmaker to justify the conclusion—in a way that disembodied reason simply cannot.”).

¹²⁷ See Marshall, *supra* note 120, at 539 (describing the symbolic value of jurisprudence and how court decisions help form society’s expectations).

¹²⁸ See *Memphis v. Green*, 451 U.S. 100, 153 (1981) (Marshall, J., dissenting) (“[I]t defies the lessons of history and the law to assert that if the harm is only symbolic, then the federal courts cannot recognize it.”).

an "objective" social meaning that gives due respect to the concept of equality.¹²⁹

Reliance on an objective social meaning construct within constitutional law is not doctrinally radical. In fact, the endorsement theory of the Establishment Clause, whose leading advocate is Justice O'Connor,¹³⁰ employs just such a construct. That theory asks whether an objective observer after considering the "text, legislative history, and implementation of the statute" would consider the law to "convey a message of endorsement."¹³¹ Similarly, the banned meanings conception asks whether an objective observer, after considering the governmental practice's text, history, and implementation, would consider the practice to convey a message of *stigma*. Indeed, Justice O'Connor herself has applied an objective social meaning construct to race issues by analogizing the question of whether an objective observer will interpret a governmental action as endorsement to "the question whether *racial* or sex-based classifications communicate an *invidious* message."¹³²

This analogy between the endorsement theory and the banned meanings conception reveals the underlying unity in applying the same conceptual structure to questions of religious establishment and to questions of racial equality. The First Amendment's anti-establishment principle requires government to treat all persons as equals regardless of their religious orientation by prohibiting government from throwing the power and prestige of the state behind any one faction.¹³³ Analogously, the Equal

¹²⁹This two-step procedure is fleshed out in greater detail, not only in the doctrinal section below, but also in part IV, which applies this procedure to the negative action portion of the "Look Like America" diversity program. *See infra* text accompanying notes 171-202.

¹³⁰*Cf.* Lawrence, *supra* note 56, at 358 (noting the use of a "cultural meaning" test in Establishment Clause cases). This analogy has been noted by various other commentators. *See, e.g.,* Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1302 (1994) (advancing a political unity principle that prohibits the creation of religious and racial factions); Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 514 (1993); Rakoff, *supra* note 91, at 90.

¹³¹*Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter Day Saints v. Amos*, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (emphasis added); *see also* *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573, 628 (1989) ("[T]he endorsement test asks the right question about governmental practices challenged on Establishment Clause grounds, including challenged practices involving the display of religious symbols . . ."); *Thorton v. Caldor, Inc.*, 472 U.S. 703, 711 (1985) (O'Connor, J., concurring) ("There can be little doubt that an *objective observer* or the public at large would perceive this statutory scheme precisely as the Court does today.") (emphasis added).

¹³²*Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (emphasis added); *see also* *Employment Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990) (holding that the same level of exacting scrutiny applies to classifications based on race as to those based on religion).

¹³³*See Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (arguing that endorsement brands adherents as insiders and nonadherents as outsiders of the political commu-

Protection Clause, under the banned meanings conception, requires government to treat all persons as equals regardless of their racial "orientation" by prohibiting government from throwing the power and prestige of the state behind stigmatic messages that individuals belonging to a particular group are properly the objects of prejudice.¹³⁴

One important difference between the banned meanings conception and Justice O'Connor's endorsement theory deserves mention. Because the endorsement question is answered from the perspective of a reasonable third-party observer, there is vigorous dispute over whether that third-party observer is a pure legal fiction or an actual person, and what kind of knowledge should be imputed to this observer.¹³⁵ The banned meanings conception escapes this thicket by placing the responsibility of interpretation on the shoulders of the court, where it properly lies. This approach involves less pretense since it is the court that undertakes the interpretive project, and it is the court's interpretation that ultimately decides the case.

b. Doctrine

Since the description of the banned meanings conception so far has been abstract and theoretical, let me now explain how this conception could be implemented into a practicable doctrine, without cracking the main pillars of current Equal Protection law. Current Equal Protection analysis is composed of three tracks—strict scrutiny,¹³⁶ intermediate scrutiny,¹³⁷ and rational basis scrutiny.¹³⁸

One variable that determines which track is applied is whether the challenged practice involves a suspect classification.¹³⁹ Under *Washington*

nity); see also Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C. L. REV. 1049, 1050 (1986).

¹³⁴ Neil Gotanda has intriguingly explored the analogies between the Religion Clauses of the First Amendment and the Equal Protection Clause. Gotanda argues that individuals should have the right to exercise freely the cultural aspects of race. He further argues that government may not establish one race as superior over all others. See Gotanda, *supra* note 62, at 67.

¹³⁵ See *Capitol Sq. Review Bd. v. Pinette*, 115 S. Ct. 2440, 2450 n.3 (1995) (Scalia, J.) (criticizing expansive application of the endorsement test by noting uncertainty "whether the hypothetical beholder who will be the determinant of 'endorsement' should be *any* beholder (no matter how unknowledgeable), or the *average* beholder, or (what Justice Stevens accuses the concurrence of favoring) the 'ultra-reasonable' beholder").

¹³⁶ See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984).

¹³⁷ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

¹³⁸ See, e.g., *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955).

¹³⁹ See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (holding that classifications based solely on race are constitutionally suspect because they violate our traditions); *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that all legal restrictions that curtail the civil rights of a racial group are subject to "the most rigid scrutiny"). The other

v. *Davis*,¹⁴⁰ the relevant question is whether discriminatory intent against a specially protected group motivated the state actor. Only upon finding such intent will a suspect classification be involved and strict scrutiny applied.¹⁴¹ While remaining within the basic framework of Equal Protection jurisprudence, the banned meanings conception would institute a new criterion for determining when a suspect classification is involved: if the court finds¹⁴² that the challenged governmental practice conveys an objective social meaning of stigma toward those individuals disadvantaged by that practice, then a suspect classification exists, regardless of whether the state actor was motivated by discriminatory intent.

In practice, the banned meanings conception can inform all three tracks of equal protection doctrine. If the objective social meaning conveys a strongly stigmatic message, then strict scrutiny is warranted. If it conveys only a mildly stigmatic message, then intermediate scrutiny is warranted. Finally, if it fails to convey a stigmatic message at all, then rational basis scrutiny is warranted.

B. Answering Objections

As detailed in Part IV, the principal justification of the banned meanings conception is that it avoids the internal instability of Dworkin's theory while keeping his defense of affirmative action essentially intact. It also proffers a new way of thinking about affirmative action that has the potential to persuade Justice O'Connor, the critical swing vote in last term's *Adarand* affirmative action decision. Before making these justifications, however, I answer four interrelated criticisms of the banned meanings conception: one psychological, one practical, one political, and one skeptical.

track-determining variable is whether the governmental practice burdens a fundamental right. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618 (1969) (travel); *Levy v. Louisiana*, 391 U.S. 68 (1968) (parent-child relationship); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (voting); Fiss, *supra* note 44, at 90.

¹⁴⁰ 426 U.S. 229 (1976).

¹⁴¹ *Washington v. Davis*, 426 U.S. 229, 242 (1976) (holding that proof of racially discriminatory intent is required to show violation of the Equal Protection Clause). Moreover, "[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (citation and footnote omitted).

¹⁴² Under the banned meanings conception, the question of whether a suspect classification exists is answered by judge, not jury. This approach is analogous to the judge's determination of whether endorsement exists under Justice O'Connor's theory of the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring).

1. Psychological

First, the banned meanings conception may be criticized for assuming that judges have the psychological capacity to glean empathically the meaning of complex social practices from personal, social, and cultural perspectives foreign to their own. While this criticism has some merit, it fails to account for the fact that the sort of empathic viewpoint shifting envisioned by the banned meanings conception is not alien to our Equal Protection jurisprudence.¹⁴³ The areas of race, gender, and mental capacity offer examples of the effective use of empathic reasoning in the judicial process.

As Martha Minow has noted, Justice Harlan's celebrated dissent in *Plessy v. Ferguson* may have been encouraged by Plessy's brief, which asked the Justices to imagine how they would feel if they suddenly awoke the next morning with "black skin and curly hair" and had to travel in segregated trains. Plessy asked, "What humiliation, what rage would then fill the judicial mind?"¹⁴⁴ Courts have also employed empathic perspective shifting in deciding sexual harassment cases. For instance, some courts have held that the hostility of a work environment must be appraised from the perspective of the plaintiff's gender.¹⁴⁵ To decide sexual harassment cases, then, the law may require male judges to put themselves in the shoes of female plaintiffs, and female judges to put themselves in the shoes of male plaintiffs. Finally, in *City of Cleburne v. Cleburne Living Center*,¹⁴⁶ Justice Stevens attempted to empathize with the interests of the mentally retarded, who challenged an application of a zoning ordinance on Equal Protection grounds. He wrote "I cannot believe that a rational member of this disadvantaged class could ever approve of the discriminatory application of the city's ordinance in this case."¹⁴⁷

For those who are suspicious that this sort of empathic viewpoint shifting is an inherently liberal methodology, consider what is involved each time a constitutional provision is read for its "original meaning" by a politically conservative judge: that judge is shifting viewpoints with an audience culturally and linguistically distanced by centuries of time.¹⁴⁸

¹⁴³ See Minow, *supra* note 114, at 14, 51, 58-59.

¹⁴⁴ *Id.* at 59-60 (quoting Brief for the Plaintiff, *Plessy v. Ferguson*, 163 U.S. 537 (1896), reprinted in *CIVIL RIGHTS AND THE AMERICAN NEGRO* 298, 303-04 (Albert Blaustein & Robert Zangrando eds., 1968)).

¹⁴⁵ See, e.g., *Ellison v. Brady*, 924 F.2d. 872 (9th Cir. 1991). Recently, the Supreme Court avoided addressing the reasonable woman standard head-on. In *Harris v. T.G. Forklift Sys.*, 114 S. Ct. 367 (1993), the Court acknowledged that the district court applied a reasonable woman standard but used the locution a "reasonable person" instead of a "reasonable woman" in its own analysis. See *id.* at 370.

¹⁴⁶ 473 U.S. 432 (1985).

¹⁴⁷ *Id.* at 455 (Stevens, J., concurring) (emphasis added).

¹⁴⁸ Cf. Harding, *supra* note 114, at 585 ("Starting thought from lives other than one's

Of course, these examples¹⁴⁹ do not prove that the individuals who constitute our federal and state judiciary are especially empathic persons. Surely, increasing the diversity of life experiences among judges would increase the judiciary's capacity to shift viewpoints.¹⁵⁰ Nonetheless, the above examples show that the judiciary has an adequate, if imperfect, empathic ability to apply the banned meanings conception. Moreover, practice makes perfect: by applying the banned meanings methodology, judges may, through time, learn to become more empathic.

2. Practical

A second criticism argues that the banned meanings conception is impracticable because it involves a fuzzy, vague notion of "stigma." Justice Powell made precisely this point in *Bakke*, in which he wrote:

The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened.¹⁵¹

However, not all feelings of resentment are based on an objective social meaning of *stigma*. Without doubt, many Whites resent affirmative action programs that indirectly limit their opportunities. That resentment alone, however, is not constitutionally troublesome unless affirmative action also sends an objective message that Whites are the proper object of society's antipathy or selective indifference.

Further, Justice Powell's claim that "stigma" is standardless and therefore unworkable must be evaluated in comparison to other legal concepts that are equally standardless but nonetheless accepted in our legal culture. Is "stigma" really more elusive than the normative labels of legitimate, important, or compelling used in Equal Protection ends-scrutiny? Is it any

own should not be a controversial idea since it is presumably the goal of a good part of the educational process. Students are expected to be able to understand how the world looked by starting their thought from the objective historical conditions in which lived Aristotle, Galileo, Shakespeare, and other thinkers whose ideas are often 'alien and possibly repugnant' to many of these students.").

¹⁴⁹For other examples of empathic reasoning in the Supreme Court, see generally Henderson, *supra* note 116, at 1593-1638.

¹⁵⁰See, e.g., *Judicial Diversity*, ST. LOUIS POST-DISPATCH, Oct. 16, 1994, at 4B (reporting that in fall 1994, the federal bench remained exclusively male in 15 states and exclusively White in 26 states).

¹⁵¹Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J.) (citations omitted).

more standardless than the idea of a suspect classification or a fundamental right?¹⁵² Indeed, one could argue that stigma has the advantage of having a real-life substantive referent, whereas the other doctrinal labels do not.

Moving to other bodies of law, stigma is no more amorphous than the concept of an abusive or hostile work environment, or the notion of the average person who must decide what is obscene under the First Amendment. Neither is stigma more standardless than “traditional notions of fair play and substantial justice,”¹⁵³ which torment each first-year civil procedure class, nor more nebulous than the hackneyed “reasonable” person in tort and criminal law.

Perhaps these comparisons show that all of our law is in a mess, and that our entire legal superstructure requires massive doctrinal overhaul. More likely, these comparisons illustrate that law is not mathematics, and that stigma is no more amorphous than countless other legal constructs that we have grown familiar with, and indeed fond of, in the law. As a result, it would be capricious to reject the banned meanings conception because it fails to satisfy a standard of concreteness and practicability that many accepted doctrines would also fail.

3. *Political*

A third criticism of the banned meanings conception is that focusing on stigma is yet another excess of touchy-feely political correctness. As Dworkin himself explains, “it is not true, as a general matter, that any social policy is unjust if those whom it puts at a disadvantage feel insulted.”¹⁵⁴ Creating an unlimited, *subjective* “insult veto” would indeed be paralyzing in the current political climate, in which one could no doubt find someone—whether on the Left or the Right—who claimed to be deeply insulted by nearly any social practice. The banned meanings conception hedges against this disaster in two ways.

First, the challenged governmental practice must cause some harm or disadvantage independent of stigma. Under the banned meanings conception, stigma alone—without any underlying disadvantage—would not be grounds for an Equal Protection claim. The requirement of disadvantage as well as stigma thus serves as a prophylactic against the excesses of “sensitivity” or “political correctness.” Second, the banned meanings conception utilizes an objective, not subjective, test. Just as the objective social meaning of a practice is not dictated solely by those who adopt

¹⁵² See Fiss, *supra* note 44, at 152.

¹⁵³ See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁵⁴ DWORKIN, *TAKING RIGHTS SERIOUSLY*, *supra* note 7, at 231 (emphasis added).

that practice, neither is it dictated solely by the subjective sentiments of those burdened by that practice.¹⁵⁵

4. *Skeptical*

This last response may not be entirely satisfactory to skeptics. Resorting to an objective/subjective dichotomy does not erase the genuine difficulty that under the banned meanings conception, reasonable minds may differ on the social meaning of any given governmental action. For example, in *Memphis v. Greene*,¹⁵⁶ the majority adamantly held that the erection of a barrier along a street connecting predominantly White and Black neighborhoods did not convey symbolic stigma or pose a “badge of slavery.”¹⁵⁷ The majority chided the plaintiffs for even raising the claim:

To regard [the barrier] as a form of stigma so severe as to violate the Thirteenth Amendment would trivialize the great purpose of that charter of freedom. Proper respect for the dignity of the residents of any neighborhood requires that they accept the same burdens as well as the same benefits of citizenship regardless of their racial or ethnic origin.¹⁵⁸

Justice Marshall, however, heard a quite different social meaning. In dissent, he argued that the Black residents “are being sent a clear, though sophisticated, message that because of their race, they are to stay out of the all-white enclave . . . and should instead take the long way around in reaching their destinations.”¹⁵⁹ The majority and dissent’s disagreement on the social meaning of the wall in *Memphis v. Greene* gives force to the skeptical criticism that there is no way to say “objectively” which view is correct.

To respond to this criticism, one must better understand both its nature and kind. On the one hand, if it is a criticism that there is no Platonic social meaning of a social practice, then it is a criticism that misses the mark. I concede that there is no “objectively right” answer somewhere out there, floating in the ether.¹⁶⁰

¹⁵⁵ Cf. Harding, *supra* note 114, at 583 (“Listening carefully to what marginalized people say—with fairness, honesty, and detachment—and trying to understand their life worlds are crucial first steps in gaining less partial and distorted accounts of the entire social order; but these could not be the last step.”).

¹⁵⁶ 451 U.S. 100 (1981).

¹⁵⁷ *Id.* at 128.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 147 (Marshall, J., dissenting).

¹⁶⁰ See generally DWORKIN, *LAW’S EMPIRE*, *supra* note 7, at 82 (calling such skepticism “external” and concluding that it “cannot threaten any interpretive project”).

However, the skeptical criticism may be interpretive and moral. After examining perspectives for blindspots, insensitivities, and oversensitivities in the critical light of equality and its precedents, the judge may see no coherent "objective" social meaning that can be synthesized out of the varied social meanings. Accordingly, to decide the case, the judge must make a choice that is undetermined, controversial, and perspective-dependent. This interpretive and moral criticism does not miss the mark.

We should not, however, unduly exaggerate the divergence and incompatibility of social meanings gleaned from different perspectives. Although interpretations may vary in certain respects, they will also typically share similarities. These similarities arise from overlapping histories, heritages, experiences, and aspirations that bind even different interpretive communities.¹⁶¹ Despite all the forces that fragment this nation, it still makes sense to speak of a national community, whose underlying social, historical, and cultural reality is likely to cause some convergence in the gleaning of social meanings.

Moreover, certain interpretations that would be impossible to reconcile into an objective social meaning may be discounted as simply unreasonable. For example, a social meaning gleaned from an unabashedly racist perspective would be rejected because it would deny the very concept of equality—that the state must treat all persons as equals, regardless of race. Consider the specific facts of *Plessy* again in modern times. If from some perspective the social meaning of White-only trains in twentieth-century America were deemed not stigmatic, then that interpretation would be rejected because from no reasonable perspective could someone reach that conclusion.¹⁶²

Finally, to the extent that this skeptical criticism is Justice Powell's practical criticism in new garb, my responses are the same. The indeterminacy and vagueness that may exist within the banned meanings conception pervade the law. In hard cases, no amount of theorizing will create clear, crisp, universal answers.¹⁶³ Certainly, the current focus of Equal Protection doctrine on discriminatory intent suffers from indeterminacy,¹⁶⁴

¹⁶¹ See Rakoff, *supra* note 91, at 85 (describing society as characterized by multiple, only partially overlapping, points of view that "vary more in their wider claims than they do in their reasoned evaluation of the evidence presented in particular cases").

¹⁶² Cf. *Capitol Sq. Review and Adv. Bd. v. Pinette*, 115 S. Ct. 2440, 2466 (1995) (Stevens, J., dissenting) (arguing that someone who interpreted the presence of an exotic cow at the zoo as a symbol of the government's approval of the Hindu religion would be clearly unreasonable under the endorsement test).

¹⁶³ See generally KARST, *BELONGING TO AMERICA*, *supra* note 92, at 236 ("No useful legal system, and no principle of law that matters, can eliminate judgment from the process of judging.").

¹⁶⁴ A finding of discriminatory intent, while superficially a finding of a "bald fact," necessarily involves an exercise in judgment in hard cases. See Rakoff, *supra* note 91, at 91; cf. *Edwards v. Aguillard*, 482 U.S. 578, 638 (1987) (Scalia, J., dissenting) ("[T]his Court has [long] recognized [that] determining the subjective intent of legislators is a

as well as other problems. In *Bakke*, for example, Justice Powell lauded Harvard University's "soft" diversity-discretion model of affirmative action as constitutionally preferable to a strict, "hard" quota system as adopted by the University of California. He failed to mention, however, that Harvard's program had anti-Semitic roots.¹⁶⁵ Harvard initiated its diversity-discretion program to decrease the number of Jewish students; President Lowell of Harvard called it a "benign" cap, which would help the University get beyond race.¹⁶⁶ Certainly, the passage of time has purged the taint of the original motivation for Harvard's diversity program, but no theory of absolution was considered or even offered by Justice Powell.¹⁶⁷

Given that current doctrine suffers from substantial indeterminacy, we should not reject the banned meanings conception simply because it too is indeterminate. This is especially true because here we are pursuing the *substance* of equality, and when doing so, there is greater organic unity in adopting a *process* that requires judges to look, feel, and learn from all views and not to focus exclusively on the view of the state actor.¹⁶⁸ Indeed, by including the perspective of those disadvantaged by a governmental practice in the doctrine itself, we give them voice, ensure their virtual participation in the constitutional discourse, and affirm that they are "member[s] of a moral community who count[] for something in the community's decisionmaking processes."¹⁶⁹ In sum, equality is better served when we place its heart neither solely in the purity of the state actor nor solely in the subjective sensitivity of the disadvantaged party, but somewhere in the empathic realm between.¹⁷⁰

perilous enterprise."); *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977). See generally Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95 (1971); John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970) (describing difficulties of finding discriminatory intent); Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction*, 86 YALE L.J. 317, 322 n.29 (1976) (discussing the problems of institutional intent).

¹⁶⁵ See Dershowitz & Hanft, *supra* note 11, at 387-93.

¹⁶⁶ See *id.* at 393.

¹⁶⁷ The banned meanings conception avoids many of the problems of motivational scrutiny because the conception embraces a thoroughly interpretive methodology that seeks less to discover the true, secret motivations of the state actor and more to interpret a social text whose objective meaning is socially constructed and thereby knowable.

¹⁶⁸ Again, Justice O'Connor's insights in Establishment Clause jurisprudence argue in favor of recognizing that the political status of individuals can be affected, that borders between insiders and outsiders can be drawn in intricate ways: "[T]he Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions. Governmental intent cannot control, and not all state policies are permissible under the Religion Clauses simply because they are neutral in form." *Capital Sq. Review and Adv. Bd. v. Pinette*, 115 S. Ct. 2440, 2454 (1995).

¹⁶⁹ Karst, *supra* note 92, at 8.

¹⁷⁰

To mask the tragedy of choice by taking refuge in rules does not negate the

IV. The Banned Meanings Conception and the Internal Instability

A. *Negative Action Against Asian Americans*

Let us return to our hypothetical “Look Like America” admissions program, which institutes a regime of negative action against Asian Americans. Consider an Equal Protection challenge under the banned meanings conception of the right to equality. As a threshold matter, the court would have to select the appropriate track with which to scrutinize the negative action program. This in turn would require the court to decide whether a suspect classification is involved. Under the banned meanings conception, the mere fact that the “Look Like America” program allocates burdens and benefits through overt racial classifications means little in itself. What must be asked is whether negative action conveys an objective social meaning of stigma toward Asian Americans.

1. *First Order Interpretation—Toward Empathy*

The objective methodology of the banned meanings conception requires the court to reach its answer by interpreting the social meaning of negative action from the perspectives of the litigating parties.

First, the court must put itself in the position of the university defendant. From its vantage point, the court would peruse the data and analysis presented to the university policymakers to see how and why they concluded that Condition I, net benefit, was satisfied. The court would also examine the text of the policy and its administrative and political history to get some rough gauge of the degree, if any, to which prejudice, in its egregious or subtle forms, may have affected the policymakers’ decisions.¹⁷¹

To make the comparison between Dworkin’s banned sources conception and my banned meanings conception meaningful, however, let us continue to assume that both Conditions I (net benefit) and II (purity) hold true. Under these conditions, the university instituted negative action as part of the “Look Like America” program because of an unprejudiced utilitarian calculus. While the university may understand why others might view the program as stigmatic, it will conclude that this view is ultimately

tragedy. Empathy cannot necessarily tell us what to do or how to accomplish something, but it does alert us to moral choice and responsibility. It also reminds us of our common humanity and responsibility to one another. We could do worse—indeed we have done worse—than to employ the knowledge empathy imparts to us.

Henderson, *supra* note 116, at 1653.

¹⁷¹ See generally *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267–68 (1977) (identifying historical background, including legislative and administrative history, as relevant to an inquiry of invidious discriminatory purpose).

unjustified. Adopting the university's perspective, the court will reach the same conclusion.

The court must not stop here, however, as would current Equal Protection doctrine and Dworkin's banned sources conception in their singular search for discriminatory motive or prejudiced preferences. Under the banned meanings conception, the court must also do an interpretive turn from the Asian American plaintiff's perspective.

At its foundation, such an interpretation would be grounded in Asian American history, in particular, how governmental action has historically come to bear on Asian Americans. For nearly the entire history of the United States, our immigration and naturalization laws facially discriminated against Asians.¹⁷² Also, up to just this century, the legislative,¹⁷³ executive,¹⁷⁴ and judicial¹⁷⁵ branches of our state and federal governments handicapped Asian Americans in their rights to property,¹⁷⁶ education,¹⁷⁷ marriage,¹⁷⁸ and political participation.¹⁷⁹ Indeed, our very constitutional icons of equality are tarnished by anti-Asian prejudice. Justice Harlan's dissent in *Plessy v. Ferguson*, revered for transcending the morality of its

¹⁷² See *supra* note 71; Chew, *supra* note 17, at 12–13; Chang, *supra* note 74, at 1289–1300.

¹⁷³ See *Anti-Asian Violence: Oversight Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 65 (1987) [hereinafter *Hearings on Anti-Asian Violence*] (statement of Floyd Shimomura, Japanese American Citizens League) ("Over 600 pieces of legislation directed against persons of Asian ancestry were enacted between the late 1800s and the early 1900s.").

¹⁷⁴ See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding selective enforcement of laundry licensing restrictions a violation of the Equal Protection Clause of the Fourteenth Amendment).

¹⁷⁵ See, e.g., *People v. Hall*, 4 Cal. 399, 404–05 (1854) (describing the Chinese in America) ("The anomalous spectacle of a distinct people, living in our community . . . whose mendacity is proverbial; a race of people whom nature has marked as inferior, . . . and who are incapable of progress or intellectual development beyond a certain point, as their history has shown; differing in language, opinions, color, and physical conformation.").

¹⁷⁶ See, e.g., Charles J. McClain, In *Re Lee Sing: The First Residential-Segregation Case*, 3 W.L. HIST. 179, 179 (1990) (describing "the first attempt by an American municipality to segregate its inhabitants [Chinese residents and businessmen] on the basis of race"); Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 61 (1947) (arguing against the constitutionality of a law that denied "aliens ineligible for citizenship the right to own, lease, or otherwise enjoy land, except to the extent provided by treaty").

¹⁷⁷ See, e.g., *Gong Lum v. Rice*, 275 U.S. 78 (1927) (approving of "separate but equal" education for Asian Americans).

¹⁷⁸ See, e.g., Recent Decision, *Marriage: Miscegenation*, 22 CAL. L. REV. 116 (1933) (describing California statute proscribing the issuance of marriage licenses between Whites and "Mongolians").

¹⁷⁹ See Chew, *supra* note 17, at 9–10; CIVIL RIGHTS ISSUES, *supra* note 66, at 7. For a brief list of state endorsed discrimination against Asian Americans, see Tsuang, *supra* note 17, at 666 n.51. See also Charles J. McClain & Laurene Wu McClain, *The Chinese Contribution to the Development of American Law*, in ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882–1943 3, 3–24 (Sucheng Chan ed., 1991) (describing Chinese American litigation against discriminatory state action).

time to presage *Brown v. Board of Education*, betrayed our anti-Asian bias.¹⁸⁰ And Asian Americans cannot forget that the author and architect of *Brown*, Chief Justice Earl Warren, actively promoted the internment of Japanese Americans during World War II while he governed the State of California.¹⁸¹

An interpretive turn from the plaintiff's perspective would also situate negative action in a more contemporary context of racial prejudice faced by Asian Americans. Specifically relevant are two stereotypes—that Asian Americans are “unfair competitors” and that they represent the “model minority.”¹⁸²

From the plaintiff's perspective, negative action will be seen to manifest antipathy toward Asian Americans because they are resented for being “unfair competitors,” who compete too well against “real,” that is “White,” Americans in academics. As I have noted elsewhere, “in educational settings, the performance of Asian Americans has come to challenge and threaten the status of white students.”¹⁸³ The fact and perception of Asian American academic success have generated resentment on campuses,¹⁸⁴ at times

¹⁸⁰ See *Plessy v. Ferguson*, 163 U.S. 537, 561 (1896) (Harlan, J., dissenting) (“There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States . . . I allude to the Chinese race.”). Those who wonder whether I am inferring too much from this quotation should consider Neil Gotanda's point that Justice Harlan evinced the same anti-Chinese bias in a subsequent case. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Court held that a person of Chinese ancestry born on U.S. soil was an American citizen under the plain command of the Fourteenth Amendment. Two Justices, however, disagreed. Justice Harlan joined Justice Fuller's dissent, which argued in part that the inassimilable Chinese “might endanger good order, and be injurious to the public interests . . .” See *id.* at 731 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 717 (1893)). See generally Neil Gotanda, “Other Non-Whites” in *American Legal History*, 85 COLUM. L. REV. 1186, 1189–90 (1985) (reviewing PETER IRONS, *JUSTICE AT WAR* (1983)).

¹⁸¹ As Attorney General for the State of California, Earl Warren testified before the Tolan Committee and recommended the evacuation as a “preventative measure against ‘a widespread simultaneous campaign of sabotage’ directed at defense installation.” After the *Hirabayashi* case, then-Governor Warren “predicted that the return of Japanese Americans to the West Coast would result in widespread sabotage and ‘a second Pearl Harbor in California.’” PETER IRONS, *JUSTICE AT WAR* 213, 252 (1983).

¹⁸² See generally Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1930–33 (1993) (identifying five current stereotypes of Asian Americans: submissive, model minority, unfair competitors, foreigners, and fungible). On the stereotype of “foreigners,” see Margaret Chon, *On the Need for Asian American Narratives in Law: Ethnic Specimens, Native Informants, Silences and Storytelling*, 3 ASIAN PAC. AM. L.J. (forthcoming 1996) (manuscript at 5, April 1995 draft on file with author) (“Even those Asian Americans who can trace their lineage within the borders of the United States for three or four generations frequently experience the conflation of foreignness with otherness, as in the oft-expressed reaction to our presence: ‘you speak such good English!’”).

¹⁸³ See Note, *supra* note 182, at 1936.

¹⁸⁴ See Keith Osajima, *Asian Americans as the Model Minority*, in REFLECTIONS ON SHATTERED WINDOWS: PROMISES AND PROSPECTS FOR ASIAN AMERICAN STUDIES 171 (Gary Y. Okihiro et al. eds., 1988) (explaining how the increasing number of Asian students threatens White students). See generally DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* 58–60 (1992).

leading to anti-Asian graffiti,¹⁸⁵ physical and verbal attacks,¹⁸⁶ and intimidation.¹⁸⁷ Negative action, which forces Asian Americans out to let Whites in, will be seen as part of this overall negative reaction toward Asian Americans. Supporting this view will be the precedent of negative action programs instituted against Jewish students in the 1920s and 1930s in elite institutions such as Harvard College.¹⁸⁸ Just as universities attempted to cap the number of Jews lest they "take over" the campus, Asian Americans would suspect that universities are now "capping" the number of Asian American students.¹⁸⁹

Further, negative action will be seen to manifest selective indifference toward Asian Americans. Viewed as the "model minority," Asian Americans are believed to be better off economically and socially than they in fact are.¹⁹⁰ However, in fact, the percentage of Asian Americans living in

¹⁸⁵ Examples of graffiti strewn on campus walls include: "Chink, chink, cheating chink!" "Stop the Yellow Hordes," "Stop the Chinese before they flunk you out." RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* 479 (1989).

¹⁸⁶ See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1407 n.86 (1991) (describing anti-Asian incidents at the University of Connecticut and Seattle, Washington); David Arase, *Education is Failing Asian-Americans*, L.A. TIMES, Mar. 16, 1992, at B5 (describing the altering of a banner that originally read "Asian American Studies Now!" to "Asian Americans Die Now!").

¹⁸⁷ See generally *Hearings on Anti-Asian Violence*, *supra* note 173, at 13 (statement of Rep. Matsui of California); TAKAKI, *supra* note 185, at 479 (claiming that increased anti-Asian sentiment accompanies the rise of the model minority stereotype). As another example, at the University of California at Davis, some members of the Asian American community interpreted the murder of an Asian American graduate student as a sign that they "were studying too hard and getting too competitive." Racist leaflets approving the killing appeared soon thereafter. Six months earlier, a group called "White Power" had praised the killing of Thong Hy Huynh, a Vietnamese student at a nearby high school. See *Hearings on Anti-Asian Violence*, *supra* note 173, at 58-59 (statement of Floyd Shimomura, Deputy Attorney General of California).

¹⁸⁸

In 1922, Harvard's President Abbott Lawrence Lowell took a similar stand and contended that a quota would actually help Jews by reducing anti-Semitic resentment. In less than a decade, new admissions policies enforcing a "silent quota" lowered the number of Jews at Harvard from nearly 22 percent to 10 percent of the student body.

Davis, *supra* note 70, at 31.

¹⁸⁹ See Dershowitz & Hanft, *supra* note 11, at 392; Nakanishi, *supra* note 17, at 275:

To keep a lid on the number of Jewish students—denounced as "damned curve raisers" by less talented classmates—the universities imposed quotas, sometimes overt, sometimes covert . . . Today's "damned curve raisers" are Asian Americans, who are winning academic prizes and qualifying for prestigious universities in numbers out of proportion to their percentage of the population. And, like Jews before them, the members of the new model minority contend that they have begun to bump up against artificial barriers to their advancement.

(quoting Linda Matthews, reporter for L.A. TIMES).

¹⁹⁰ See Chew, *supra* note 17, at 8 n.10 (citing surveys of Whites' beliefs regarding

poverty is nearly one-and-a-half times greater than the percentage of impoverished Whites.¹⁹¹

In the academic context, the “model minority” stereotype views Asian Americans as a monolithic bloc of self-starting, hard-working, homework-loving “whiz kids” hard-wired to succeed in academia. Negative action, which requires Asian Americans to shoulder a greater burden than Whites, will be seen as a foreseeable consequence of society’s tendency to believe that all Asian Americans either face no racial discrimination¹⁹² or are genetically and culturally equipped to overcome such adversity by prodigious industry and sheer will.

Negative action will be seen as being callously indifferent to the fact that, although on the average Asian Americans may perform better than other Americans on certain metrics of academic achievement, significant numbers of Asian Americans in fact perform below the national mean. It will be seen as being indifferent to the fact that many Asian Americans, especially recent immigrants from Southeast Asia, desperately need affirmative help, not negative burden.¹⁹³ Even for those Asian Americans who do perform extremely well, negative action will be seen as creating a double standard: an Asian American must be twice as good to get the same opportunities and recognition. In sum, from the plaintiff’s perspective, the court would conclude that the social meaning of the “Look Like America” program is strongly stigmatic because it transmits a message of antipathy and selective indifference.

Finally, in making a claim about an Asian American plaintiff’s perspective, I should not be misread as suggesting that there is an essentialist Asian American viewpoint.¹⁹⁴ Instead, what I have offered is a hypothetical case that a plaintiff could make and the result an empathic court would reach if such a case were made. It bears repeating that under the banned meanings conception, the court does not make interpretive turns from abstract perspectives completely unanchored from the case or controversy before it. Rather, the court ties its empathic viewpoint shifting to the

discrimination against Asian Americans); Ong & Hee, *supra* note 70, at 32–37 (explaining how national statistics of household income overestimate the actual affluence of Asian Americans).

¹⁹¹ See Ong & Hee, *supra* note 70, at 35 (“Using the official poverty line, 14 percent of the Asian Pacific American population lived in households with an income below the poverty line in 1989.”).

¹⁹² See, e.g., Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome”*, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 1087, 1088 (Hyung-Chan Kim ed., 1992) (labeling the view that Asian Americans face no discrimination as the “Miss Saigon Syndrome”).

¹⁹³ Nearly half of all Americans of Southeast Asian descent live in poverty. See Ong & Hee, *supra* note 70, at 36–37.

¹⁹⁴ See, e.g., Jim Chen, *Unloving*, 80 IOWA L. REV. 145, 155 (1994) (“What I have written so far should shatter any illusion that American immigrants from Asia respond monolithically to whatever common legacy of discrimination they may share . . . Looks do not equal voice.”).

parties before it, including the individual plaintiff (or class of plaintiffs) who is claiming that her individual right to equality has been violated.

2. *Second Order Interpretation—Toward Equality*

After situating itself in the perspectives of the university defendant and the Asian American plaintiff, the court must attempt a second-order interpretation reconciling these two divergent viewpoints.¹⁹⁵ In attempting this reconciliation, the court must examine the perspectives that generated the interpretations for blindspots, insensitivities, and oversensitivities. For example, the court would surely consider whether Asian Americans who hear a stigmatizing message are being too sensitive. Many would argue that negative action marks Asian Americans not with a badge of inferiority but with a badge of merit: negative action is necessary because individuals of Asian descent, on average, perform too well scholastically. Admission ceilings, therefore, do not stigmatize Asian Americans; rather, they lionize them.

This argument, while having surface appeal, fails to realize that calling people “superior” at a particular task is hardly assurance against stigma.¹⁹⁶ Consider, for example, the pernicious stereotype that those of the Jewish faith are good with money. Similarly, stereotypes that Asian Americans are somehow “whiz kids” or the “model minority” are just shades away from the stereotype that, by their “superiority,” they constitute unfair competitors who consume economic and educational opportunities that should go to “real” Americans.¹⁹⁷ A statement by the president of the Seattle Anti-Japanese League in 1920 illustrates how labels of superiority can be laden with contempt:

[The Japanese] are not inferior to us. In fact, they constantly demonstrate their ability to best the white man at his own game in farming, fishing, and business. They will work harder, deprive themselves of every comfort and luxury, make beasts of burden of their women, and stick together, making a combination that America cannot defeat.¹⁹⁸

¹⁹⁵ Before attempting this distanced reconciliation, the court may want to enter the perspectives of intervenors and amici. For example, the views of minority groups similarly situated to Asian Americans, such as Jews, may be highly relevant.

¹⁹⁶ See Wu, *supra* note 22, at 229 (explaining that the “Janus-like” nature of model minority images “permits ostensibly ‘positive’ characteristics to be turned into ‘negative’ attributes”).

¹⁹⁷ See Note, *supra* note 182, at 1931, 1934–36.

¹⁹⁸ See Elizabeth Becker, *Private Idaho*, NEW REPUBLIC, May 4, 1992, at 9.

The second-order interpretation would also involve examining precedents and moments in legal history that generated similar disputes over the meaning of governmental practices. In particular, a court could not avoid seeing a strange, if somewhat forced, parallel to the Japanese internment cases.¹⁹⁹ In the relocation camps of World War II, Japanese Americans were forced to bear a greater burden than Americans of German or Italian descent to further the interest of national security.²⁰⁰ In the universities of today, negative action asks Asian Americans to bear a greater burden than Americans of European descent to further the interest of decreasing racial prejudice. Although we are assuming the truth of Condition II (purity) in the pages of this Article, in the real world involving a live case or controversy, a court applying the banned meanings conception cannot be so confident. It would weigh heavy indeed on the court's mind that only a half-century ago, a majority of the Justices of the Supreme Court confidently pronounced that Condition II applied to the internment of Japanese Americans, that the internment was justified by "[p]ressing public necessity," not "racial antagonism."²⁰¹

At the end of the reconciliation process, the court would conclude that the objective social meaning of the "Look Like America" admissions program is strongly stigmatizing. The program does not treat Whites and Asian Americans indistinguishably, giving Asian Americans neither affirmative nor negative action, in what may be called a regime of *neutral* action. Rather, it excludes Asian Americans to make room for more Whites. By so doing, negative action sends an objective message of antipathy caused by resentment, jealousy, and fear, as well as a message of indifference caused by the misperception that Asian Americans constitute a monolithic bloc of overachievers who can afford to shoulder extraordinary burdens. At bottom, its social meaning is that although it is and has always been acceptable for universities to be populated predominantly by Americans who happen to be White, it is unacceptable for them to be populated predominantly by Americans who happen to be Asian American.

¹⁹⁹This comparison would not seem too forced given the prominent role of the internment cases in last Term's affirmative action decision. See *Adarand Constr. Co. v. Peña*, 115 S. Ct. 2097 (1995). The internment is rich with irony. The legal battle against the forced relocations spawned the "suspect classification" doctrine, although it was egregiously misapplied in *United States v. Korematsu*, 323 U.S. 214 (1944), itself. In dissent, Justice Roberts referred to the relocation centers as "concentration camps" and "prison." *Id.* at 230 (Roberts, J., dissenting). Justice Murphy flatly called the evacuation orders a fall "into the ugly abyss of racism," *id.* at 233, supported by mere "half-truths and insinuations," *id.* at 239, not reasonably related to any imminent danger, *id.* at 241 (Murphy, J., dissenting).

²⁰⁰Americans of German and Italian ancestry were not evacuated. See CIVIL RIGHTS ISSUES, *supra* note 66, at 10; see also *Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting).

²⁰¹*Korematsu*, 323 U.S. at 216.

Thus, under the banned meanings conception, the "Look Like America" program would involve a suspect classification, and strict scrutiny would be appropriate. As such, the negative action component of the "Look Like America" program would be examined to make certain that the state interests were compelling and that the means chosen were narrowly tailored to those interests. Negative action would be struck down as unconstitutional because so far strict scrutiny has been "strict" in theory but "fatal" in fact.²⁰²

B. Affirmative Action for Racial Minorities

The result differs when the banned meanings conception is applied to the indirect ceiling on White admissions caused by affirmative action for racial minorities. The court would first have to select the appropriate track for Equal Protection analysis by asking whether the objective social meaning of affirmative action stigmatizes Whites as the proper objects of antipathy or selective indifference.

From the university's perspective, affirmative action obviously does not stigmatize Whites. Affirmative action was not adopted to subjugate or ignore Whites; rather, it was adopted to produce net-benefit by creating a more heterogeneous academic environment and ultimately a less prejudiced society. Stepping empathically into the shoes of the White plaintiff, however, the court may well view affirmative action as "reverse discrimination" that broadcasts a message of antipathy and selective indifference toward Whites.

In reconciling these divergent perspectives, a court would conclude that the objective social meaning of affirmative action is not strongly stigmatic²⁰³ for several reasons. From a historical perspective, Whites do not share a legacy of racial oppression with racial minorities. And today, Whites continue to exhibit dominance in the educational, corporate, and political realms.²⁰⁴ Against this backdrop, affirmative action programs do

²⁰²See generally Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). But see *Adarand*, 115 S. Ct. at 2097. There are two doctrinal hooks that the court could use to invalidate the law. The program could either fail ends-scrutiny because the net utilitarian benefit of negative action would not be compelling or fail means-scrutiny since a program of negative action would not be narrowly tailored to the ends sought.

²⁰³See THOMAS NAGEL, *MORTAL QUESTIONS* 103 (1979) ("The self-esteem of whites as a group is not endangered by such a practice, since the situation arises only because of their general social dominance . . ."); Karst, *supra* note 92, at 52–53.

²⁰⁴See *Adarand*, 115 S. Ct. at 2135 (Ginsburg, J., dissenting) (noting the continuing effects of racial caste in "our workplaces, markets, and neighborhoods"); see also John Chandler, *Blacks, Latinos Lag Whites in Completing High School, Attending College*, L.A. TIMES, Mar. 14, 1995, at A23 (reporting findings of the American Council on Education);

not manifest the objective message that Whites are political or social outsiders.²⁰⁵

Furthermore, under the banned meanings approach, it will often be perfectly constitutional to give Asian Americans neither affirmative nor negative action. Under this regime of *neutral* action,²⁰⁶ Asian American and White individuals would face the same indirect burden caused by affirmative action programs targeted for non-Asian minorities. To be sure, Whites and Asian Americans may resent the burden that they bear, but again, resentment is not stigma. If even a racial minority can be constitutionally asked to shoulder the same burden as Whites, it is hard to argue that affirmative action conveys the objective social meaning that Whites—*because they are White*—deserve society's antipathy or indifference.

Finally, it is also possible that a racial minority who is included in an affirmative action program might challenge it on Equal Protection grounds, arguing that affirmative action programs stigmatize racial minorities as inherently incapable of succeeding without preferential treatment.²⁰⁷ This argument would fail under the banned meanings conception because this conception requires that the challenged governmental practice somehow harm, injure, or disadvantage the plaintiff independent of any stigma associated with that practice.²⁰⁸ There is no such disadvantage here: the racial minority's access to higher education is in no way hindered. To the contrary, it is improved. In addition, the objective social meaning of affirmative action programs in general is not strongly stigmatic. Its social meaning is not that racial minorities are properly the objects of antipathy or selective indifference. Instead, affirmative action policies show solicitude and sensitivity to the welfare of racial minorities

Frank Swoboda, *Minorities, Women Are Rare in Management*, WASH. POST, Mar. 16, 1995, at A1 (stating that the Glass Ceiling Commission found that 97% of senior managers at the Fortune 1000 industrial corporations are White men). *See generally* Gotanda, *supra* note 62, at 51 (“[A]n argument [that strict scrutiny should be applied to a government practice denying a white applicant certain benefits under an affirmative action program] would be historically, socially, and analytically insupportable. There is no history of subordination of whites by Blacks and there are no social science analyses—sociological, psychological, or linguistic—that suggest continuing subordination of Whites by Blacks.”); *supra* note 151 and accompanying text.

²⁰⁵ Cf. John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 727 (1974) (“It is not ‘suspect’ in a constitutional sense for a majority, any majority, to discriminate against itself.”).

²⁰⁶ *See* Dong, *supra* note 15, at 1029 (arguing that educational diversity “should never be used to justify giving whites preferential treatment relative to a minority group”); Wu, *supra* note 22, at 284 (arguing for what I call “neutral action” at Lowell High School).

²⁰⁷ *See, e.g., Adarand*, 115 S. Ct. at 2097, 2119 (Thomas, J., concurring in part and concurring in judgment) (“So-called ‘benign’ discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence.”).

²⁰⁸ *See supra* text accompanying notes 154–155.

whose life prospects have been capriciously diminished by racial prejudice.²⁰⁹

Since the objective social meaning of affirmative action is not strongly stigmatic, strict scrutiny is unwarranted, and under either intermediate or rational basis scrutiny, a reasonably constructed affirmative action program would pass constitutional muster.

Conclusion

This Article has spanned a great conceptual distance, touching on many points: anti-Asian American quotas, the philosophy of Ronald Dworkin, competing conceptions of equality, theories of objective meanings, and Equal Protection doctrine. One way to connect the dots is to view the Article as an extended exercise in reflective equilibrium. Dworkin's justification of affirmative action—one of the most persuasive defenses in the literature—suffered from an internal instability. While defending affirmative action for certain minorities, his theory also authorized negative action against Asian Americans under plausible empirical conditions.

This internal instability in turn opened a gateway for reflection about Dworkin's banned sources conception of the right to equality. This reflection prompted a new articulation of an old theory based on the conviction that the Constitution's promise of equal protection prohibits burdensome governmental practices that objectively stigmatize.²¹⁰ Substituted back into Dworkin's basic defense of affirmative action, the banned meanings conception resolved the internal instability while maintaining the fundamental structure and persuasiveness of Dworkin's argument. With this modification, we can use Dworkin's argument to support affirmative action—to answer the likes of Bakke—without fear of its sharp double-edge.

Those readers who favor some forms of affirmative action programs but are unhappy with this new equilibrium must answer tough questions. Assuming that the internal instability of a Dworkin-like defense of affirmative action is genuine, how else can that instability be removed? More

²⁰⁹ See, e.g., *Bakke v. Regents of the Univ. of Cal.*, 438 U.S. 265 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part) ("Nor can the [affirmative action] program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior."). Admittedly, this interpretation is contextual. For example, if a university adopted an affirmative action program with a preamble stating that the program was necessary because non-Whites are genetically inferior to Whites, then it would be an easy case that such a program would be objectively stigmatic. Of course, this example would *prima facie* violate Condition II as well.

²¹⁰ This piece leaves unexplored many issues related to a stigma theory of Equal Protection. For instance, how does the banned meanings conception apply to the question whether a gender classification is stigmatic or whether it "realistically reflects the fact that the sexes are not similarly situated in certain circumstances"? *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981).

importantly, how can it be done in a manner that will garner support from the political middle and a post-*Adarand* Supreme Court? The banned meanings conception, with its explicit nod to Justice O'Connor's Establishment Clause jurisprudence, is an attempt to answer these questions.²¹¹

In closing, it bears mention that the objective social meaning of no political practice, including affirmative action, is fixed. While affirmative action is now at most mildly stigmatic to Whites, warranting intermediate scrutiny, this will not always be true. In some future world, when programs such as affirmative action have effectively purged racial prejudice in American social and professional life, we will live in a society in which "nonracial admissions programs, whatever [their] consequences might be, could be accepted with no sense of racial barriers or injustice."²¹² In such a world, continuing preferential treatment for racial minorities will transmit a strong objective social meaning of stigma toward Whites. When that day arrives, universities will have to justify affirmative action programs under the strictest of scrutiny and properly so. Let us hope that day comes soon.

²¹¹ The banned meanings conception should also assuage Justice O'Connor's fear that "[a]ny retreat from the most searching judicial inquiry [that is, strict scrutiny] can only increase the risk of another such error [as in *Korematsu*] occurring in the future." *Adarand*, 115 S. Ct. at 2117. The banned meanings conception, which does not automatically track all race-based programs onto "strict scrutiny," explicitly requires the court to view the practice from the plaintiff's perspective. By doing so, the banned meanings conception guards against repeating the Japanese internment cases better than current doctrine, which, after all, failed miserably in *Korematsu* itself.

²¹² DWORKIN, A MATTER OF PRINCIPLE, *supra* note 7, at 294.

