
Affirmative Action and Social Discord: Why Is Race More Controversial than Sex?

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A major concern courts have raised about race-conscious affirmative action is its potential to evoke resentment, racial tension, and social discord. This concern has led to narrow limits on race-conscious affirmative action and, with respect to college and university affirmative action programs, the avoidance of a racial justice rationale in favor of a justification based on the benefits of diversity to the institution. This concern, and these responses, have not arisen — at least not to the same extent — with respect to affirmative action for women. This Article tries to explain why. It focuses on psychological and cognitive factors, including self-interest, system-justifying beliefs, and stereotyping, that make race a more threatening category than gender and may help to explain a significant gap in popular support between race-conscious and sex-conscious affirmative action. The Article also advances the hypothesis that, despite important differences in the way people perceive race and sex, the factors that reduce opposition to affirmative action in each case are the same ones that reinforce the conditions for inequality that give rise to the need for such programs in the first place. Treating the diversity of educational institutions as the most compelling interest for minority admissions policies may reduce antagonism to affirmative action, but only by leaving in place the settled expectations of the racially dominant that their interests come first. Paternalistic stereotypes may soften resistance to affirmative action, but only by building on views of women that keep them at a disadvantage. In short, one of the difficulties of affirmative action is the opposition to it; yet the factors that appear to reduce that opposition may also serve to worsen the larger problem of discrimination that affirmative action is intended to address.

I. THE INTENSITY OF THE AFFIRMATIVE ACTION DEBATE: COMPARING RACE AND SEX

A. Race

Few issues are more divisive than race-conscious affirmative action. Courts, legislatures, scholars, and the public are deeply split over whether affirmative action, in its many different forms,¹ should be

¹ For the classic break-down of five different forms of affirmative action, see David Benjamin Oppenheimer, *Distinguishing Five Models of Affirmative Action*, 4 BERKELEY WOMEN'S L.J. 42 (1988) (distinguishing quotas, preference systems, self-examination plans, outreach plans, and commitments not to discriminate). The form matters greatly to people's support of it. See *infra* Part IV.

permissible. Despite the widespread use of race-conscious affirmative action in one form or another, between forty percent and eighty percent of the population (depending on what question is asked, of whom, and in what order²) state that they disapprove of it.³

Judicial wrangling over affirmative action mirrors the divisions within public opinion. The U.S. Supreme Court has examined issues of race-conscious decision-making in college and university admissions under the U.S. Constitution on at least six separate occasions. In most of these cases, the vote was as close as it could be, and generated an unusual number of separate opinions, some highly

² For a discussion of particular difficulties with public opinion surveys on affirmative action, see Loan Le & Jack Citrin, *Affirmative Action*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 162, 162-63 (Nathaniel Persily et al. eds., 2008) (among the difficulties, questions are asked in a variety of abstract and specific forms, and respondents respond from different beliefs about what affirmative action means). For additional discussion of the complexities of wording questions about affirmative action in public opinion surveys, see Charlotte Steeh & Maria Krysan, *The Polls — Trends: Affirmative Action and the Public, 1970-1995*, 60 PUB. OPINION Q. 128, 129-30 (1996). The form of the question can have a big influence on respondents' answers. For example, questions that ask about programs to help minorities and women get better jobs and education in order to overcome past discrimination show more support for affirmative action than questions that ask about "special preferences." *Conflicted Views of Affirmative Action: Summary of Findings*, PEW RES. CTR. (May 14, 2003), <http://www.people-press.org/2003/05/14/conflicted-views-of-affirmative-action/> [hereinafter *Conflicted Views of Affirmative Action*]. Because of these variations, poll results are not always consistent, as the figures provided in this article illustrate. Insofar as I seek principally to identify the comparative level of support for sex- and race-conscious affirmative action rather than any absolute level of that support, these difficulties generally are not a problem. However, the order of questions may distort this comparative analysis. On the importance of the order of the questions, see *infra* note 14. On the unreliability of public opinion polls on race issues more broadly, see Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 762 (2000).

³ For example, although most private elite colleges and universities engage in some form of affirmative action in their admissions processes, according to a Rasmussen poll, only thirty-seven percent of Americans believe that colleges and universities should strive for racial diversity. *Most Oppose Affirmative Action in College Admissions*, RASMUSSEN REP. (July 9, 2018), http://www.rasmussenreports.com/public_content/lifestyle/education/most_oppose_affirmative_action_in_college_admissions; see also Le & Citrin, *supra* note 2, at 164-79 (reporting studies showing different levels of support for affirmative action, depending upon the strength of the program, ranging between thirty percent to seventy-six percent in the context of university admissions policies, and nineteen percent to seventy percent in the jobs context); Steeh & Krysan, *supra* note 2, at 130-32 (comparing polls showing approval of job preferences for Blacks and minorities between fifteen percent and forty percent); Frank Newport, *Most in U.S. Oppose Colleges Considering Race in Admissions*, GALLUP (July 8, 2016), <https://news.gallup.com/poll/193508/oppose-colleges-considering-race-admissions.aspx?version=print> (reporting that sixty-three percent of the population believes race should not be a factor in college admissions decisions).

charged.⁴ In the employment context, as well, cases challenging various forms of affirmative action under Title VII and the U.S. Constitution have generated mounds of litigation and a closely divided Court.⁵

Among academics, affirmative action is also controversial. A significant majority of those writing on the topic support affirmative action,⁶ but some scholars argue against it, based on a wide range of legal and policy considerations.⁷ Even among those supporting race-conscious affirmative action, scholars disagree about the appropriate theory to support it. Most believe that the best justification for

⁴ See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016) (*Fisher II*) (4–3 split, with a majority opinion and two separate dissents); *Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (5–4 decision); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (5–4 decision, with six separate opinions); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (five-Justice plurality, with six separate opinions).

⁵ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557 (2009) (5–4 majority, with four separate opinions); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (5–4 majority, with six separate opinions); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (6–3 majority, generating eight separate opinions).

⁶ For a representative sampling in the legal literature, see Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1224–28 (2002); Mario L. Barnes, Erwin Chemerinsky & Angela Onwuachi-Willig, *Judging Opportunity Lost: Assessing the Viability of Race-Based Affirmative Action After Fisher v. University of Texas*, 62 UCLA L. REV. 272, 305 (2015); Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N.U. L. REV. 1159, 1161–67 (1996); Kimberlé W. Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 123, 123–24 (2006); Jerome McCristal Culp, Jr., *Diversity, Multiculturalism, and Affirmative Action: Duke, the NAS, and Apartheid*, 41 DEPAUL L. REV. 1141, 1142 (1992); Samuel Issacharoff, *Can Affirmative Action Be Defended?*, 59 OHIO ST. L.J. 669, 682–84 (1998); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 427–29 (1997); David A. Strauss, *Affirmative Action and the Public Interest*, 1995 SUP. CT. REV. 1, 3–4; Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIF. L. REV. 953, 956–58 (1996); Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311, 1311–12 (1999).

⁷ See, e.g., RICHARD D. KAHLBERG, *THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION* (1996) (arguing that affirmative action should be based on class, not race); RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* 3–5 (2012) (arguing that affirmative action does not help Blacks as much as it hurts them); David E. Bernstein, *Schuette v. Coalition to Defend Affirmative Action and the Failed Attempt to Square a Circle*, 8 N.Y.U. J. L. & LIBERTY 210, 226 (2013) (arguing that race-conscious preferences are more dangerous than preferences for legacies, athletes, and other groups because, among other things, they risk “societal divisiveness” and “significant social disorder”); John O. McGinnis, *Diversity Policies Favoring Minorities and Women Create Less Ideological Diversity*, L. & LIBERTY (Apr. 18, 2017), <https://www.lawliberty.org/2017/04/18/diversity-policies-favoring-minorities-and-women-create-less-ideological-diversity/> (arguing that affirmative action impedes ideological diversity).

affirmative action is to reverse the continuing legacy of centuries of racial injustice,⁸ but others, for either substantive or strategic reasons (or both), argue that the best defense of affirmative action is the diversity it promotes on behalf of the university and its students.⁹ The controversial nature of affirmative action is well recognized among legal scholars, a number of whom have discussed the role that reducing racial tension and divisiveness (or “balkanization”) has played in the Court’s affirmative action decisions.¹⁰

B. Sex

Affirmative action has been less contentious with respect to sex. Although the figures vary widely by poll, in every poll that makes the distinction, more people support affirmative action for women than for racial minorities. For example, a Gallup poll of over 2,000 adults in the United States conducted in the summer of 2015 showed that sixty-seven percent of Americans “generally favor” affirmative action programs for women, while only fifty-eight percent “generally favor” such programs for racial minorities.¹¹ In the 1980s and 1990s, the

⁸ See, e.g., Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622 (2003) (criticizing the diversity rationale for enabling courts and policymakers to avoid addressing directly the barriers of race and class and giving legitimacy to criteria that favor Whites); Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. REV. 425 (2014) (arguing that the diversity rationale reaffirms notions of racial superiority among Whites); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. C.R. & C.L. 171 (2005) (identifying the appeal of the diversity rationale, its risks, and the need for a more “substantive” theory); Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013) (criticizing diversity rationale for giving Whites social and economic value from nonwhite racial identity); see also Rubinfeld, *supra* note 6, at 432-44 (criticizing “cost-benefit” approach to strict scrutiny, that produced the diversity defense).

⁹ See, e.g., ELLEN BERREY, *THE ENIGMA OF DIVERSITY: THE LANGUAGE OF RACE AND THE LIMITS OF RACIAL JUSTICE* (2015); Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 924-25 (1983); see also Jessica Bulman-Pozen, *Grutter at Work: A Title VII Critique of Constitutional Affirmative Action*, 115 YALE L.J. 1408, 1424-33 (2006) (arguing for view of diversity as integration, under Title VII).

¹⁰ See, e.g., Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1 (2015); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 74-76 (2003); Neil S. Siegel, *Race-Conscious Student Assignment Plans: Balkanization, Integration, and Individualized Consideration*, 56 DUKE L.J. 781 (2006); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

¹¹ Rebecca Riffkin, *Higher Support for Gender Affirmative Action than Race*, GALLUP

acceptance gap between race- and sex-conscious affirmative action varied between three and eighteen percentage points,¹² with the gap widening starting in the 1990s due primarily to the erosion of support for race-conscious programs.¹³ Because surveys typically ask the race question before the sex question, it is likely that the reported disparities are significantly understated.¹⁴

Sex-conscious affirmative action also generates less extreme negatives than race-conscious affirmative action. In the 2016 results for the General Social Surveys, for example, forty-four percent of respondents strongly oppose race-conscious affirmative action, while only thirty-three percent strongly opposed sex-conscious affirmative action.¹⁵

(Aug. 26, 2015), <https://news.gallup.com/poll/184772/higher-support-gender-affirmative-action-race.aspx?version=print>. The poll results reported in this article are not entirely consistent with one another. For an explanation, including why the variations are not, for the most part, material to the analysis of the article since it seeks to explore the gap in support for affirmative action between race and sex, not some absolute level of support, see *supra* note 2. With respect to the one factor that may consistently understate the gap, see *infra* note 14.

¹² Steeh & Krysan, *supra* note 2, at 137.

¹³ Dawn Michelle Baunach, *Progress, Opportunity, and Backlash: Explaining Attitudes Toward Gender-Based Affirmative Action*, 35 SOC. FOCUS 345, 346 (2002) (finding that support for sex-conscious programs, unlike support for race-conscious programs, has remained relatively stable).

¹⁴ When respondents are asked questions about both race- and sex-conscious affirmative action, the race question usually comes first. See, e.g., NAT'L OPINION RESEARCH CTR., GENERAL SOCIAL SURVEYS, 1972-2010: CUMULATIVE CODE BOOK 3525 (2011). Insofar as opposition to race-conscious affirmative action for minorities is stronger, putting the race question first can predispose the respondent to be more negative about affirmative action for women. See Chloe Angyal, *Affirmative Action Is Great for White Women. So Why Do They Hate It?*, HUFFPOST (Jan. 21, 2016, 12:22 PM ET), https://www.huffingtonpost.com/entry/affirmative-action-white-women_us_56a0ef6ae4b0d8cc1098d3a5 (quoting researcher stating that mentioning race ahead of sex “primes race over sex” and thus deflates level of expressed support for affirmative action for women). If polls asked respondents first about women, respondents’ stated attitudes toward race-conscious affirmative action likely would be more positive. See Steeh & Krysan, *supra* note 2, at 137 (describing research studies showing that placement of questions about affirmative action “produced large effects;” placing questions about women first raises level of expressed support for preferences for Blacks); David C. Wilson et al., *Affirmative Action Programs for Women and Minorities: Expressed Support Affected by Question Order*, 72 PUB. OPINION Q. 514, 514 (2008) (describing research showing that asking first about affirmative action for women increases reported support for race-conscious affirmative action).

¹⁵ NORC at the Univ. of Chi., *For or Against Preferential Hiring of Women*, GSS DATA EXPLORER, <https://gssdataexplorer.norc.org/variables/1656/vshow> (last visited Mar. 17, 2019) [hereinafter *Hiring of Women*]; NORC at the Univ. of Chi., *Favor Preference in Hiring Blacks*, GSS DATA EXPLORE, <https://gssdataexplorer.norc.org/variables/423/vshow> (last visited Mar. 17, 2019). The question asked by the GSS was

Fewer reported judicial cases challenge sex-conscious affirmative programs than race-conscious plans, and courts generally uphold such programs.¹⁶ Legal scholars have been correspondingly less interested in sex-conscious affirmative action. The few academics who have written on the subject tend to be supporters,¹⁷ and those who make the comparison to race-conscious affirmative action accept the more lenient standard applied to sex-conscious affirmative action, even if they cannot explain it.¹⁸ In media and popular culture, as well, there is comparatively less attention given to affirmative action for women.¹⁹

C. Summary of Argument

This Article proceeds as follows. Part II compares reported judicial decisions concerning race-conscious affirmative action programs to those addressing programs favoring women. While the reason courts afford race the strongest level of constitutional protection is the long history of entrenched racial discrimination, the stated standard for reviewing affirmative action programs today is as rigorous as the standard for reviewing rules and practices that discriminate against members of racial minorities. General societal race disparities, no matter how severe, will not justify affirmative action; there must be a concrete finding of discrimination on the part of the program's defender or — in the case of university admissions systems — a

as follows: "Some people say that because of past discrimination, blacks should be given preference in hiring and promotion. Others say that such preference in hiring and promotion of blacks is wrong because it discriminates against whites. What about your opinion — are you for or against preferential hiring of blacks?" *Id.* This question elicited more negative responses than the simpler, more open-ended Gallup Poll question: "Do you generally favor or oppose affirmative action programs for women/racial minorities?" Riffkin, *supra* note 11. In the CCES instrument, the next question substitutes "women" for "blacks." *Hiring of Women, supra.*

¹⁶ See *infra* Part II.

¹⁷ See, e.g., Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J.L. & GENDER 1 (2011). But see James P. Scanlan, *The Curious Case of Affirmative Action for Women*, SOC'Y 36, 36 (1992), http://jpscanlan.com/images/The_Curious_Case_of_Affirmative_Action_for_Women.pdf.

¹⁸ See Levinson, *supra* note 17, at 36 (arguing that the race/gender anomaly is not justified, but that the incongruity should not be resolved by subjecting gender-based affirmative action to strict scrutiny).

¹⁹ As a result, critics have alleged that the media and popular culture have framed the affirmative action debate primarily through the lens of race. See, e.g., JENNIFER L. PIERCE, *RACING FOR INNOCENCE: WHITENESS, GENDER, AND THE BACKLASH AGAINST AFFIRMATIVE ACTION* 85, 91-92 (2012). For an ethnographic study that documents the relative lack of attention to sex-conscious affirmative action, see *id.* at 85.

showing that a narrowly tailored program is necessary to fulfill the university's compelling need for diversity.

Courts review sex-conscious affirmative programs under a more lenient standard of review. Under that standard, general societal discrimination, as shown by significant gender disparities, will justify affirmative action for women. The few courts evaluating programs to increase opportunities for women focus on the lack of past opportunities for women, and they do not disapprove of programs to correct present disparities out of a concern for social discord.

Part III attempts to explain why affirmative action is unpopular and, in particular, why race-conscious affirmative action is more unpopular than sex-conscious affirmative action. Its focus is not on rational arguments, most of which do not seem capable of explaining the difference in attitudes between race and sex.²⁰ Rather, this Part explores various cognitive and psychological explanations that seem to have the greatest explanatory force, including self-interest, system-justifying beliefs, and stereotyping.

Part IV briefly looks at the aspects of affirmative action programs themselves that might make a difference to people's opposition to them. These factors include the degree of procedural restraint the program imposes on decision-makers and the perceived size of a program's impact. The stronger the preference, and the more people an affirmative action program actually helps, the more likely other people are to oppose it.

Part V concludes with the question of whether the goal of reducing social discord serves the larger end of reducing discrimination. This Part acknowledges that, given the threat associated with race, the diversity rationale is a more palatable basis for race-conscious affirmative action than the racial justice rationale because it represents less of a rebuke to those who believe they are not blameworthy with respect to society's racial disparities. At the same time, it argues that in obscuring the existence and causes of race discrimination to which such programs are a response, the diversity rationale both reinforces the myth of the "innocence" of the race-dominant, and undercuts the perceived need for such programs. Part V also argues that the relative lenience courts show toward sex-conscious affirmative action programs relies on unacknowledged and paternalistic stereotypes about women that, while helping to make affirmative action for women more acceptable, reinforces the dependency stereotypes that have long reduced women's opportunities — the harm affirmative

²⁰ See *infra* text accompanying notes 85–86.

action seeks to cure. Ironically, if people viewed the claims underlying affirmative action for women more like the claims underlying affirmative action for minorities — i.e., as systemic and pervasive rather than a consequence of biological differences — they likely would feel more threatened, and thus more opposed, to it.

II. A COMPARISON OF LEGAL STANDARDS FOR RACE- AND SEX-CONSCIOUS AFFIRMATIVE ACTION

This section compares the standards courts have used to address challenges to race- and sex-conscious affirmative action programs. Three points stand out. First, courts evaluate race-conscious programs more strictly than sex-conscious programs. Evidence of societal disparities in women's opportunities are generally sufficient to justify sex-conscious programs, but comparable (or even worse) racial disparities are not enough to justify race-conscious programs. Second, while ostensibly applying the strictest standard to review race-conscious programs, in the college and university admissions context, courts have been willing to find the benefits of institutional diversity to be sufficient and, indeed, a stronger basis for affirmative action than reducing centuries of accreted societal, race-conscious disparities in opportunity and resources. Third, while reducing racial tension is a goal of courts in shaping the law with respect to affirmative action for minorities, reducing gender discord does not play role in reviewing affirmative action programs for women.

A. Race-Conscious Affirmative Action

The first U.S. Supreme Court case to address affirmative action, *Regents of the University of California v. Bakke*,²¹ held that a minority quota system for admission to the medical school at the University of California at Davis violates the Equal Protection Clause. In rejecting the Davis plan, Justice Powell both explains his concerns about affirmative action, and suggests the kind of race-conscious affirmative action that might pass constitutional muster.

One of Justice Powell's concerns about affirmative action is that it is not a suitable tool for addressing the past societal discrimination that may underlie the significant racial disparities in a school's student population. "Societal discrimination," he writes, is "an amorphous concept . . . that may be ageless in its reach into the past."²² For Justice

²¹ 438 U.S. 265 (1978).

²² *Id.* at 307 (Powell, J.) (plurality opinion).

Powell, responsibility for societal discrimination is simply too diffuse and imprecise to provide a basis for evaluating the constitutionality of an affirmative action program. Justice Powell also expresses concern about institutional competence, believing that a university is poorly positioned to determine what societal disparities should be corrected, and how. The university's mission and competence is "education," he states, "not the formulation of any legislative policy or the adjudication of particular claims."²³

Another key concern for Justice Powell is for the "innocent persons . . . [forced] to bear the burdens of redressing grievances not of their making."²⁴ Imposing the burdens of affirmative action on those innocents, he explains, would reinforce "racial and ethnic antagonisms," making it even more difficult to make progress in the area of race.²⁵

Based on these concerns, Justice Powell articulates an alternative rationale for affirmative action that he claims is both consistent with the university's core mission and competency, and less likely to stir up racial antagonisms. That rationale is diversity. The university's interest in a diverse student body, Justice Powell writes, is "essential" to the university's academic freedom;²⁶ a diverse student body provides the "experiences, outlooks, and ideas" all medical students should have to equip them "to render with understanding their vital service to humanity."²⁷ Accordingly, as long as the university does not impose racial quotas, which would only exacerbate racial tensions, it may consider race as a "plus" factor in its admissions process, along with other diversity factors.²⁸

Justice Powell's opinion in *Bakke* makes clear that race-conscious affirmative action programs must pass a level of constitutional scrutiny higher than imposed on sex-based classifications,²⁹ but it was not until over a decade later, in *City of Richmond v. J.A. Croson Co.*,³⁰ that the U.S. Supreme Court held explicitly that the appropriate standard for reviewing race-conscious affirmative action programs by a public entity is the same strict scrutiny as applied to rules and practices that discriminate against minorities. *Croson*, like *Bakke*, is motivated by a

²³ *Id.* at 309.

²⁴ *Id.* at 298.

²⁵ *Id.* at 299.

²⁶ *See id.* at 311-12.

²⁷ *Id.* at 314.

²⁸ *Id.* at 315-18.

²⁹ *Id.* at 302-03.

³⁰ 488 U.S. 469 (1989).

concern for race salience and social discord, rejecting racial balance as a compelling goal because its effect “assures that race will always be relevant in American life, and that the ‘ultimate goal’ of ‘eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being’s race’ will never be achieved.”³¹

In subsequent cases, the Court has alternated between a concern about the negative effects of affirmative action on the racial minorities it is designed to help, and a sympathy for the “innocent” non-minorities whose opportunities affirmative action appears to reduce. In *Adarand Constructors, Inc. v. Peña*,³² for example, Justice O’Connor, writing for the Court, worries that a presumption that minority-owned businesses are “disadvantaged,” for purposes of a set-aside program for federal contracts, would imply that minorities are less qualified, and thus would exacerbate racial prejudice.³³ Fourteen years later in *Ricci v. DeStefano*,³⁴ the Court focuses squarely on the White firefighter victims, whose promotion test results were thrown out by the city of New Haven because the tests would have produced virtually no promotions by Black firefighters. What made New Haven’s decision unacceptable to the Court’s majority is not the negative message it conveyed about the competitiveness of minority firefighters, but rather its disappointment of the “high, and justified, expectations” of White firefighters, many of whom had “studied for months, at considerable personal and financial expense.”³⁵

As the U.S. Supreme Court tightened the standard of review for race-conscious affirmative action in workplace cases, it proceeded to loosen the standard in the educational context. The Court rejected an undergraduate affirmative action program at the University of Michigan affording a set number of points to minorities in the admissions process in *Gratz v. Bollinger*,³⁶ but in *Grutter v. Bollinger*,³⁷ the Court upheld an admissions program at the University of Michigan Law School that treated race as one among a number of factors to be considered in the admissions process.³⁸ Although affirming that the appropriate standard of review is strict scrutiny

³¹ *Id.* at 495 (alteration in original) (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 320 (1986)).

³² 515 U.S. 200 (1995).

³³ *Id.* at 229.

³⁴ 557 U.S. 557 (2009).

³⁵ *Id.* at 593.

³⁶ 539 U.S. 244 (2003).

³⁷ 539 U.S. 306 (2003).

³⁸ *Id.* at 306.

under the *Adarand* case,³⁹ the Court's majority finds that the Law School's interest in student diversity is a compelling one.⁴⁰ Writing for the court, Justice O'Connor elaborates Justice Powell's reasoning in *Bakke*, explaining that the diversity promoted by the program has "substantial" benefits for students, including improved learning outcomes, "cross-racial understanding" that helps break down racial stereotypes,⁴¹ and preparation for "an increasingly diverse workforce and society."⁴² The benefits of diversity reach beyond the students themselves, Justice O'Connor explains, to the civic, military, and professional institutions the students might one day join.⁴³ Importantly, past and present societal discrimination against minority groups is not an adequate or even a relevant factor in the Court's reasoning. Only the concurring opinion by Justice Ginsburg, joined in by Justice Breyer, mentions the relevance of conscious and unconscious race bias,⁴⁴ and the "current reality that many minority students encounter markedly inadequate and unequal educational opportunities."⁴⁵

Throughout her opinion in *Grutter*, Justice O'Connor reiterates the concern of prior affirmative action cases for people not in the favored racial or ethnic groups — applicants feeling unjustly burdened by the racial preferences extended to others.⁴⁶ It is because of this burden that certain limitations on affirmative action are necessary: the race-conscious aspect of the admissions program must be narrowly tailored⁴⁷ and part of an individualized process that gives substantial weight to diversity factors other than race.⁴⁸ The program must consider race-neutral alternatives,⁴⁹ be time-limited,⁵⁰ and "work the least harm possible to other innocent persons competing for the benefit."⁵¹ Subsequent litigation over a race-conscious college and

³⁹ *Id.* at 326.

⁴⁰ *Id.* at 343.

⁴¹ *Id.* at 330.

⁴² *Id.* at 330.

⁴³ *Id.* at 330-33.

⁴⁴ *Id.* at 345 (Ginsburg, J., concurring).

⁴⁵ *Id.* at 346.

⁴⁶ *Id.* at 341 (majority opinion).

⁴⁷ *Id.* at 334.

⁴⁸ *Id.* at 334-40.

⁴⁹ *Id.* at 340.

⁵⁰ *Id.* at 342-43.

⁵¹ *Id.* at 341 (citing *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 308 (1978)). In reaction to the *Grutter* decision, Michigan voters decided to amend the state constitution to ban affirmative action in public employment and educational

university admissions program at the University of Texas reaffirmed that race-conscious admissions policies are subject to strict scrutiny, that race cannot be considered unless “available, workable race-neutral alternatives do not suffice,”⁵² and that, under the right circumstances, diversity can be a sufficiently compelling interest to justify such a program, as long as it is limited in scope.⁵³

B. Sex-Conscious Affirmative Action

In contrast to challenges to race-conscious affirmative action plans, challenges to sex-conscious plans are relatively rare, and the plans are generally upheld.

The only Supreme Court decision addressing a challenge to a sex-conscious affirmative action plan in the workplace context is *Johnson v. Transportation Agency*.⁵⁴ In *Johnson*, the Court holds that an affirmative action plan authorizing a county transportation agency to consider sex in making promotion decisions does not violate Title VII.⁵⁵ In so holding, the Supreme Court applies the same standard that it had adopted in *United Steelworkers v. Weber*,⁵⁶ which upheld a race-conscious affirmative action program by a private company under Title VII. The plan in *Weber* had allowed one Black into a training program for every White trainee it brought on. The Court identifies various features that together made the plan acceptable under Title VII: the program does not constitute an absolute bar to hiring non-minorities; it is temporary, with an end date or goal; and it allows flexibility in the hiring of non-minorities.⁵⁷

In *Johnson*, while the dissenting members of the Court assert that the same strict scrutiny standard used in the public affirmative action race cases under the U.S. Constitution should be applied to the public affirmative action sex cases under Title VII,⁵⁸ five Justices conclude that a “manifest imbalance” in the workforce could be taken as a sign of actual discrimination or its “lingering effects.” In endorsing this approach, the Court not only adopts a more lenient standard than it

institutions. The ban was upheld by the U.S. Supreme Court in *Schuette v. Coal. to Defend Affirmative Action*, 572 U.S. 291, 314 (2014).

⁵² *Fisher v. University of Texas*, 570 U.S. 297, 312 (2013) (*Fisher I*).

⁵³ *Fisher v. University of Texas*, 136 S. Ct. 2198, 2212-13 (2016) (*Fisher II*).

⁵⁴ *Johnson v. Transp. Agency*, 480 U.S. 616, 616 (1987).

⁵⁵ *Id.* at 641-42.

⁵⁶ 443 U.S. 193, 208-09 (1979).

⁵⁷ *Id.* at 208-09.

⁵⁸ *Johnson*, 480 U.S. at 649 (Scalia, J., dissenting).

came to adopt in reviewing race-conscious affirmative action by a public entity;⁵⁹ it also recognizes past discrimination as the strongest and most appropriate rationale for upholding a sex-conscious affirmative action plan under Title VII. The Court makes no mention of diversity as either a substitute or an alternative rationale; it does not speak about the benefits of women to road crews, or to the public, or about the resentments or discord that could result from “innocent” people being passed over in favor of women. Without finding that illegal sex discrimination had previously occurred, the rationale of the opinion focuses entirely on the benefits of eliminating the effects of past societal discrimination.⁶⁰

In the context of public entities adopting voluntary, sex-conscious affirmative plans challenged under the Equal Protection Clause, most courts have also applied something less than strict scrutiny review. Prior to *Johnson*, in *Califano v. Webster*,⁶¹ the Supreme Court had applied an intermediate standard of review in upholding a Social Security provision that allowed women a more favorable formula for determining Social Security benefits, citing a “long history of discrimination against women” that created a “disparity in economic condition” between women and men.⁶² Consistent with *Califano*, decisions in the Third,⁶³ Fifth,⁶⁴ Ninth,⁶⁵ Tenth,⁶⁶ and Eleventh⁶⁷ Circuits have applied an intermediate standard of review to public

⁵⁹ See *supra* text accompanying note 30.

⁶⁰ It also rejected the premises of Justice Scalia’s dissenting opinion that, (1) without affirmative action, the job criteria were sex-neutral (see *Johnson*, 480 U.S. at 659 (Scalia, J., dissenting)) (“In a discrimination-free world, it would obviously be a statistical oddity for every job category to match the racial and sexual composition of even that portion of the county work force *qualified* for that job; it would be utterly miraculous for each of them to match . . . the composition of the *entire* work force.” (emphasis in original)); and (2) that the absence of women on road maintenance crews meant simply that women were not interested in the jobs (see *id.* at 668 (Scalia, J., dissenting)) (“It is absurd to think that the nationwide failure of road maintenance crews, for example, to achieve the Agency’s ambition of 36.4% female representation is attributable primarily, if even substantially, to systematic exclusion of women eager to should pick and shovel.”)).

⁶¹ 430 U.S. 313, 313 (1977) (per curiam).

⁶² *Id.* at 320.

⁶³ *Contractors Ass’n of E. P. v. City of Philadelphia*, 6 F.3d 990, 1011 (3d Cir. 1993).

⁶⁴ *Dallas Fire Fighters Ass’n v. City of Dallas*, 150 F.3d 438, 441-42 (5th Cir. 1998).

⁶⁵ *W. States Paving Co. v. Wash. Dep’t of Trans.*, 407 F.3d 983, 1003 (9th Cir. 2005).

⁶⁶ *Concrete Works of Colo., Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003).

⁶⁷ *Eng’g Contractors Ass’n of South Fla., Inc., v. Metro. Dade County*, 122 F.3d 895, 902 (11th Cir. 1997).

entity affirmative action cases concerning women, concluding that a long history of discrimination against women in the economic sphere is a sufficient basis for affirmative action, even without proof of discrimination by the government entity that instituted the program.⁶⁸ A few of the cases explicitly note that the U.S. Constitution requires less evidence to justify a sex-conscious affirmative plan than a race-conscious plan.⁶⁹

An exception is the Sixth Circuit Court of Appeals, which in a 1993 case applied strict scrutiny to a sex-conscious affirmative action plan. In doing so, it cites as precedent a prior Sixth Circuit decision that relies upon two U.S. Supreme Court cases challenging *race-conscious* affirmative action plans.⁷⁰ The Federal Circuit Court of Appeals also has shown an intention to apply strict scrutiny in sex cases, announcing that if plaintiffs could show preferential treatment by the U.S. Air Force in selecting officers for involuntary separation, both race and sex classifications would be subject to strict scrutiny.⁷¹

The Seventh Circuit Court of Appeals has also applied strict scrutiny to uphold challenges to affirmative action plans for women, although in those cases, the defender of the plans did not argue for a more deferential standard.⁷² Without a truly litigated precedent in the Circuit, federal district courts in the Seventh Circuit have split on the appropriate standard of review.⁷³ But nothing in the Sixth, Seventh, or Federal Circuit cases suggest that diversity is the primary concern, or

⁶⁸ See, e.g., *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991).

⁶⁹ See, e.g., *Concrete Works*, 321 F.3d at 959-60; *Eng'g Contractors*, 122 F.3d at 908-11; *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580-81 (11th Cir. 1994); *Coral Constr.*, 941 F.2d at 931. At least one decision allowed the extension of a preference beyond the workplace categories in which a numerical disparity is shown. See *Eng'g Contractors*, 122 F.3d at 929.

⁷⁰ See *Brunet v. City of Columbus*, 1 F.3d 390, 403-04 (6th Cir. 1993) (citing *Conlin v. Blanchard*, 890 F.2d 811, 816 (6th Cir. 1989), in turn citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)).

⁷¹ See *Berkley v. United States*, 287 F.3d 1076, 1084 (Fed. Cir. 2002).

⁷² See, e.g., *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 722 (7th Cir. 2007) (applying strict scrutiny to affirmative action plan designed to promote minorities and women, without discussion of any separate standard relating to women or any apparent contention by the county that there should be a more lenient standard); *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir. 1991).

⁷³ *Compare Builders Ass'n of Greater Chi. v. County of Cook*, 123 F. Supp. 2d 1087, 1116 (N.D. Ill. 2000) (finding sex-conscious affirmative action plan invalid under "exceedingly persuasive" standard), *with Builders Ass'n of Greater Chi. v. City of Chicago*, 170 F.R.D. 435 (N.D. Ill. 1996) (applying strict scrutiny to invalidate sex-conscious affirmative action plan).

even a secondary one. The issue, instead, is whether there is a sufficient disparity to suggest that there have been reduced opportunities, past and present, for women.

There have been no sex-conscious affirmative action cases in the education sphere with which to compare the *Bakke* line of cases in the race context. No U. S. Supreme Court case addresses a challenge to an affirmative plan that favors women in a co-educational college or university admissions process.⁷⁴ However, a First Circuit Court of Appeals decision, *Cohen v. Brown University*,⁷⁵ considers the meaning of an affirmative obligation toward women imposed under a Policy Interpretation of Title IX promulgated by the Office for Civil Rights of the U.S. Department of Education. The approach taken in *Cohen* provides a studied contrast to the race cases.

Faced with the need to cut back its support for its athletic programs, Brown University had demoted an equal number of men's and women's sports teams from university-funded varsity status to donor-funded varsity status. Brown's decision was challenged by women students under Title IX, on the ground that while it appeared to be even-handed — the cuts affected an equal number of women's and men's teams⁷⁶ — the policy perpetuated Brown's discriminatory treatment of women in varsity athletics.

The First Circuit does not handle the case as one about the legitimacy of voluntary affirmative action plans⁷⁷ — indeed, Brown's action was one of retrenchment, not special consideration. But the Policy Interpretation at issue in the case⁷⁸ requires colleges and

⁷⁴ For reasons, see *supra* notes 147–52. In 1999, there was an Equal Protection, “reverse discrimination” challenge against a University of Georgia preference for men, adopted to stem the tide of overwhelming majorities of female undergraduates. The district court ruled against the University on its male gender preference and the University decided not to appeal, although it did appeal a ruling in the same case challenging its preference for racial minorities. *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001). The constitutionality of excluding women from a public university was litigated in *United States v. Virginia*, 518 U.S. 515, 519 (1996). See *supra* text accompanying note 81.

⁷⁵ 101 F.3d 155, 155 (1st Cir. 1996).

⁷⁶ In fact, the District Court found that the University's actions resulted in a bigger drop in support for women's sports than men's. By demoting women's volleyball and gymnastics, Brown saved \$62,028, in comparison to the \$15,795 saved by demoting men's golf and water polo. *Cohen v. Brown Univ.*, 879 F. Supp. 185, 187 n.2 (D. R.I. 1995).

⁷⁷ The court took great pains to make this point. See *Cohen*, 101 F.3d at 170 (“Title IX is not an affirmative action statute; it is an anti-discrimination statute . . .”).

⁷⁸ A Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec.

universities receiving federal money, under certain circumstances, to give special attention and priority to women's sports; in this sense, regardless of the court's insistence that Title IX is "not an affirmative action statute," it implicates the same concerns present in *Johnson*, *Bakke*, *Grutter*, and *Fisher*.

The Policy Interpretation states that in order to satisfy Title IX's obligations to provide equal opportunities in athletics programs to women, one of three things must be shown: women's participation in sports must be proportional to their enrollment at the school; the school must show a history and continuing practice of expansion of athletic programs for women; or the school must fully and effectively accommodate the needs of women at the school. As applied in *Cohen*, the Court held that unless women are participating in sports proportional to their school enrollment or unless all of their athletic interests are being satisfied, Brown is not allowed to decrease opportunities for women.

Cohen is instructive in three ways. First, in contrast to the focus on diversity in cases upholding race-conscious affirmative action in college and university admissions, the Court focuses on reducing the accreted consequences of past discrimination. The Court makes no mention of the benefits of women's participation in sports to the university itself, and expresses no concern about the resentments or divisiveness that the Policy Interpretation might create.

Second, in considering the existence of past discrimination that may have stunted women's opportunities to participate, the Court does not allow Brown to defend itself on the ground that women lack the same interest in sports as men.⁷⁹ "Interest and ability rarely develop in a vacuum," the Court explains. "[T]hey evolve as a function of opportunity and experience."⁸⁰ Indeed, rather than being a justification for failing to expand women's opportunities, women's apparent lack of interest underline the depth and pervasiveness of past discrimination.

Third, in *Brown*, it is not necessary to prove past discrimination by Brown itself in order to justify its affirmative obligation to expand

11, 1979), <https://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html>. Subsequent amendments to this Policy Interpretation have, at various times, been made and then withdrawn.

⁷⁹ *Cohen*, 101 F.3d at 178-81. This defense was similar to the point made by Justice Scalia in his dissenting opinion in *Johnson v. Santa Clara County*, with respect to the unlikelihood that women would want shovels requiring use of the pick and shovel. See *Johnson v. Transp. Agency*, 480 U.S. 616, 668 (1987) (Scalia, J., dissenting).

⁸⁰ *Cohen*, 101 F.3d at 179.

opportunities for women. The Court focuses, instead, on the present, and on preventing the disparities of the past to excuse the disparities of the present.

C. Summary

It is important not to overread the contrasts drawn in this section. *Johnson v. Transportation Agency* was decided in 1987, before *Croson* and *Adarand* laid down the need for strict scrutiny in reviewing challenges to race-conscious affirmative action. Given the closeness with which *Johnson* tracks *Weber*, it is possible that the same Court that decided *Croson* and *Adarand* would have demanded a showing of past discrimination by the defendant in *Johnson*. In addition, there are no Supreme Court cases addressing affirmative action for women in the college and university admissions context to which the many race cases can be compared. In 1996, the Supreme Court by a 6–3 majority in *United States v. Virginia*⁸¹ held that it was unconstitutional for the Virginia Military Institute to exclude female students, but the case involved direct evidence of past discrimination by the state of Virginia and did not concern affirmative action. *Cohen*, while addressing a Policy Interpretation of the statute that imposed special obligations on colleges and universities to provide opportunities for women, did not involve an affirmative action admissions program, and it was not decided by the Supreme Court.

Despite these caveats, the differences in how courts approach race- and sex-conscious affirmative action are striking. Notwithstanding the legacy of race-conscious inequalities in this society that are at least as entrenched as inequalities facing women, courts apply legal standards that make race-conscious affirmative action more difficult to defend. Statistical disparities alone, no matter how great, will not justify affirmative action plans to correct the disparities. Moreover, concern for the racial resentments and divisiveness that affirmative action might provoke is used to limit its use. Such is not the case when courts review sex-conscious affirmative action programs. Sex-based disparities are sufficient to justify sex-conscious affirmative action plans, and courts do not resort, in the name of reducing discord, to diversity theories that rely on the benefits to the institution itself rather than on the need to counter institutional disadvantage.⁸²

⁸¹ 518 U.S. 515 (1996).

⁸² Even this rationale is not available in the employment context. See Corey A. Ciocchetti & John Holcomb, *The Frontier of Affirmative Action: Employment Preferences & Diversity in the Private Workplace*, 12 U. PENN. J. BUS. L. 283, 296-97 (2010).

The higher standard of review for race-conscious affirmative action programs mirrors the higher level of opposition among the public for such programs.⁸³ Part III, below, explores some possible explanations for this opposition.

III. EXPLAINING THE GREATER OPPOSITION TO RACE-CONSCIOUS AFFIRMATIVE ACTION

This Part examines some of the factors that might help to explain the greater resistance to race-conscious affirmative action, each of which entails a potential threat to people's self-interest or ideology. Affirmative action may threaten people's material self-interest, their sense of the justness and order of present society, and their judgments about others. This Part addresses each of these potential threats.⁸⁴

This Article does not address reasoned arguments made against affirmative action, especially the frequently made argument that, as a basic matter of equality and individual rights, people should be evaluated as individuals rather than as members of a group.⁸⁵ Even if this argument is based in reason and principle rather than in human psychology,⁸⁶ it should apply equally to race- and sex-conscious programs. Two other reasoned arguments might help to differentiate race and sex. One is that affirmative action makes more sense with respect to women than minorities because, while race differences are socially constructed, there are biological differences between women and men, like pregnancy, that society may wish to accommodate. Another argument is that affirmative action may have a greater

⁸³ Whether court decisions reflect public opinion or public opinion reflects court decisions is immaterial to this Essay, but for an examination of the issue, see Le & Citrin, *supra* note 2, at 266-67.

⁸⁴ For an analysis of the variables that go into the threats posed by affirmative action, see generally C. Lausanne Renfro et al., *The Role of Threat in Attitudes Toward Affirmative Action and Its Beneficiaries*, 36 J. APPLIED SOC. PSYCH. 41 (2006) (analyzing realistic threats, symbolic threats, intergroup anxiety, and negative stereotypes).

⁸⁵ See, e.g., Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1312 (1986). For this argument and others, see also *supra* note 7.

⁸⁶ Some researchers have concluded that statements of principle against affirmative action are motivated by beliefs and attitudes that are not principled. See generally, e.g., Christopher M. Federico & Jim Sidanius, *Racism, Ideology, and Affirmative Action Revisited: The Antecedents and Consequences of "Principled Objections" to Affirmative Action*, 82 J. PERSONALITY & SOC. PSYCH. 488 (2002) (concluding that principled objections to affirmative action are influenced by dominance-related concerns); Jim Sidanius et al., *Racism, Conservatism, Affirmative Action, and Intellectual Sophistication: A Matter of Principled Conservatism or Group Dominance?*, 70 J. PERSONALITY & SOC. PSYCH. 476 (1996) (concluding that the net effects of political conservatism, racism, and social dominance orientation increase with education).

negative effect on racism than on sexism. These are both potential explanations, but to an important extent, they beg the questions that this Part seeks to answer — why is there a greater willingness to accommodate the disabling realities faced by women than the racial realities faced by disadvantaged minority groups, and what causes people to react differently to efforts to reduce race and sex disparities. The analysis in this section speaks to these questions.

The Article also does not explicitly address differences in animus based on race or sex that might explain the gap in level of support for affirmative action. Some researchers identify racial affect or animus as a determination of opposition to affirmative action.⁸⁷ Here again, however, this explanation restates rather than answers the question of why racial animus is stronger than animus toward women. The focus of this Article is on those factors that might explain any such difference.

A. Self-Interest

As an explanation for opposition to affirmative action, self-interest is the most obvious place to start. Researchers distinguish competitive self-interest and cooperative self-interest.⁸⁸ Competitive self-interest refers to people's fear that affirmative action programs will reduce the availability of jobs and school admissions slots to people like themselves.⁸⁹ People whose competitive, group self-interest is threatened by those programs would be predicted to be more likely to oppose them, while people who stand to benefit from these programs

⁸⁷ See, e.g., JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICANS' VIEWS OF WHAT IS AND WHAT OUGHT TO BE 209 (1986).

⁸⁸ See Eliot R. Smith & James R. Kluegel, *Beliefs and Attitudes About Women's Opportunity: Comparisons with Beliefs About Blacks and a General Perspective*, 47 SOC. PSYCH. Q. 81, 83-84 (1984) [hereinafter *Beliefs and Attitudes*]. Smith and Kluegel also discuss, as a form of self-interest, "ideological self-interest," referring to the "adoption of beliefs and attitudes because they promote the perceived fairness of a system from which one benefits (or deny the legitimacy of a system from which one suffers)." *Id.* at 84; see also *infra* text accompanying notes 109–11. The essay addresses the role of ideology, whether it is shaped by self-interest or self-interest shapes it, as a separate phenomenon. See *infra* Part III.B.

⁸⁹ Smith & Kluegel, *Beliefs and Attitudes*, *supra* note 88, at 83-84. On the importance of one's group position to one's perception of one's self-interest, see Lawrence Bobo, *Race, Interests, and Beliefs About Affirmative Action*, 41 AM. BEHAV. SCIENTIST 985, 989 (1998). The research shows that those who oppose affirmative action tend to be focused on their own group's outcome, rather than its effects on the population targeted by an affirmative action program. See Brian S. Lowery et al., *Concern for the In-Group and Opposition to Affirmative Action*, 90 J. PERSONALITY & SOC. PSYCH. 961, 970 (2006).

should be more likely to support them. The evidence supports these predictions. Black men and women are three to seven times more likely to support affirmative action as Whites,⁹⁰ and women are more likely to support affirmative action when women are the beneficiary group than when minorities are favored.⁹¹

Cooperative self-interest refers to the alignment in interests between direct beneficiaries and those who benefit indirectly. Cooperative self-interest will lead people to consider not only what benefits them as individuals, but also what benefits those with whom their interests converge, such as their family members or members of their racial or gender ingroup.⁹² People also may support programs that are *like those* they believe will benefit them, out of the belief that support for one set of programs will help build the coalitions necessary to support the other.⁹³ “Cooperative self-interest,” or “interest convergence,”⁹⁴ can help to explain why more minorities than Whites support affirmative action for women;⁹⁵ why Whites of both genders are about twice as

⁹⁰ Emily W. Kane & Else K. Kyyro, *For Whom Does Education Enlighten? Race, Gender, Education, and Beliefs About Social Inequality*, 15 GENDER & SOC'Y 710, 721 (2001) [hereinafter *For Whom Does Education Enlighten?*] (citing other studies). Blacks are about equally likely to support affirmative action as a remedy for racial and gender inequality. *Id.*; see also *Conflicted Views of Affirmative Action*, *supra* note 2 (reporting that eighty-six percent of nonwhites favor affirmative action in general, as compared to fifty-eight percent of whites).

⁹¹ Vicky M. Wilkins & Jeffrey B. Wenger, *Belief in a Just World and Attitudes Toward Affirmative Action*, 42 POLY STUD. J. 325, 336 (2014) (reporting results of a study showing that being a woman significantly raises the probability of supporting preferential hiring for females, but not Blacks).

⁹² Baunach, *supra* note 13, at 347.

⁹³ Smith & Kluegel, *Beliefs and Attitudes*, *supra* note 88, at 84. Relatedly, women may support affirmative action for minorities, and minorities for women, because their experiences of inequality increase their understanding of the inequalities faced by others. See Emily W. Kane & Kimberly J. Whipkey, *Predictors of Public Support for Gender-Related Affirmative Action: Interests, Gender Attitudes, and Stratification Beliefs*, 73 PUB. OPINION Q. 233, 239 (2009) [hereinafter *Predictors of Public Support*] (citing studies).

⁹⁴ For a powerful and influential analysis of the role of interest convergence in the development of affirmative action law, see Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). Bell's interest convergence theory has been a powerful basis for understanding both civil rights gains, and the limitations of those gains. See Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622-23 (2003) (criticizing the diversity rationale for race-conscious affirmative action on the grounds that it takes into account only the interests of the majority, not the needs of Blacks, and permits college and university officials from dealing with the real problems of minority disadvantage and discrimination).

⁹⁵ See generally Klea Faniko et al., *The Influence of Education on Attitude Toward*

likely to support sex-conscious affirmative action than race-conscious affirmative action;⁹⁶ and why more White women than White men support affirmative action for minorities.⁹⁷

Cooperative self-interest might be expected to generate more support for sex-conscious affirmative action than race-conscious affirmative action because of the greater social interaction and interest convergence between men and women, as compared to Blacks and Whites. People of different races tend to eat, play, work, study, live and love in racially segregated spaces.⁹⁸ In contrast, men and women live, eat, play and fall in love, largely with each other; they share, in this sense, an “in-group.” Not only do men have daughters, wives, sisters, and mothers, with whom they have considerable contact and affinities of interest,⁹⁹ but friendships are more likely to cross the gender line than the race line.¹⁰⁰

Despite the greater convergence of interests between men and the women, the evidence is mixed about how much of the gap in support for race- and sex-conscious affirmative action is explained by it. Historically, men’s and women’s lives have always been entangled with one another and yet women have not been able to count on men to act

Affirmative Action: The Role of the Policy’s Strength, 42 J. APPLIED SOC. PSYCH. 387, 388 (2012) [hereinafter *The Influence of Education*] (stating that minorities are more likely to support gender-based affirmative action); Kane & Whipkey, *Predictors of Public Support*, *supra* note 93, at 235 (reporting that women and Blacks are more likely to support gender-based affirmative action); Ivan Katchanovski et al., *Race, Gender, and Affirmative Action Attitudes in American and Canadian Universities*, 45 CANADIAN J. HIGHER EDUC. 18, 36 (2015) (positional differences outweigh other factors in attitudes toward affirmative action); David A. Kravitz & Judith Platania, *Attitudes and Beliefs About Affirmative Action: Effects of Target and of Respondent Sex and Ethnicity*, 78 J. APPLIED PSYCH. 928, 934 (1993).

⁹⁶ Kane & Kyyro, *For Whom Does Education Enlighten?*, *supra* note 90, at 720-22.

⁹⁷ *Conflicted Views of Affirmative Action*, *supra* note 2 (reporting that sixty-six percent of White women support programs that help Blacks, women, and other minorities get jobs and education, as compared to forty-eight percent of White men).

⁹⁸ One survey published in 1994 showed that 95.5% of all Whites and sixty-eight percent of Blacks live in neighborhoods of their own, or mostly their own race; eighty-nine percent of Whites work entirely or mostly with other Whites and 32.9% of Blacks work entirely or mostly with other Blacks. See MARY R. JACKMAN, *THE VELVET GLOVE: PATERNALISM AND CONFLICT IN GENDER, CLASS, AND RACE RELATIONS* 141 tbl.4.1 (1994).

⁹⁹ See Baunach, *supra* note 13, at 360 (“[M]ost people live in a gender-integrated world, while racial and ethnic segregation continues to reach alarming levels.”); see also Jones, *supra* note 8, at 186 n.43.

¹⁰⁰ In one survey, 90.2% of Whites report that all of their friends are of the same race; an additional 6.4% have one friend of another race. JACKMAN, *supra* note 98, at 157 tbl.4.7. In comparison, only 29.1% of men and thirty-two percent of women limit themselves to friends of their own gender. *Id.* at 158 tbl.4.8. Among Blacks, 65.2% of friends are also Black and nineteen percent have one friend of another race. *Id.*

in their interests. Indeed, many of the disadvantages women have faced — most notably, the expectation that they be the primary caretakers of children — can best be explained as a structural means to keep women occupied in domestic pursuits, for men's benefit.

Indeed, some research concludes that men's support of affirmative action for women tends to *diminish* when they marry. Being married correlates with a reduction by both men and women in support for gender-related affirmative action.¹⁰¹ Married women appear to identify with the interests of their husbands more than husbands identify with them, and “though married men may benefit from an employed spouse's wages, they also benefit from gender inequality within the workplace and home.”¹⁰²

Some research also associates having daughters with a decline in support for affirmative action. A study using a sample of 1,695 employed respondents from cross-sectional data from the 2000, 2002, 2004, and 2006 General Social Surveys found that while having daughters and no sons magnifies support for affirmative action for women by employed mothers, it actually minimizes employed fathers' support for such programs.¹⁰³ Despite some evidence to the contrary,¹⁰⁴ it would seem that for men more than for women, self-interest is likely to trump cooperative self-interest.¹⁰⁵ This explanation

¹⁰¹ Kane & Whipkey, *Predictors of Public Support*, *supra* note 93, at 247.

¹⁰² *Id.* at 240.

¹⁰³ Anastasia H. Prokos et al., *Attitudes about Affirmative Action for Women: The Role of Children in Shaping Parents' Interests*, 62 *SEX ROLES* 347, 347 (2010); see also Dalton Conley & Emily Rauscher, *The Effect of Daughters on Partisanship and Social Attitudes Toward Women*, 28 *SOC. FORUM* 700, 700 (2013) (concluding that having daughters promotes identification with Republican Party, depending upon social status).

¹⁰⁴ See, e.g., Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 *AM. J. POL. SCI.* 37, 37 (2015) (arguing that having daughters can affect the way that judges decide cases on women's issues); Andrew J. Oswald & Nattavudh Powdthavee, *Daughters and Left-Wing Voting*, 92 *REV. ECON. & STAT.* 213, 213 (2010) (concluding, using a British data set, that having daughters is associated with voting for left-wing political parties); Elizabeth A. Sharrow et al., *The First Daughter Effect: The Impact of Fathering Daughters on Men's Preferences for Gender Equality Policies*, 82 *PUB. OPINION Q.* 493, 493-94 (2018) (arguing, based in 2016 Cooperative Congressional Election Study, having a daughter as one's first child leads to higher levels of support for gender-equality policies). For an effort to reconcile some of the research, see Andrew Gelman, *Having Daughters Makes You More Liberal. No, it Makes You More Conservative. No, It . . . ??*, *WASH. POST* (Dec. 18, 2013), https://www.washingtonpost.com/news/monkey-cage/wp/2013/12/18/having-daughters-makes-you-more-liberal-no-it-makes-you-more-conservative-no-it/?utm_term=.cf4154c89550.

¹⁰⁵ See Donna M. Garcia et al., *Opposition to Redistributive Employment Policies for Women: The Role of Policy Experience and Group Interest*, 44 *BRIT. J. SOC. PSYCHOL.* 583,

fits with evidence that many women who oppose affirmative action do so because they prioritize their sons getting into the best colleges, and their husbands obtaining the best jobs.¹⁰⁶

The next section explores ideological factors that might also help to explain the sex/race gap in opposition to affirmative action.

B. Ideology

In explaining people's opposition to affirmative action, some researchers have concluded that people's beliefs or ideologies about the proper order of society and how that order can be achieved is more important than self-interest in the attitudes they have toward affirmative action.¹⁰⁷ Also important are the assumptions or stereotypes people have about the groups of people that inhabit that order.¹⁰⁸ These beliefs and assumptions can derive from people's perceptions of their self-interests, broadly defined, and are thus sometimes referred to as "ideological self-interest."¹⁰⁹ It might make just as much sense, however, to think of the relationship between self-interest and ideology as reciprocal. Self-interest influences people's beliefs about the world, but people's beliefs also influence what they believe is in their self-interest.¹¹⁰ Despite this interrelationship, this Article separates matters of self-interest, which are drawn from people's sense of their own material welfare and advancement, from belief systems and stereotypes that are drawn from people's

595-97 (2005); see also Prokos, *supra* note 103, at 357 (suggesting that having daughters affect men's attitudes only when those interests align with their own self and group interests); Smith & Kluegel, *Beliefs and Attitudes*, *supra* note 88, at 91 (describing how competitive self-interest outweighs cooperative self-interest).

¹⁰⁶ PIERCE, *supra* note 19, at 117.

¹⁰⁷ James R. Kluegel & Eliot R. Smith, *Affirmative Action Attitudes: Effects of Self-Interest, Racial Affect, and Stratification Beliefs on Whites' Views*, 61 SOC. FORCES 797, 813 (1983) [hereinafter *Affirmative Action Attitudes*] (concluding that "current affirmative action attitudes are more strongly determined by the combined influence of racial affect and stratification beliefs than by economic self-interest"); see also Baunach, *supra* note 13, at 360 (concluding that system-justifying beliefs are the most important explanation for people's attitudes about affirmative action).

¹⁰⁸ See John T. Jost et al., *Political Ideology: Its Structure, Functions, and Elective Affinities*, 60 ANNUAL REV. PSYCHOL. 307, 309 (2009) [hereinafter *Political Ideology*].

¹⁰⁹ See Smith & Kluegel, *Beliefs and Attitudes*, *supra* note 88, at 83-84; see also *supra* note 88.

¹¹⁰ See Jost et al., *Political Ideology*, *supra* note 108, at 308 ("[P]eople can be said to choose ideas, but there is also an important and reciprocal sense in which ideas choose people."). The term "elective affinity" is sometimes used to refer to the "mutual attraction" between people's belief systems and their motives or interests. *Id.* at 309.

socialization and psychological predispositions, and not necessarily in their material self-interest.¹¹¹

1. System-Justifying Beliefs

People who have system-justifying beliefs rationalize society's social and economic arrangements as already properly ordered and basically fair.¹¹² To system-justifiers, the world is already a "just world."¹¹³ System-justifying beliefs may derive from self-interest, but they may also be the result of socialization and unconscious psychological processes deployed to reduce uncertainty, threat, and social discord.¹¹⁴ These processes cause people to justify a system even when it does not serve their own economic interests. For those with high levels of system justification, threat only strengthens their belief in the status quo.¹¹⁵

Those with system-justifying beliefs are not concerned with inequality because they believe that success and failure are matters of ability and effort, not structural defects in the status quo.¹¹⁶ They may even believe that inequality is a good thing because it shows that society rewards those who take initiative and work hard, and penalizes those who do not. These beliefs are supported by the neo-liberal

¹¹¹ *Id.* at 308. The distinction is sometimes made between realistic threats to the ingroup's political or economic power, and symbolic threats to one's beliefs. See C. Lausanne Renfro et al., *The Role of Threat in Attitudes Toward Affirmative Action and Its Beneficiaries*, 36 J. APPLIED SOC. PSYCHOL. 41, 43-44 (2006).

¹¹² See Jost et al., *Political Ideology*, *supra* note 108, at 326-27.

¹¹³ For the "just world" hypothesis, see MELVIN J. LERNER, *THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION* (1980); Carolyn L. Hafer & Alicia N. Rubel, *The Why and How of Defending Belief in a Just World*, 51 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 41 (2015).

¹¹⁴ John T. Jost, *A Theory of System Justification*, PSYCHOL. SCI. AGENDA (June 2017), <http://www.apa.org/science/about/psa/2017/06/system-justification.aspx> [hereinafter *System Justification*].

¹¹⁵ *Id.*; Victoria L. Brescoll et al., *The Effects of System-Justifying Motives on Endorsement of Essentialist Explanations for Gender Differences*, 105 J. PERSONALITY & SOC. PSYCH. 891, 893 (2013) (determining heightened threat increases essentialist explanations for gender differences); see *System Justification*, *supra* note 114 (using system justification theory to explain results of research demonstrating support for Donald Trump, the justification of inequality, and the rejection of climate change, by those who stand to be worse off if these positions prevail). System-justifying beliefs also reduce moral outrage, which is positively associated with support for redistributive social policies. See Cheryl J. Wakslak et al., *Moral Outrage Mediates the Dampening Effect of System Justification on Support for Redistributive Social Policies*, 18 PSYCHOL. SCI. 267, 267 (2007).

¹¹⁶ See Kluegel & Smith, *Affirmative Action Attitudes*, *supra* note 107, at 801.

commitments to “choice” and “personal responsibility” that tend to frame current-day discussions of opportunity and fairness. Through the choice lens, inequality is not a collective failing, but instead represents the sum of “conscious and deliberate individual activities.”¹¹⁷ Focusing on choice and individual experiences masks the effect of group decisions and the institutional exercise of power that make the existing distribution of resources and opportunities seem more natural and merit-based than they in fact are.¹¹⁸

Wherever their place in the social and economic hierarchy, those with high levels of system justification tend to oppose affirmative action. Those at the top of the pyramid see their own power and opportunities as deserved, and oppose affirmative action because it challenges that deservedness. These people tend to deflect their racial and class group privilege with a view of egalitarianism based on individualism and merit.¹¹⁹

Those who feel left behind by the status quo adopt system-justifying beliefs in response to the perceived threat of uncertainty, change, and discord. They, too, believe that those who now have power have earned it and are thus not to be blamed;¹²⁰ instead, they blame racial

¹¹⁷ PIERCE, *supra* note 19, at 9. For a comprehensive critique of neo-liberalism as an apology for inequality based on individual choice and autonomy, see David Singh Grewal & Jedediah Purdy, 77 L. & CONTEMP. PROBS. 1 (2015).

¹¹⁸ For a detailed analysis of how the media have cultivated this focus on individual experiences, including the common trope of the innocent male victim of affirmative action, see PIERCE, *supra* note 19.

¹¹⁹ See JACKMAN, *supra* note 98, at 223-26; see also Thomas A. Morton et al., *Shifting Ground: The Variable Use of Essentialism in Contexts of Inclusion and Exclusion*, 48 BRIT. J. SOC. PSYCHOL. 35, 35 (2009) (arguing members of high-status groups tend to essentialize lower-status outgroups when they are or feel that they are under threat). Education may also be a factor, but not always in the way generally assumed. Education is typically associated with rejection of segregation and discrimination as a general matter, but it is also associated with the rejection of group-based policies to address such inequality; one possible explanation is that the better educated have more success to defend, and are better able to string together the rationalizations necessary to do so. See Kane & Whipkey, *Predictors of Public Support*, *supra* note 93, at 249; Kane & Kyyro, *For Whom Does Education Enlighten?*, *supra* note 90, at 710. The highly educated may also be more threatened by programs that challenge their meritocratic views. Faniko et al., *The Influence of Education*, *supra* note 95, at 388 (describing studies showing that education has no effect on “soft” affirmative action policies, but increases opposition to stronger policies, which pose more of a threat to meritocratic beliefs).

¹²⁰ Kluegel & Smith, *Affirmative Action Attitudes*, *supra* note 107, at 802 (“[A]nger is vented toward blacks and the poor alone because beliefs about equality of opportunity and individualist ideology block its expression against higher status groups.”).

minorities who have benefited from government programs like affirmative action for getting more than they deserve, at the expense of people like themselves.¹²¹

System-justifying beliefs predict opposition to both sex-conscious affirmative action and race-conscious affirmative action.¹²² However, those who believe in a “just world” are more likely to oppose affirmative action that favors Blacks than they are to oppose affirmative action that favors women.¹²³ Insofar as system-justifying beliefs correlate with a person’s sense of threat and fear of change, this tendency suggests that people perceive changes in the social order that would benefit minorities as a greater threat than changes that would benefit women.¹²⁴ This perception is strongly influenced by race and gender stereotypes, which are examined in the next section.

2. Stereotyping

While system-justifying beliefs relate to a person’s view of how the world does, and should, work, stereotypes reflect a person’s understanding of the different groups of people that occupy that world.¹²⁵ Sex and race stereotypes both are numerous, but because of important differences between them, beliefs about race are more negative, and more significant in people’s attitudes toward race-conscious affirmative action, than beliefs about sex are to people’s attitudes about affirmative action for women.¹²⁶

To start with, stereotypes about Blacks are virtually all negative.¹²⁷ These negative stereotypes — that they are lazy and irresponsible¹²⁸ —

¹²¹ See *id.* at 814.

¹²² Kane & Whipkey, *Predictors of Public Support*, *supra* note 93, at 247; Kluegel & Smith, *Affirmative Action Attitudes*, *supra* note 107, at 802-03.

¹²³ See Wilkins & Wenger, *supra* note 91, at 336.

¹²⁴ Baunach, *supra* note 13, at 360 (“[T]he threat posed by gender-based affirmative action is perceived as less serious than the threat posed by race-based affirmative action.”).

¹²⁵ Social psychologists John Jost and Mahzarin Banaji characterize system-justification as a form of stereotyping — a form that helps to explain, among other things, why even disadvantaged people sometimes share the negative stereotypes of themselves that others have. John T. Jost & Mahzarin Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRIT. J. SOC. PSYCHOL. 1, 1 (1994).

¹²⁶ Baunach, *supra* note 13, at 359; Kane & Kyyro, *For Whom Does Education Enlighten?*, *supra* note 90, at 723; Kane & Whipkey, *Predictors of Public Support*, *supra* note 93, at 249.

¹²⁷ I set aside the athletic advantages many presume Blacks to have — which scientists refute and which, in any case, affect too few people to influence the affirmative

tend to support the same narrative as system-justifying beliefs: it is the fault of Blacks themselves that they lag behind Whites. These same stereotypes cause others to view Blacks as “responsible for several major threats to social order,” a view sometimes referred to as symbolic racism.¹²⁹ Symbolic racism engenders a sense of racial antipathy that may be expressed as opposition to affirmative action.¹³⁰

Stereotypes about women — including the assumptions that women are weaker, more emotional, less competitive, and not interested in men’s jobs¹³¹ — have also served to rationalize women’s more limited opportunities and lower position on the economic scale.¹³² But while many stereotypes about women are negative — such as their incompetence or emotional instability — others are often understood as compliments.¹³³ Women’s kinder, more nurturing side may make

action debate. The popular case for the superiority of Blacks in athletics, without robust data, is stated in JON ENTINE, *TABOO, WHY BLACK ATHLETES DOMINATE SPORTS AND WHY WE’RE AFRAID TO TALK ABOUT IT* (2008); see also Karen Rowan, *Scientists Theorize Why Black Athletes Run Fastest*, LIFE SCI. (July 13, 2010, 10:04 AM ET), <https://www.livescience.com/10716-scientists-theorize-black-athletes-run-fastest.html>.

¹²⁸ One-half or more of Whites depict Whites as superior in intelligence and dependability and over one-third believe that Blacks are more likely to be lazy. JACKMAN, *supra* note 98, at 327 tbls.8.2 & 8.3. Increasingly, these views track the partisan divisions in this society. According to the Pew Research Center, about half of American adults think that “Blacks who can’t get ahead in this country are mostly responsible for their own condition,” but this figure represents seventy-five percent of Republicans, and only twenty-eight percent of Democrats. See *Partisan Divides Over Political Values Widen*, PEW RES. CTR. (Oct. 4, 2017), http://www.people-press.org/2017/10/05/1-partisan-divides-over-political-values-widen/1_1-18/. In contrast to this forty-seven-point gap, the gap in 1994 was only thirteen points. *Id.*

¹²⁹ Kluegel & Smith, *Affirmative Action Attitudes*, *supra* note 107, at 800.

¹³⁰ *Id.* at 800-01.

¹³¹ See, e.g., Kingsley R. Browne, *Sex and Temperament in Modern Society: A Darwinian View of the Glass Ceiling and the Gender Gap*, 37 ARIZ. L. REV. 971, 977, 1005 (1995) (arguing that there is no “glass ceiling” problem because women themselves choose to exploit their evolutionary advantage as mothers over the status-seeking, competitiveness and risk-taking necessary to excel in the workplace).

¹³² This theory was followed in now-Justice Ruth Bader Ginsburg’s litigation strategy in the 1970s and 1980s, attempting to overturn laws that treated women more favorably than men based on benign stereotypes. See Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 41-42 (1975); see also *Associated Gen. Contractors of Cal. v. San Francisco*, 813 F.2d 922, 941-42 (9th Cir. 1987) (reasoning that despite the potential benefits of affirmative action for women, broad preferences can reinforce harmful stereotypes); Rosalie Berger Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 HARV. J. L. & GENDER 1, 5 (2011).

¹³³ This is likely what Chief Justice Rehnquist meant when, at his confirmation hearings for the U.S. Supreme Court, he stated that distinctions between women, while very unfair to them, “are not genuinely invidious in the way” there are

them unsuited for certain occupations, but people may believe that these same stereotypes make women better parents of young children, more qualified to be secretaries, teachers, and nurses, and even nicer as people. Researchers have coined the term “benevolent sexism” to describe the belief set of those who hold stereotypes about women that they perceive as flattering, or benign.¹³⁴

The benevolent nature of stereotypes about women can have a range of attitudinal consequences. Because stereotypes about members of racial minorities are virtually all negative, people often feel shame for holding them, which makes them defensive and resentful.¹³⁵ The fact that stereotypes about women have a positive connotation means that those who hold these stereotypes do not necessarily feel badly about it; indeed, they can think of themselves as favorable to and supportive of women. As a result, having these stereotypes carries little or no shame. Without shame, benevolent stereotypers do not feel threatened or defensive.¹³⁶ This absence of shame, in itself, reduces the resistance to programs that promote women.¹³⁷

People also tend to believe that there are more actual differences between the sexes than between the races,¹³⁸ and that these differences

distinctions between races. See PAUL M. COLLINS, JR. & LORI A. RINGHAND, SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE, ch. 6, n.96 (2013) (citing transcript of Rehnquist confirmation hearing).

¹³⁴ The classic work on benevolent sexism is Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 7 PSYCHOL. WOMEN Q. 119, 119 (1996).

¹³⁵ Researchers distinguish between shame and guilt. White guilt, which is associated with the belief that other Whites are racially prejudiced, may lead to support for corrective actions, while shame, which entails feeling bad about oneself, leads to a lack of support for affirmative action. See Paul W. Eftim et al., *Gender Role Stress in Relation to Shame, Guilt, and Externalization*, 79 J. COUNSELING. & DEV. 430, 431 (2001); Janet K. Swim & Deborah L. Miller, *White Guilt: Its Antecedents and Consequences for Attitudes Toward Affirmative Action*, 25 PERSONALITY & SOC. PSYCHOL. BULL. 500, 501 (1999). This essay does not separately analyze the phenomenon of guilt, but the research is largely consistent with the research about threat. One researcher concludes that White guilt supports weak forms of affirmative action, but is associated with increased opposition to stronger forms. See Aarti Iyer et al., *White Guilt and Racial Compensation: The Benefits and Limits of Self-Focus*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 117, 126 (2003). Researchers contrast guilt, which is a self-focused emotion, from sympathy, which focuses on the welfare of the harmed. *Id.* at 124-26.

¹³⁶ See generally Klea Faniko et al., *Quota Women Are Threatening to Men: Unveiling the (Counter) Stereotypization of Beneficiaries of Affirmative Action Policies*, 76 SWISS J. PSYCHOL. 107, 113 (2017) [hereinafter *Quota Women*].

¹³⁷ See Gloria Fraser et al., “We Want You in the Workplace, but Only in a Skirt!” *Social Dominance Orientation, Gender-Based Affirmative Action and the Moderating Role of Benevolent Sexism*, 73 SEX ROLES 231, 240 (2015).

¹³⁸ JACKMAN, *supra* note 98, at 340 tbl.8.8.

are not man-made, but biological or God-given. This tendency, too, contributes to the lesser shame associated with sex stereotypes. When people are corrected about the stereotypes they hold about women that have at least some biological basis — such as stereotypes about pregnancy — these beliefs can often be dismissed as, at worst, honest mistakes. In contrast, racial stereotypes are understood to have no factual basis, and thus to be the result of prejudice or animus, which is harder to forgive.¹³⁹

Finally, benevolent sex stereotypes affirmatively support a narrative in favor of affirmative action. These stereotypes include the paternalistic view that “women should be cherished and protected due to their gentle and nurturing nature.”¹⁴⁰ This view is consistent with the notion that, although women may be inferior to men, they need men’s help, and deserve to get it. There are no equivalent race stereotypes.¹⁴¹ The closest parallel — that Whites, as the superior race, have an obligation to care for the inferior slave race — is a product of a plantation economy and no longer operates as a plausible rationale for racial subordination.¹⁴² Race stereotypes work in only one direction — to evoke a sense of threat and explain why Blacks do not deserve a helping hand.

Just as threat increases rationalizations of existing unequal distributions of power and privilege,¹⁴³ social science evidence shows that it also increases stereotyping.¹⁴⁴ The extent of this increase correlates with the degree of threat, explored in Part IV.

IV. DIFFERENCES IN DEGREE

Across the psychological and cognitive factors that might help explain the race-sex gap in opposition to affirmative action are matters

¹³⁹ This distinction may help to explain the difference in the constitutional standard of review applied to classifications based on race and sex, as well as the significance of animus in equal protection doctrine. See generally Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012).

¹⁴⁰ Fraser et al., *supra* note 137, at 240.

¹⁴¹ For research demonstrating the stronger role of paternalism in sexism than in racism, see JACKMAN, *supra* note 98, at 294 (“In race and class relations, the structure of interaction across group lines is less favorable to paternalism.”).

¹⁴² John C. Calhoun, *Speech in the U.S. Senate, 1837*, in *DEFENDING SLAVERY* 54, 58-59 (2003) (lauding slavery for having improved the conditions of the Black race physically, morally and intellectually).

¹⁴³ See *supra* Part III.B.I.

¹⁴⁴ See Faniko, *Quota Women*, *supra* note 136, at 107 (describing an Albanian study showing quotas for women reinforced sex stereotypes); see also Brescoll et al., *supra* note 115 (arguing threat increases essentialist explanations for gender difference).

of degree that influence the strength of opposition to affirmative action.

The research is clear that the greater the procedural strength — that is, the degree to which an affirmative action policy weighs group membership — the more people tend to oppose the measure.¹⁴⁵ This is because the more race counts, the greater the potential threat to the self-interest and ideological commitments of those not helped by the policy. Thus, a compulsory quota will be viewed as more threatening than a rule requiring only that decision-makers give heightened attention to the qualifications of minorities and women, and thus give rise to stronger objections. Insofar as race-conscious programs generally do not give stronger preferential treatment than sex-conscious programs, however, this factor would not seem to explain the gap in support gap for race- and sex-conscious programs.¹⁴⁶

More significant is the extent of an affirmative action program's perceived impact. The more change people believe is brought about by a program, the more threatened they will feel by it, and thus the more likely they will to oppose it. The clearest test of this factor would be with respect to affirmative action programs in college and university admissions processes. Affirmative action has had little impact on the admissions of women to colleges and universities. Women outperform men in high school, earning better grades and accounting for seventy percent of valedictorians.¹⁴⁷ Without any significant affirmative action, women are overrepresented in colleges and universities, especially

¹⁴⁵ See Le & Citrin, *supra* note 2, at 162-81 (reporting numerous studies showing that public opinion is far more hostile to “hard” forms of affirmative action than “soft” forms); Lowery et al., *supra* note 89, at 966 (concluding that the opposition of Whites to affirmative action “is in part a function of procedural strength”); see also Faniko et al., *Quota Women*, *supra* note 136, at 109, 113 (concluding that stronger preferences for women are more threatening to men, and thus do more to reinforce sex stereotypes).

¹⁴⁶ This could change. While quota-based affirmative action programs are almost unheard of today in the United States, California's recent measure requiring the appointment of women to the boards of publicly-traded companies might be expected to tighten the gap in support between race-conscious and sex-conscious programs. See Kim Elsesser, *California Mandates Women on Corporate Boards, But Do Quotas Work?*, FORBES (Oct. 2, 2018, 5:04 PM), <https://www.forbes.com/sites/kimelsesser/2018/10/02/california-mandates-women-on-corporate-boards-but-do-quotas-work/#14fb47be5866> (describing possible backlash to quotas for women).

¹⁴⁷ Jon Birger, *Why Getting into Elite Colleges Is Harder for Women*, WASH. POST (July 30, 2015), https://www.washingtonpost.com/posteverything/wp/2015/07/30/achieving-perfect-gender-balance-on-campus-isnt-that-important-ending-private-colleges-affirmative-action-for-men-is/?utm_term=.6baf311325dd.

among low-income populations.¹⁴⁸ During the 2013–14 school year, women earned 57.1 percent of all bachelor's degrees, sixty percent of all master's degrees, and 51.8 percent of all doctoral degrees awarded in the United States.¹⁴⁹ Indeed, many elite private colleges and universities now admit men under lower standards than are applied to women in order to avoid a significant imbalance in favor of women,¹⁵⁰ although such a practice by the University of Georgia was found to be unconstitutional.¹⁵¹ Affirmative action for women is largely limited to professional and graduate schools, particularly in the STEM fields where women are still significantly underrepresented.¹⁵²

In contrast, race-conscious affirmative action plans at colleges and universities have had a significant impact. Minority enrollment in colleges and universities has more than doubled since 1976.¹⁵³ This

¹⁴⁸ According to the U.S. Department of Education, fifty-six percent of college students in 2017 were women. Jon Marcus, *Why Men Are the New College Minority*, ATLANTIC (Aug. 8, 2017), <https://www.theatlantic.com/education/archive/2017/08/why-men-are-the-new-college-minority/536103/>.

¹⁴⁹ NAT'L CENTER FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS, BACHELOR'S, MASTER'S AND DOCTOR'S DEGREES CONFERRED BY POSTSECONDARY INSTITUTIONS BY SEX OF STUDENT AND DISCIPLINE DIVISION: 2013–14 (2015), https://nces.ed.gov/programs/digest/d15/tables/dt15_318.30.asp; AAUW *Issues: Higher Education*, AAUW, <https://www.aauw.org/what-we-do/public-policy/aauw-issues/higher-education/> (last visited Jan. 24, 2019).

¹⁵⁰ See Birger, *supra* note 147 (describing two to five percentage point advantages for male applicants at Brown, Columbia, Vanderbilt, Pomona, and Williams).

¹⁵¹ See *Johnson v. Bd. of Regents of the Univ. of Ga.*, 263 F.3d 1234, 1237 (11th Cir. 2001).

¹⁵² According to the U.S. Department of Commerce, women filled forty-seven percent of jobs in 2015, but only twenty-four percent of jobs in STEM fields. *Women in STEM: 2017 Update*, U.S. DEP'T OF COMMERCE (Nov. 13, 2017), <http://www.esa.doc.gov/reports/women-stem-2017-update>. For a summary of programs, see Roya Pakzad, *Affirmative Action for Women in STEM* (Working Paper, 2015), http://www.academia.edu/18613873/Affirmative_Action_for_Women_in_STEM. Some researchers have concluded that affirmative hiring for women in the STEM fields is more about effort than preferences. See, e.g., Stephen J. Ceci & Wendy M. Williams, *Women Have Substantial Advantage in STEM Faculty Hiring, Except When Competing Against More-Accomplished Men*, FRONTIERS IN PSYCHOL. (Oct. 20, 2015), <https://www.frontiersin.org/articles/10.3389/fpsyg.2015.01532/full>; see also Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Trade-Off*, 54 J. ECON. LITERATURE 3, 4 n.3 (2016) (stating that women have been the beneficiaries of affirmative action in admissions only if they are members of particular racial or ethnic groups).

¹⁵³ NAT'L CENTER FOR EDUC. STAT., STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC MINORITIES, INDICATOR 24: ENROLLMENT (2010) (Black enrollment in all degree-granting programs for part-time and full-time students grew from 943,000 to 2,269,000 between 1976 and 2008). The increase is most substantial at elite colleges and universities. See WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCE OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 7

increased enrollment is perceived as a direct threat to Whites, especially in elite institutions. Overall, although minorities have still not approached parity with Whites in institutions of higher education,¹⁵⁴ the percentage of White college students fell from eight-four percent in 1976 to sixty percent in 2012.¹⁵⁵

In employment, there are significantly more minorities *and* women in the workforce than before the days of affirmative action. In 1972, Whites outnumbered Blacks by nine to one; by 2010, this ratio was seven to one.¹⁵⁶ Although not achieving parity, according to U.S. Labor Department statistics, the number of Blacks in the workforce has doubled in the past forty years, compared with a sixty percent increase among Whites.¹⁵⁷ These gains went disproportionately to Black women, whose labor rate participation went from 48.7 percent in 1972 to 59.4 percent in 2016.¹⁵⁸

(1998) (based on data from 80,000 students admitted to twenty-eight selective private or public colleges and universities in 1951, 1976, and 1989, the proportion of African-American students at Ivy League schools increased from 2.3% in 1967 to 6.3% in 1976); David L. Chambers et al., *Michigan's Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 494 (2000) (without race conscious admissions policies, minorities would have been less than three percent of graduates of the University of Michigan Law School in the 1990s and even less than that in the 1970s and 1980s; instead, as a result of those policies, percentage of minority graduates was 7.6% in the 1970s, 10.2% in the 1980s and 15.4% in the 1990s); Richard O. Lempert et al., *Michigan's Minority Graduates in Practice: Answers to Methodological Queries*, 25 LAW & SOC. INQUIRY 585, 594-96 (2000).

¹⁵⁴ See Jeremy Ashkenas et al., *Even with Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges than 35 Years Ago*, N.Y. TIMES (Aug. 24, 2017), <https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html> (reporting gap between percentage of college-age Blacks and college enrollments of seven percent in 1980, as compared to ten percent in 2015). The percentages of Black enrollment are higher at the most elite colleges and universities where Black enrollment is nine percent, as compared to six percent of all colleges and universities. *Id.* The biggest gaps are at the public flagship universities, particularly those in states that have made affirmative action illegal in their public universities. *Id.* (showing Black enrollments at UC Berkeley, Washington, Nebraska, and Arizona all at five percent or below).

¹⁵⁵ Victoria M. Massie, *White Women Benefit Most from Affirmative Action — And Are Among Its Fiercest Opponents*, VOX (June 23, 2016), <https://www.vox.com/2016/5/25/11682950/fisher-supreme-court-white-women-affirmative-action>.

¹⁵⁶ Richard Wolf, *The Goal Then and Now: Jobs*, USA TODAY (Aug. 19, 2013), <https://www.usatoday.com/story/news/nation/2013/08/19/march-on-washington-affirmative-action/2645963/>.

¹⁵⁷ *Id.*

¹⁵⁸ *Women in the Labor Force*, U.S. DEP'T OF LABOR, https://www.dol.gov/wb/stats/NEWSTATS/facts/women_lf.htm#two (last visited Jan. 23, 2019) (showing a chart of the Labor Force Participation Rates by Sex, Race, and Hispanic Ethnicity). Black men's labor participation rate in that period declined from 73.6% to 64.1%. *Id.*

Women of all races have seen tremendous job gains since the early days of affirmative action. From 1962 to 2000, the percentage of women sixteen and older in the workforce increased from thirty-seven percent to sixty-one percent, although it had fallen back to 57.2 percent by 2016.¹⁵⁹ Women's share of the labor force in 1960 was thirty-three percent and had risen to forty-seven percent by 2016; in the same period, men's share of the labor force fell from sixty-seven percent to fifty-three percent.¹⁶⁰ In some previously male-dominated professions, women have made especially significant strides. For example, 9.4 percent of the nation's police were women in 1983; by 1998, the percentage was 16.3 percent.¹⁶¹ Between 1970 and 2002, the percentage of women physicians tripled, from 7.6 percent to 25.2 percent.¹⁶² In the total workforce, again, gains have been largest among Black women. Data from the Equal Employment Opportunity Commission show that Black women's share of employment at large U.S. firms increased from 4.7 to 5.8 percent in the thirty-year period from 1973 to 2003,¹⁶³ while White women's share held steady at about thirty-three percent.¹⁶⁴

While the workplace gains by minorities and women over the past thirty years are significant, it is not easy to determine how much those gains are attributable to affirmative action. One way researchers have tried to tie progress made by minorities and women to affirmative action is to determine the impact of its repeal in certain states. The figures are impressive with respect to race. A study of the representation of Whites and Blacks in the workforce in California, Michigan, Nebraska and Washington concludes that after the repeal of

¹⁵⁹ Sandra E. Black et al., *The Recent Decline in Women's Labor Force Participation*, in *THE 51% DRIVING GROWTH THROUGH WOMEN'S ECONOMIC PARTICIPATION* 1, 1 (Diane Whitmore Schanzenbach & Ryan Nunn eds., 2017), <https://www.brookings.edu/multi-chapter-report/the-51-percent-driving-growth-through-womens-economic-participation/>.

¹⁶⁰ *Women in the Labor Force*, *supra* note 158 (showing a chart of the Civilian Labor Force by Sex).

¹⁶¹ U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES: 1999*, at 426 (comparing Employed Civilians, by Occupation, Sex, Race, and Hispanic Origin in 1983 and 1998).

¹⁶² GARLAND PINKSTON, JR., *CITIZENS' COMM'N ON CIVIL RIGHTS, AFFIRMATIVE ACTION TO OPEN THE DOORS OF JOB OPPORTUNITY* 123-29 (1984); Massie, *supra* note 155.

¹⁶³ Fidan Ana Kurtulus, *The Impact of Affirmative Action on the Employment of Minorities and Women: A Longitudinal Analysis Using Three Decades of EEO-1 Filings*, 35 *J. POL'Y ANALYSIS & MGMT.* 34, 34-35 (2016) [hereinafter *The Impact of Affirmative Action*]. The Kurtulus data actually shows a small decline among White women. *Id.* at 53 (showing a decline in employment share for White women of 0.369% among federal contractors who became subject to affirmative action requirements).

¹⁶⁴ *Id.* at 35.

affirmative action in those states, the percentage of employed White men went up by 4.7 percent, while the number of employed Black women decreased by four percent, a decline growing larger over time.¹⁶⁵

Other studies have attempted to get at the impact attributable to affirmative action by comparing employment figures in firms holding federal contracts, and therefore subject to federal affirmative action requirements, to those without federal contracts. One study showed that while affirmative action explained gains by Black and Native American women and men, it did not explain gains by White women. For example, the data show that federal affirmative action requirements accounted for almost a one percent increase for Black women, and a 0.6 percent increase for Black men,¹⁶⁶ but did not increase the share of employment for Hispanics or White women.¹⁶⁷ Several other studies have also shown that women's gains in the workplace would have happened without affirmative action. The study of employment patterns in six Florida cities, for example, concludes that affirmative action was not significantly related to any increased level of White female employment when controlling for other variables.¹⁶⁸ A better explanation for women's gains may be, as one

¹⁶⁵ Fidan Ana Kurtulus, *The Impact of Eliminating Affirmative Action on Minority and Female Employment: A Natural Experiment Approach Using State-Level Affirmative Action Laws and EEO-4 Data* (Univ. of Mass. Amherst & Harvard Law Sch., Working Paper, 2013), <http://gap.hks.harvard.edu/impact-eliminating-affirmative-action-minority-and-female-employment-natural-experiment-approach>.

¹⁶⁶ Kurtulus, *The Impact of Affirmative Action*, *supra* note 163, at 53. Much of the gains were in the early years, with some reversals in gains starting in the early 1980s. *Id.* at 60.

¹⁶⁷ *Id.* at 53. These studies would seem to contradict the popular assertion that White women have benefitted most by affirmative action. *See, e.g.*, Kane & Whipkey, *Predictors of Public Support*, *supra* note 93, at 234 (asserting that "in sheer numbers, more women than people of color have benefitted from affirmative action programs in the United States"); Massie, *supra* note 155. A time study found that in the period between 1965 and 1980, women benefitted in terms of greater stability of employment, in comparison to men whose employment status became more sensitive to variations in employment, but this study does not appear to control for factors not related to EEO enforcement or affirmative action programs. Noel D. Uri & J. Wilson Mixon, Jr., *Effects of U.S. Equal Employment Opportunity and Affirmative Action Programs on Women's Employment Stability*, 26 *QUALITY & QUANTITY* 113, 113 (1992). The Uri & Mixon study does show that during the period of the Reagan administration, which reduced its EEO enforcement efforts, women lost some of their gains. *See id.* at 115.

¹⁶⁸ James Button et al., *White Women and Affirmative Action in Employment in Six Southern Cities*, 43 *SOC. SCI. J.* 297, 301 (2006).

study shows, that White women are the best educated among disadvantaged groups.¹⁶⁹

In sum, minorities have benefited more than women from affirmative action, especially with respect to college and university admissions, fueling perceptions that they are a greater threat. The differential could help to explain both why people oppose race-conscious affirmative action more than sex-conscious affirmative action, and also why opposition to affirmative action in college and university admissions runs somewhat ahead of opposition to affirmative action in hiring and promotions.¹⁷⁰

V. AVOIDING SOCIAL DISCORD: AT WHAT COST?

Self-interest, system-justifying views, and stereotypes all seem to offer plausible, if only partial, explanations for opposition to affirmative action, as do the strength of an affirmative action preference and the overall impact, or perceived impact, of a program. Based on these factors, this Article has highlighted some differences in the nature of opposition to affirmative action on behalf of minorities and women. This section moves from the explanations for the opposition to affirmative action to a consideration of the goal of reducing that opposition. Does this goal make sense?

Common to each explanation for the disparity in support between race- and sex-conscious affirmative action — self-interest, system-justifying beliefs, and stereotypes — is its connection with the threat that affirmative action programs may evoke. Some experimental research suggests that the diversity rationale is less likely to evoke system threat, and thus does not evoke the same level of opposition to affirmative action.¹⁷¹ One explanation is that a diversity rationale does

¹⁶⁹ See *id.* at 298.

¹⁷⁰ This is a difficult gap in pin down. According to a poll from the Pew Research Center for the People & the Press, sixty-three percent of respondents generally favor affirmative action “to help blacks, women, and other minorities get better jobs and education,” but when a question is asked only about programs “designed to increase the number of black and minority students on college campuses,” only sixty percent say that it is a “good thing.” *Conflicted Views of Affirmative Action*, *supra* note 2. Insofar as the general affirmative action question included education as well as jobs, it is likely these figures understate the gap. Other opinion polling indicates that over sixty percent of people oppose affirmative action in the education context. See *supra* note 3.

¹⁷¹ See Aneeta Rattan & Nalini Ambady, *Diversity Ideologies and Intergroup Relations: An Examination of Colorblindness and Multiculturalism*, 43 *EUR. J. SOC. PSYCHOL.* 12, 14 (2013); Stacey J. Sasaki & Jacquie D. Vorauer, *Ignoring Versus Exploring Differences Between Groups: Effects of Salient Color-Blindness and Multiculturalism on Intergroup Attitudes and Behavior*, 7 *SOC. & PERSONALITY PSYCHOL.*

not require Whites to face up to their own race privilege. People who are unaware of their race privilege feel less threatened and less guilty, and thus have more satisfaction with existing realities and fewer resentments.¹⁷² Another potential psychological mechanism is that a focus on diversity encourages an outward focus on the distinctive, positive qualities of other groups, as compared to the inward focus on people's own behavior generated by a color-blind perspective or more aggressive, race-conscious rationales focused on "stamping out racism."¹⁷³ This research provides some support for Justice Powell's assumption that the diversity rationale could mitigate the "deep resentment" that "innocent persons" might experience¹⁷⁴ and thus increase support for measures to reduce race disparities.¹⁷⁵

Despite the research suggesting that the diversity rationale lessens system-threat and thus opposition to affirmative action, it is not clear that the reality has matched what the science has predicted. For one thing, there is little evidence that the emphasis on diversity in college and university admissions processes has diminished resentment over affirmative action.¹⁷⁶ Multiple experimental studies have shown that the diversity rationale does not reduce race and sex stereotyping, and may even increase it.¹⁷⁷

It is also not clear that people, even when they prefer a diversity rationale for affirmative action to its alternatives, buy into the

COMPASS 246, 251 (2013). Both of these studies conclude, however, that diversity ideologies do not reduce stereotyping. *See id.* at 249; *see also* Ashley E. Martin, *The Divergent Effects of Diversity Ideologies for Race and Gender Relations* 57 (Apr. 21, 2018) (unpublished Ph.D. thesis, Columbia University), <https://academiccommons.columbia.edu/doi/10.7916/D8ST95WK>.

¹⁷² *See* Roger L. Worthington et al., *Color-Blind Racial Attitudes, Social Dominance Orientation, Racial-Ethnic Group Membership and College Students' Perceptions of Campus Climate*, 1 J. DIVERSITY IN HIGHER EDUC. 8, 8 (2008) (finding that students who have color-blind racial attitudes are less aware of their racial privilege, report more favorable views of the general campus climate and of race relations on campus).

¹⁷³ *See* Jacquie D. Vorauer et al., *Salient Intergroup Ideology and Intergroup Interaction*, 20 PSYCHOL. SCI. 838, 840 (2009).

¹⁷⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 294 n.34 (1978) (Powell, J.) (plurality opinion); *see also* Mishkin, *supra* note 9, at 918 (arguing that Justice Powell, through the diversity rationale, found a way to "heal wounds and defuse emotion").

¹⁷⁵ *See* Reva B. Siegel, *supra* note 10, at 1300-03 (stating the case that resentments among the racially privileged stand in the way of efforts to improve opportunities for disadvantaged groups through moderate reforms).

¹⁷⁶ *See* Newport, *supra* note 3 (showing that opposition has not diminished).

¹⁷⁷ *E.g.*, Martin, *supra* note 171 (referencing gender context); Rattan & Ambady, *supra* note 171, at 19 (referencing race context); Sasaki & Vorauer, *supra* note 171, at 249 (referencing race context).

supposed benefits of diversity.¹⁷⁸ Research based on interviews with 680 start-up founders and executives in the tech industry revealed that while business leaders say that building a diverse workplace is very important, only twelve percent employed five or more employees from diverse or underrepresented backgrounds and thirty-two percent of them employed no women or minorities at all.¹⁷⁹ There is no doubt that a stated commitment to diversity goals is itself good for business, although the “business case” for diversity is not entirely convincing.¹⁸⁰ The most significant benefit may be that diversity goals make people feel better about themselves; it confirms to other people and to

¹⁷⁸ For an examination of “diversity faultlines” that highlights the negative side of diversity, see generally Sherry M.B. Thatcher et al., *Cracks in Diversity Research: The Effects of Diversity Faultlines on Conflict and Performance*, 12 GROUP DECISION & NEGOT. 217 (2003).

¹⁷⁹ LAWLESS RESEARCH, TECH STARTUPS: DIVERSITY AND INCLUSION 6 (2018); see also Jared Lindzon, *Tech Founders Still Don't Believe Diversity Can Boost the Bottom Line*, FAST COMPANY (Sept. 13, 2016), <https://www.fastcompany.com/3063643/tech-founders-dont-believe-diversity-can-be-a-bottom-line-booster>.

¹⁸⁰ The literature is full of articles on the business case for diversity. See, e.g., CATALYST INFO. CTR., WHY DIVERSITY MATTERS (2013), https://www.catalyst.org/system/files/why_diversity_matters_catalyst_0.pdf; CHARTERED INST. OF PERSONNEL & DEV., DIVERSITY AND INCLUSION AT WORK: FACING UP TO THE BUSINESS CASE, SUMMARY REPORT 2 (2018), https://www.cipd.co.uk/Images/diversity-and-inclusion-at-work_2018-summary_tcm18-44150.pdf; Gail Robinson & Kathleen Dechant, *Building a Business Case for Diversity*, 11 ACAD. OF MGMT. EXEC. 21 (1997). Yet much of the academic research suggests that the business case for diversity is mixed. See, e.g., Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009) (in a sample of U.S. firms, finding that gender-diverse corporate boards allocate more effort to monitoring, but that overall effect of gender diversity on firm performance is negative); Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q.J. ECON. 137 (2012) (based on impact of gender quotas in Norway, finding that the quota caused a significant drop in stock price, increases in leverage and acquisitions, and deterioration in operating performance); Cristian L. Dezső & David Gaddis Ross, *Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation*, 33 STRATEGIC MGMT. J. 1072 (2012) (based on fifteen years of panel data on the top management teams of the S&P 500 firms, finding that female representation in top management improves firm performance but only to the extent that a firm's strategy is based on innovation); Greg Filbeck et al., *Does Diversity Improve Profits and Shareholder Returns? Evidence from Top Rated Companies for Diversity by DiversityInc*, 37 ADVANCES IN ACCT. 94 (2017) (finding that most diverse firms outperform the S&P 500 index, but that the difference is explained by differences in firm size); David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, 5 AM. ECON. J. 136 (2013) (based on impact of gender quotas of corporate boards in Norway, concluding that female board members undertake fewer workforce reductions, leading to increased labor costs and lower profits than comparison firms).

themselves that they are not racists.¹⁸¹ There is a difference, though, between diversity rhetoric based on an assumed premise that diversity is good for everyone and a genuine commitment to reducing racial inequalities. It is sometimes difficult to see how the diversity rationale itself, with its focus on the benefits to the institution rather than the victims of these inequalities, enhances such a commitment.

Still other difficulties relate to the messages the diversity rationale conveys. As noted by many commentators, in focusing on the benefits of affirmative action to those already in power rather than to the disadvantaged themselves, the diversity rationale allows dominant people to ignore their own race advantage.¹⁸² Indeed, it is only by reinforcing a sense of innocence among the racially privileged that the diversity rationale can reduce threat and preserve racial “harmony.” In this sense, using a diversity rationale to justify affirmative action is a little like addressing domestic violence by persuading the batterer that *he* is better off by not engaging in domestic violence, rather than his wife.

Some social science evidence is beginning to explore the limitations of an approach that reduces the salience of the very wrong it is trying to address. A number of studies have shown that an approach to inter-ethnic relations that recognizes different group realities members of different races face generates more positive and accurate intergroup stereotypes than a colorblind approach.¹⁸³ A recent doctoral dissertation finds a positive association between greater race awareness and a decline in system justification beliefs; people who are aware of the effects of race on opportunity are more open to reforms that improve opportunity for racial minorities.¹⁸⁴ Conversely, race blindness increases the likelihood that people will think the status quo

¹⁸¹ See, e.g., Ben C. Fletcher, *Diversity and Inclusiveness Is Good for Your Well-Being*, PSYCHOL. TODAY (Sept. 18, 2016), <https://www.psychologytoday.com/us/blog/do-something-different/201609/diversity-and-inclusiveness-is-good-your-well-being> (describing research associating diversity and inclusion behaviors with well-being); Katherine W. Phillips, *How Diversity Makes Us Smarter*, GREATER GOOD MAG. (Sept. 18, 2017), https://greatergood.berkeley.edu/article/item/how_diversity_makes_us_smarter (citing studies showing that working with those who are different makes people more creative, diligent, and hard-working).

¹⁸² See, e.g., James, *supra* note 8 (describing how the diversity rationale influences White identity and a sense of privilege).

¹⁸³ See, e.g., Christopher Wolsko et al., *Framing Interethnic Ideology: Effects of Multicultural and Color-Blind Perspectives on Judgments of Groups and Individuals*, 78 J. PERSONALITY & SOC. PSYCHOL. 635 (2000).

¹⁸⁴ Martin, *supra* note 171, at 25, 28, 86 (showing, in experimental research, that those who more strongly endorse race awareness are less likely to endorse system-justifying beliefs).

is justified and thus oppose affirmative action.¹⁸⁵ What this research suggests is that in smoothing over resentments and reducing feelings of negativity,¹⁸⁶ the diversity rationale is also likely to reduce awareness of race inequality and the commitment to ending discrimination associated with that awareness.

Sex-conscious affirmative action poses a different problem. Sex-conscious affirmative action has not been controversial enough to send courts looking for an alternate, less threatening rationale. Instead, courts justify it on grounds of reducing the effects of societal discrimination against women. Yet, despite being upfront about the harms of social discrimination, the primary factor influencing more positive attitudes toward affirmative action for women, as discussed above, are the gender stereotypes upon which women's subordination is based. Therein lies the problem. The belief that women are weaker or in need of a helping hand may generate support for affirmative action, but in accentuating women's differences from men, it also reinforces the stereotypes used as an excuse for all the many ways in which women are subordinated, including stereotypes about what jobs they want and can do.¹⁸⁷ Indeed, some research suggests that whereas heightened awareness of race inequality lessens attachment to system-justifying beliefs and thus builds support for race-conscious affirmative action, heightened awareness of gender increases stereotypes and an attachment to system-justifying beliefs.¹⁸⁸ In short, benevolent stereotypes — whatever positive role they may play in supporting affirmative action for women — keep the focus where it continues to do the most harm: on perceived differences between men and women.¹⁸⁹ This dynamic raises the question whether, if the systemic subordination of women were taken seriously rather than obscured under the umbrella of benevolent stereotypes, measures to combat it, like affirmative action, would generate more threat, and thus more opposition.

¹⁸⁵ *Id.* at 45; Philip J. Mazzocco et al., *Different Shades of Racial Colorblindness: The Role of Prejudice*, 15 GROUP PROCESSES & INTERGROUP RELATIONS 167 (2012). In the study, the difference between race awareness and race blindness was observed in low-prejudice individuals. High-prejudice individuals oppose affirmative action whether or not they are aware of race inequalities. *Id.*

¹⁸⁶ See Sasaki & Voraaur, *supra* note 171, at 247-48; Martin, *supra* note 171, at 19.

¹⁸⁷ For example, some argue that the gender pay gap is due to women's different interests and job priorities rather than discrimination. See, e.g., Browne, *supra* note 131.

¹⁸⁸ Martin, *supra* note 171, at 40, 59, 86.

¹⁸⁹ See *id.* at 59. Martin explains that when gender awareness focuses on women's different experiences and opportunities, it does not have this effect. See *id.* at 75-77.

CONCLUSION

This Article summarizes some plausible explanations for how self-interest, system-justifying beliefs, and stereotyping lead to greater opposition to race-conscious affirmative action than to affirmative action for women. In each of these areas, the greater salience and negativity associated with race make race-conscious measures more threatening, and thus less acceptable, than sex-conscious measures. Insofar as affirmative action law has developed in part in response to a concern about social discord and balkanization, these differences between race and sex could help to explain the law's current path of limiting — perhaps soon even eliminating — race-conscious affirmative action, even as affirmative action for women continues without significant challenge.¹⁹⁰

Along with describing the differences in responses to race-conscious and sex-conscious affirmative action programs, this Article has also identified one dynamic in common. With respect to both race- and sex-conscious programs, the same factors that reduce opposition to affirmative action may also help to sustain the conditions for inequality that give rise to the need for such programs in the first place. To the extent this is the case, the goal of reducing opposition to affirmative action, however appealing it might be as a short-term public policy objective, should be understood in the long-term to be, at best, a double-edged sword.

This does not mean that the resentments affirmative action can stir should be ignored for all purposes. For example, it seems clear that workplace strategies that build accountability within positive and affirming norms of inclusion work better in building a commitment to nondiscrimination than those based on accusation, threat and shame.¹⁹¹ But how affirmative action is implemented is a different matter from whether affirmative action should exist, and why. Even if concerns about resentment and discord are appropriate in deciding how to make affirmative action work, it is a concern for justice and

¹⁹⁰ A potential vehicle is the lawsuit against Harvard University for discrimination against Asian-Americans in its admissions decisions — a lawsuit designed specifically to end affirmative action altogether at Harvard — that was at the trial stage at the time of this symposium. The lawsuit is described at Anemona Hartocollis, *Does Harvard Admissions Discriminate? The Lawsuit on Affirmative Action, Explained*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html> (describing the case as “widely seen as a battle over the future of affirmative action”).

¹⁹¹ See Katharine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893 (2009).

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equality that should ordinarily determine when it is allowed, and how it is justified.