Antisubordination of Whom? What India's Answer Tells Us About the Meaning of Equality in Affirmative Action

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Who should be the beneficiaries of race-conscious affirmative action? This rarely asked question serves to illuminate a larger debate over the nature of equality. Neither of two competing paradigms of equal protection — antidiscrimination and antisubordination — offers a satisfactory method to select beneficiaries. The Supreme Court's current antidiscrimination approach focuses myopically on underrepresentation in particular contexts: it tells us to count heads, but not who gets counted. This latter inquiry hinges on a societal understanding of race that antidiscrimination theory is unable to supply. By contrast, India offers a working example of an antisubordination approach in which the eradication of societal hierarchies is the explicit goal of affirmative action. Yet, higher rates of social mobility and immigration make India's model unlikely to translate to the U.S. context. Appreciating the shortcomings of each of these paradigms on their own paves the way for an integrated understanding of equality in which antisubordination values give normative content to antidiscrimination doctrine. India's example also provides the basis for a clearer allocation of responsibility between the judiciary and the political branches on questions of race.

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INTRODUCTION

Have slavery and segregation left no fingerprints? When Justice O'Connor wrote in *Richmond v. J.A. Croson Co.* that the effects of societal discrimination are "inherently unmeasurable,"[1] this apparent whitewashing of history confirmed many commentators' worst suspicions about the Rehnquist Court. To them, *Croson*'s holding disregarded rampant racial inequalities and flew in the face of the original intent of the Equal Protection Clause.[2] Moreover, the effective muzzling of affirmative action accomplished in *Croson* seemed to herald an ideology of "color-blindness" that placed in jeopardy three decades of civil rights progress.[3]

This Article suggests such criticism is misplaced. Instead, it links the *Croson* Court's rejection of societal rationales for affirmative action to a question the Court did not address, namely: Who should be the beneficiaries?[4] The argument that follows will suggest that the reasons *Croson* never asked this "Who Question" go a long way to explaining the Court's aversion to societal remedies. Appreciating these

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[1] 488 U.S. 469, 506 (1989) (holding affirmative action subject to strict scrutiny and rejecting past societal discrimination as insufficiently compelling basis to justify race-conscious remedies under that standard). Technically, *Croson*'s holding applied only to state and local governments. It took six more years for the other shoe to drop in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995), which held the federal government to the same strict scrutiny standard enunciated in *Croson*.

[2] *See, e.g.*, Sameer M. Ashar & Lisa F. Opoku, *Justice O'Connor's Blind Rationalization of Affirmative Action Jurisprudence* — Adarand Constructors, Inc. v. Pena, 31 HARV. C.R.-C.L. L. REV. 223, 235-38 (1996); Brent E. Simmons, *Reconsidering Strict Scrutiny of Affirmative Action*, 2 MICH. J. RACE & L. 51, 70 (1996).

[3] Simmons, *supra* note 2, at 53-55. The term "color-blindness" comes from Justice Harlan's famous dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896), which proclaimed that "Our Constitution is color-blind." It describes a view of equal protection inimical to formal distinctions based on race. *Cf. Adarand*, 515 U.S. at 239 (Scalia, J., concurring.) ("In the eyes of government, we are just one race here . . . American").

[4] This Article focuses on race-based affirmative action. In addressing the question of who should benefit from affirmative action, we can identify two distinct substantive inquiries: (1) the *selection* question: which racial or ethnic groups are eligible; and (2) the *definition* question: how do we define the boundaries of a group? This Article refers to both inquiries collectively as the "Who Question." The Article does not address the related procedural question of how the substantive criteria we select are to be applied in practice. *See generally* Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CAL. L. REV. 1231 (1994) (considering procedural issues associated with "classificatory due process").

connections has substantive implications for our analysis of affirmative action.

Despite the oceans of ink spilled in pages of American law reviews on affirmative action, the Who Question has been conspicuous by its absence: only a handful of articles have devoted more than cursory attention to the question of who benefits.[5] As Professor Cass Sunstein has observed, arguments over affirmative action often seem almost hopelessly abstract, akin to a stylized "form of Kabuki theater [in which] no one learns anything."[6] Asking the Who Question serves as a valuable corrective.

Asking who benefits keeps the affirmative action debate grounded in facts, rather than abstractions.[7] The sheer diversity and heterogeneity of racial and ethnic groups who benefit from affirmative action belie the simplistic black and white, majority versus minority framework to which discussions of race frequently reduce. Moreover, the uneven distribution of such benefits undermines assumptions that affirmative action is helping the groups that need it most. In particular, current practices appear to systematically shortchange the one group whose claim to affirmative action is almost universally accepted — African Americans.[8]

Asking the Who Question thus forces us to confront questions of comparative entitlement. Doing so requires clarity as to our underlying purpose. After all, who we include in affirmative action depends on why we are doing it.[9] Confronting choices between potential beneficiaries could help us penetrate the fuzzy rhetoric surrounding affirmative action rationales and perhaps target benefits

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[5] For two exceptions, see Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995) (arguments for including different racial/ethnic groups under various possible rationales for affirmative action); George La Noue & John Sullivan, *Deconstructing the Affirmative Action Categories*, 41 AM. BEHAV. SCIENTIST 913 (1998) (questioning arbitrary basis by which current categories of affirmative action beneficiaries are constituted).

[6] Cass R. Sunstein, *Affirmative Action, Caste, and Cultural Comparisons*, 97 MICH. L. REV. 1311, 1314 (1999).

[7] Focusing on actual outcomes is consistent with the empirical trend in affirmative action scholarship that Sunstein and others have championed. Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 369-70 (2004); Sunstein, *supra* note 6, at 1314-15.

[8] Nor are blacks the only group to be shortchanged under current practices: Native Americans, Southeast Asians, and Pacific Islanders may have their own cause for complaint. *See infra* text accompanying notes 56-57.

[9] There is unlikely to be a single answer to these questions. *See* Brest & Oshige, *supra* note 5, at 898-99 (analyzing Who Question in higher education context under three possible affirmative action rationales).

more rationally.[10] At the same time, this Article will argue that too much clarity could prove counterproductive. Far from an accidental oversight, avoidance of the Who Question may reflect the genuine costs in undertaking such a project.[11]

Exploring the practical and prudential limitations on our ability to answer the Who Question serves to illuminate a much larger debate over the nature of equality itself. Ever since Professor Owen Fiss's 1976 article, *Groups and the Equal Protection Clause*, equality scholars have argued over which of two competing models should be used to interpret the Equal Protection Clause: antidiscrimination or antisubordination.[12] Commentators favoring the latter view have criticized existing doctrine for emphasizing an antidiscrimination approach that reduces equality to a mere "procedural" requirement of facial neutrality in matters of race.[13] In advocating an alternative antisubordination reading, they seek a more robust "substantive" approach focused on equalizing outcomes rather than process.[14]

Viewed through the lens of the Who Question, however, neither theory offers a satisfactory method of selecting affirmative action beneficiaries. As we will see, an antisubordination approach founders on the ambiguous, amorphous nature of group identities and social hierarchies whose shifting demographic footprint makes the identification of subordinated groups problematic.[15] The Court's current approach, rooted in antidiscrimination theory, avoids such societal complexities by focusing on remedying underrepresentation in particularized contexts. However, this methodology of "counting

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[10] *See* Sean Pager, *Comparisons in Color Consciousness: Targeting Affirmative Action in India, France and the US*, *in* MULTICULTURALISMS: MEANINGS AND PERSPECTIVES OF MULTICULTURALISM IN A GLOBAL WORLD (Barbara Pozzo ed., 2006).

[11] *See infra* notes 234-57 and accompanying text.

[12] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); *see also* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1473 n.10 (2004) (summarizing extensive literature). *Compare* Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (defending antidiscrimination reading of Equal Protection Clause), *with* Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003 (1986) (advocating antisubordination approach).

[13] Simmons, *supra* note 2, at 81.

[14] Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 105 (Crenshaw et al. eds., 1995). Antisubordination theorists also challenge current doctrine's focus on individual equality at the expense of groups. *See id.*; Siegel, *supra* note 12, at 1473.

[15] *See infra* notes 214-33 and accompanying text.

heads" remains incomplete. It tells us *how* to count, but not *which* heads to count.[16] Appreciating the shortcomings of either approach on its own paves the way for an integrated understanding of equal protection that combines both perspectives.

Affirmative action has long represented a key flashpoint in the larger debate over equality. By rejecting the remedying of societal discrimination as a constitutionally compelling rationale for affirmative action, critics see the Supreme Court as marginalizing affirmative action by consigning it to narrowly circumscribed contexts, grudgingly tolerated as an "exceptional" remedy.[17] Moreover, the Court's failure to adequately justify its rejection of societal remedies has led many to question the Court's motives; they attribute its neutering of affirmative action to an ideological enthrallment with color-blindness, which, for some, is merely the hegemonic conspiracy of white privilege inscribed in legal doctrine.[18]

This Article offers a more prosaic account of the Court's motives. It argues that the Supreme Court's aversion to societal remedies is better explained by examining the difficulties posed by the Who Question. Such difficulties make the explicit targeting of racial hierarchies contemplated under an antisubordination model both impractical and inadvisable. Reinterpreting *Croson* in this fashion has important implications: understanding the Court's objection to societal remedies to be founded on pragmatic concerns rather than underlying principle opens the door to the incorporation of antisubordination values into existing equal protection doctrine. Such an integrated approach is appealing because the Court's current answer to the Who Question contains a crucial omission: it has constitutionalized the selection of beneficiary groups without defining what counts as a "group." This lacuna has left lower courts to adjudicate racial identities under ad hoc and wildly inconsistent methods.[19]

Bringing a societal context to the Court's "particularized" remedies will enrich our understanding of equal protection and result in more nuanced doctrine. Its benefits include: (1) a firmer normative foundation for group remedies; (2) more carefully targeted affirmative

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[16] *See infra* notes 44-53 and accompanying text.

[17] Cheryl Harris, *Whiteness as Property*, *in* Critical Race Theory, *supra* note 14, at 289.

[18] Neil Gotanda, *A Critique of "Our Constitution is Color-Blind*," 44 Stan. L. Rev. 1, 62 (1991); Harris, *supra* note 14, at 289.

[19] *See infra* notes 72-88, 134-40 and accompanying text.

action; and (3) a rebalancing of decisional authority between the judiciary and the political branches in defining racial boundaries.[20]

To advance these arguments, this Article employs a comparative international perspective. In doing so, the Article builds on a growing receptiveness of American constitutional law to comparative scholarship.[21] As Professor Clark Cunningham has observed, the sterile nature of domestic debate on affirmative action has inspired scholars to look elsewhere for fresh ideas.[22] India, in particular, has attracted the attention of leading constitutional law scholars,[23] Supreme Court Justices,[24] and social scientists.[25]

In contrast to the relative indifference toward such issues in the United States, the Who Question has long been a central preoccupation of Indian affirmative action law. The selection and identification of beneficiaries has been extensively studied, debated, and litigated. As a result, India has developed a rather sophisticated methodology that relies on a formalized administrative process to determine eligibility empirically by assessing societal disadvantage based on socioeconomic data.[26]

By reconceptualizing affirmative action as a project dedicated to eradicating societal hierarchies, India illustrates "the road not taken in the United States," offering a working model of an antisubordination approach to equality.[27] The Indian experience thus provides an

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[20] Moreover, this integrated understanding of equality has important implications beyond the affirmative action context. *See infra* notes 288-90 and accompanying text.

[21] This trend toward comparative constitutionalism has not been without controversy. *See* Clark Cunningham, *After* Grutter *Things Get Interesting! The American Debate Over Affirmative Action Is Finally Ready for Some Fresh Ideas from Abroad*, 36 CONN. L. REV. 665, 665-67 (2004).

[22] *Id.* at 668.

[23] *E.g.*, Sunstein, *supra* note 6, at 1313; Mark Tushnet, *Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action*, 36 CONN. L. REV 649, 655-56 (2004).

[24] *E.g.* Cunningham, *supra* note 21, at 667 n.13 (noting Justices O'Connor and Breyer participated in scholarly exchange on affirmative action with justices of Supreme Court of India shortly before *Grutter* opinion was handed down); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253, 273-77 (1999).

[25] *E.g.*, LAURA DUDLEY JENKINS, IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED (2003); SUNITA PARIKH, THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA (1997); Clark D. Cunningham et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 GEO. L.J. 835, 873-78 (2002).

[26] *See infra* notes 181-90 and accompanying text.

[27] Clark D. Cunningham & N.R. Madhava Menon, *Race, Class, Caste . . . ?*

instructive case study. Indeed, such comparative insights prompted a group of American scholars to file a recent amicus brief before the U.S. Supreme Court, highlighting India's societal approach to the Who Question.[28] The brief explicitly proposed that the United States adopt India's methodology.[29]

This Article casts doubt on the amicus scholars' proposal. In this critique, the Indian example functions not as a model to emulate but rather as a demonstration of why an antisubordination approach would prove unworkable in the United States context. Any attempt to select affirmative action beneficiaries on this basis would be confounded by the demographic complexities posed by immigration and social mobility. Moreover, the racially polarizing effects of such efforts would exact a prohibitive social cost.[30]

The comparative perspective thus helps to account for the current U.S. approach to — or avoidance of — the Who Question. Our laissez-faire attitude to questions of racial entitlement, in turn, reinforces the Supreme Court's preference for an antidiscrimination reading of equality. However, an antidiscrimination approach has its own shortcomings. To overcome this impasse, this Article proposes an integrated solution in which the two readings of equality would go hand in hand, with antisubordination values serving to give normative content to antidiscrimination doctrine. The Article concludes with some practical illustrations of the potential for this integrated understanding to resolve ambiguities in current doctrine. It also shows how a more modest adoption of Indian methodology could improve on our current method of selecting affirmative action beneficiaries.[31]

The argument proceeds in three parts. Part I.A begins by exploring the connection between the Supreme Court's silence on the Who Question and its rejection of societal remedies. Part I.B shows how the Court's silence leaves in place a popular consensus approach to racial categories by default. This section challenges such popular consensus definitions on several levels, namely: (1) the indeterminate

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Rethinking Affirmative Action, 97 MICH L. REV. 1296, 1302-05 (1999).

[28] Brief for Social Science and Comparative Law Scholars as Amicus Curiae Supporting Neither Party, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) (No. 00-730).

[29] *Id.* Three of these scholars later expanded the insights of their brief in a law review article calling for a more general reform of affirmative action. *See* Cunningham et al., *supra* note 25, at 882.

[30] *See infra* notes 234-51 and accompanying text.

[31] *See infra* notes 291-97, 305-10 and accompanying text.

boundaries of the standard racial categories, (2) the extreme heterogeneity of the groups contained within them, and (3) the arbitrary basis on which such groups were constituted. Indeterminacy and heterogeneity are demonstrated empirically, the former through survey evidence showing inconsistencies in the definitions actually used in affirmative action, and the latter through socioeconomic data drawn from the U.S. Census. Arbitrariness is traced both historically, by showing how our current categories emerged through a largely ad hoc process driven by bureaucratic and political expediency, and doctrinally, in the wildly inconsistent ruling of courts facing classificatory challenges. Part I.C confronts the inability of antidiscrimination theory to resolve such ambiguity and arbitrariness. Such failures call into question the Supreme Court's laissez-faire approach to the Who Question. Investigating the claims of "inherent unmeasurability" that underlie this approach entails exploring the feasibility of quantifying racial disadvantage.

Part II.A then introduces India's model in which empirical assessments of societal disadvantage are used to determine affirmative action eligibility. Part II.B illustrates how the model might be applied in practice to the U.S. context, again using Census data disaggregated into racial subgroups. Doing so raises both demographic and methodological challenges. In particular, Part II.C highlights the uncertain connection between immigration and ethnic disadvantage. Part II.D then explores the prudential risks in embracing Indian methodology: the Who Question can be divisive, heightening race consciousness in ways that have unintended repercussions. Ultimately, Part II concludes that the Supreme Court's avoidance of the Who Question may be justified on political grounds. Accordingly, the Court's aversion to societal remedies can be explained in terms of second order consequentialist concerns rather than any a priori principle.

Understanding the Court's objections to antisubordination as grounded in pragmatism rather than principle opens the door to a reintegration of antisubordination values in equal protection doctrine. Part III.A explores the potential for an antisubordination perspective to resolve ambiguities in affirmative action case law by moving away from an intent-based notion of discrimination. It also calls for consideration of systemic disadvantage as a threshold test to tailor the categories we count with. Part III.B proposes some further applications of Indian methodology with regard to the definitional issues of race, arguing for a more differentiated and contextualized analysis of ethnic subgroups. Part III.C then addresses a procedural issue, namely: who decides the Who Question? Here, India's

administrative process model offers a useful midpoint between two competing impulses in U.S. law: avoidance and constitutionalization. The fingerprints of race are undeniable. How we choose to acknowledge them is up to us.

I.   A TALE OF TWO EQUALITIES

A.   *What the Supreme Court Hasn't Told Us*

The absence of the Who Question from affirmative action discourse in the United States can be explained historically in part. Like the Civil Rights Movement from which it sprang, affirmative action initially focused on redress for the historical injustices of slavery and segregation — a legacy of oppression centering on the experience of African Americans.[32] Not only did African Americans present the most compelling claim to racial justice,[33] for all intents and purposes, they were the *only* racial minority of national significance.[34] In the atmosphere of crisis precipitated by the 1960s race riots, early efforts to ensure equal opportunity hardened into overt racial preferences, with little unifying vision beyond the perceived need for action.[35] Because such efforts focused so clearly on one group — African Americans — the Who Question was largely overlooked.[36]

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[32] HUGH DAVIS GRAHAM, COLLISION COURSE: THE STRANGE CONVERGENCE OF AFFIRMATIVE ACTION AND IMMIGRATION POLICY IN AMERICA 143-44, 173 (2002). Former President Lyndon Johnson famously justified affirmative action by evoking the imagery of slavery. "You do not take a person who for years has been hobbled by chains and liberate him, bring up to the starting line of a race and then say, 'You are free to compete with all the others.'" *Id.* at 77.

[33] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., concurring & dissenting). "The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that of a whole people marked as inferior by the law." *Id.*

[34] David Lauter, *Minorities Adding up to a Majority*, TIMES UNION (Albany, N.Y.), Apr. 12, 1995, at E1. Other groups were mostly limited to a regional presence: Chinese and Japanese Americans on the West Coast, Mexican Americans in the Southwest, and Puerto Ricans in the Northeast. GRAHAM, *supra* note 32, at 104.

[35] *Id.* at 137-38; JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 89-110 (1996).

[36] Lauter, *supra* note 34; *see* Cunningham et al., *supra* note 25, at 864. The 1967 Kerner Commission investigating the race riots concluded that "special encouragement" was needed to guide blacks into the economic mainstream. No other groups were discussed. George La Noue & John Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to*

Over time, the original focus on remedying historical injustice expanded to embrace other objectives and include other groups.[37] Yet, while courts have said a lot about *why* we have affirmative action (i.e., which rationales are constitutionally compelling) and *how* we should do it (preferably not via quotas), they have said very little about *who* gets included.

Such judicial avoidance of the Who Question is no accident. The Supreme Court has been unwilling to choose between competing groups because it regards such questions as judicially unmanageable.[38] As Justice Powell explained in *Regents of the University of California v. Bakke*, almost every ethnic group has suffered at least *some* discrimination at some point. The United States, he argued in *Bakke*, "ha[s] become a Nation of minorities," in which even the so-called "'majority' is composed of various minority groups, most of whom can lay claim to a history of prior discrimination."[39] He saw no principled basis to prioritize their competing claims to remedial justice. "The kind of variable sociological and political analysis necessary . . . simply does not lie within the judicial competence."[40] In *Croson*, Justice O'Connor similarly bemoaned the impossibility of selecting between "inherently unmeasurable claims of past wrongs."[41]

This refusal to play favorites animates the Court's antidiscrimination approach to equality. By reading the Equal Protection Clause to

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Affirmative Action, 6 J. POL'Y HIST. 439, 440-43 (1994). Similarly, the Labor Department held hearings in 1969 to document discrimination against black workers to justify its "Philadelphia Plan" for racially preferential hiring. No record was made of discrimination against any other minority groups at the hearings. GRAHAM, *supra* note 32, at 139.

[37] *See* GRAHAM, *supra* note 32, at 195; Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677-81 (2004).

[38] *Cf.* Alexandra Natapoff, *Trouble in Paradise: Equal Protection and the Dilemma of Interminority Group Conflict*, 47 STAN. L. REV. 1059, 1082 (1995) (describing Who Question as Rehnquist Court's worst nightmare).

[39] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 295 (1978).

[40] *Id.* at 297; *see also* De Funis v. Odegaard, 416 U.S. 312, 333-34 (1974) (Douglas, J., dissenting) (noting theoretical difficulties in evaluating competing claims of minority groups).

[41] Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989). Justices Powell and O'Connor's concerns focus on the institutional inadequacy of the courts to engage in societal fact finding. *See* Cunningham et al., *supra* note 25, at 857-59 (arguing Court was only concerned with its own institutional limitations). However, O'Connor makes clear that strict scrutiny does not permit the judiciary to defer to anyone else on these issues either, therefore effectively taking societal rationales off the table. *See Croson*, 488 U.S. at 493-94, 510-11.

require equal treatment between individuals rather than groups, the Court deflects the issue of systemic inequalities and renders racial hierarchies invisible.   This reading of equality regards racial classifications as inherently "suspect," making affirmative action presumptively invalid regardless who the beneficiaries are. Race itself is reduced to an abstraction, an irrelevant and illegitimate criterion that only the most compelling rationale and narrowly tailored means can legitimize.

The result has been to significantly restrict the scope of affirmative action by foreclosing societal rationales for affirmative action. Applying its strict scrutiny standard, the Court has rejected societal discrimination as too "amorphous" to support racial preferences.[42] Instead, the Court has conditioned the use of racial preferences on more narrowly defined aims limited to specific contexts: either remedying identified discrimination within a particularized setting or enhancing the diversity of viewpoints represented in higher education.[43]

Focusing on such particularized contexts eliminates any need to address the societal significance of race. Instead, the U.S. answer to the Who Question, to the extent it has one, focuses on numbers: affirmative action is cognized in terms of remedying the "underrepresentation" of racial and ethnic minorities. Therefore, either explicitly or implicitly, the choice of beneficiaries is determined essentially by counting heads.

Under the *Croson* decision, such counting became a constitutional mandate. *Croson* holds that cities could justify racial preferences by demonstrating a significant disparity between the availability of qualified minority-owned firms and the share of city contracts awarded to such firms.[44] The Court emphasizes that the disparities must be shown to exist within a specific sector in the local market.[45] Such disparities created an inference of unlawful discrimination that would legitimate a remedy for underrepresented groups. What the Court does not tell us, however, is underrepresentation of whom? The Court seemed to suggest that disparities be measured on a group-

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[42] *Croson*, 488 U.S. at 505, 510 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986)).

[43] Grutter v. Bollinger, 539 U.S. 306, 339-43 (2003).

[44] *See Croson*, 488 U.S. at 501-03, 509. *Croson* makes clear that such disparities can only legitimize the use of racial preferences in extreme cases.

[45] *Id.* at 504 (rejecting Richmond's efforts to rely on findings of discrimination in contracting nationwide).

specific basis, yet it left open the definitional question of which heads get counted in which column or even what the categories should be.

Reconceiving racism as discrete acts of prejudice in a limited context elides the enduring salience of societal discrimination.[46] Moreover, *Croson*'s prescribed means to identify such particularized injuries distances the Court even further from social context: In relying on statistical disparities to justify racial preferences, the Court supplants a messy inquiry into the dynamics of group prejudice with the seemingly objective comfort of statistical analysis. The Court no longer has to choose between groups because the numbers will do the job for it.

In *Bakke*, Justice Powell introduced a second rationale for affirmative action: promoting educational diversity by giving preference to underrepresented viewpoints.[47] Rather than awarding a predetermined preference based on race, universities were instructed to weigh the total diversity value of each applicant in a holistic assessment in which race would be considered amongst other characteristics.[48] Focusing on individual applicants again moves away from the broader societal relevance of race. Moreover, by deferring to universities on First Amendment grounds to make such determinations, the Court remains agnostic as to who would qualify under such a regime.[49]

In both cases, the Court's solution relies on counting. Whether measured in contracts or viewpoints, group representation has thus become our default answer to the Who Question.[50] The process by which such counting occurs depends on the context. *Croson* establishes an intricate statistical methodology to calculate disparities in contracting. *Bakke* and its progeny stipulate a flexible,

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[46] *Cf.* Gotanda, *supra* note 18, at 43-44.

[47] Justice Powell's diversity rationale, first enunciated in *Bakke*, received the imprimatur of the full Court in *Grutter*, 539 U.S. at 325.

[48] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

[49] *See id.* at 312-13; Richard Pildes & Richard Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After* Shaw v. Reno, 92 MICH. L. REV. 483, 498 (1993).

[50] EEOC reporting requirements likewise force employers to pay attention to racial balance, many of whom voluntarily undertake affirmative action to increase minority representation. Deborah Malamud, *Affirmative Action and Ethnic Niches*, *in* COLOR LINES: AFFIRMATIVE ACTION, IMMIGRATION, AND CIVIL RIGHTS OPTIONS FOR AMERICA 321 (John David Skrentny ed., 2001) (explaining how employers have incentive to maintain racial parity to preempt discrimination claims).

individualized evaluation in which race is weighed as only one "plus factor" among many.[51] Yet, the numbers game is ubiquitous.

But *who* are we counting? Which minority groups do we look at?[52] How do we define them? *Croson* doesn't tell us. It instructs us to choose beneficiaries through statistical analyses, but says almost nothing about whose statistics to gather. Similarly, *Bakke* accepts race as a proxy for viewpoint yet leaves open how underrepresented "racial" views are to be identified. *Bakke* and *Croson* thus answer only half the Who Question. They allow us to choose affirmative action beneficiaries through numerical formulae, while ignoring the definitional question of what race actually is.[53]

B.   *What's Wrong with the Status Quo?*

The Court's hands-off approach to the Who Question has some perverse consequences. The original beneficiaries of affirmative action, African Americans, now constitute a minority among minorities, while affirmative action benefits instead go disproportionately[54] to newer immigrant groups who lack a

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[51] Justice Powell makes a point of distinguishing Harvard's flexible, individualized assessments of diversity (good) versus UC Davis's overly rigid, numerical quotas (bad). *Grutter*, 539 U.S. at 335 (reiterating distinction).

[52] America is full of ethnic and national origin groups that could *potentially* face discrimination. The U.S. Census Bureau counts at least 630 established ethnic groups. Students in New York City School District 23 alone converse in some 83 different languages. *See* La Noue & Sullivan, *supra* note 36, at 439. It would be impractical to count them all, but how do we choose between them, or even decide who goes in which box?

[53] Despite a vast body of case law on discrimination, there is surprisingly little law defining the core concepts of "race" or "ethnicity." This ambiguity proved controversial when the Small Business Administration ("SBA") excluded Hasidic Jews from federal affirmative action on the ground that the Hasids were a religious group and not an ethnicity. *See id.* at 449.

[54] In 1993, black-owned construction companies received less than a fifth of federal highway set-asides, and in 1996 garnered only a third of the SBA minority business funding — less than the share of their proportional representation among U.S. minorities would justify and roughly half their share from a decade earlier. Asian Americans claimed almost as much SBA money as African Americans despite having half the population. GRAHAM, *supra* note 32, at 164; *see also id.* at 192, 197 (describing how many employers have added "diversity" to their workforce by hiring Hispanic or Asian immigrants at the expense of African Americans); George R. La Noue, *The Impact of* Croson *on Equal Protection Law and Policy*, 61 ALBANY L. REV. 1, 41 (1997) (noting slower growth rate of black-owned businesses compared to other minorities will mean continued decline in African American share of Minority Business Entrepreneur ("MBE") benefits); Malamud, *supra* note 50, at 318 (describing predominant share of minority scholarships going to nonblacks).

comparable history of discrimination in the United States.[55] Indeed, even within the category of "African American," the beneficiaries of affirmative action are increasingly black immigrants from Africa and the Caribbean rather than the descendants of American slaves originally contemplated.[56]

Croson's insistence on counting in particularized contexts also penalizes groups such as Native Americans whose numbers are often too small to generate statistically meaningful evidence. Conversely, counting with broad categories leads to other problems. For example, because Asians as a whole are no longer underrepresented in higher education, Asian subgroups such as Laotians and Samoans who *are* underrepresented are denied access to affirmative action.

By default, most affirmative action plans continue to classify beneficiaries within one of four broad racial groupings devised by federal statisticians: black, Asian, Hispanic, and Native Americans. This "ethno-racial quadrangle" has emerged as our quasi-official definition of what it means to be a "minority" in the United States. Yet, as a blueprint for affirmative action, the value of the quadrangle is questionable for at least three reasons: (1) its boundaries are indeterminate; (2) the internal heterogeneity of these groupings is too extreme for them to serve as meaningful categories; and (3) its categories were arbitrarily constituted and unfairly advantage certain groups over others. We will explore each of these objections in turn.

1. Indeterminancy

Most people take the standard minority categories for granted. So deeply are they woven into our national consciousness that they seem innate, almost like the air we breathe.[57] Examined more closely, however, the categories of the quadrangle appear far more anomalous and arbitrary.

For one thing, there is widespread disagreement as to their boundaries.   For example, the Hispanic classification varies considerably across jurisdictions.   Even within the same region, different entities may recognize different groups as Hispanic.[58]

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[55] La Noue & Sullivan, *supra* note 36, at 460.

[56] Jennifer Lee, *The Racial and Ethnic Meaning Behind Black*, *in* COLOR LINES, *supra* note 50, at 184; Sara Rimer & Karen W. Arenson, *Top Colleges Take More Blacks, But Which Ones?*, N.Y. TIMES, June 24, 2004, at A1.

[57] DVORA YANOW, CONSTRUCTING "RACE" AND "ETHNICITY" IN AMERICA 83-85 (2003) (charting evolution of categories).

[58] *See infra* Table 1 (contrasting Hispanic definitions used in five Bay Area

According to the U.S. Census, "Hispanic" does not even count as a race. Instead, it is treated as an "ethnic category" that cuts across racial identities and is tracked independently.

Uncertainty as to who counts as Hispanic naturally leads to questions over eligibility for affirmative action. The definitional boundaries of "Hispanic-ness" have been repeatedly contested. The inclusion of Spanish and Portuguese Americans in affirmative action remedies has proven particularly contentious. San Francisco's Civil Service Commission fielded a heated debate on the issue,[59] and litigation in New York State reached the Second Circuit.[60]

Table 1. Who Is Hispanic?

Name of Jurisdiction	Spaniards	Portuguese	Other Latin American
Atlanta	No	No	Yes
Baltimore	Yes	Yes	Yes
Boston	No	No	Yes
Miami	Yes	Yes	Yes
New York	No	No	Yes
Oakland*	Yes	No	Yes
Richmond*	Yes	No	Yes
San Francisco*	No	No	Yes
San Jose*	No	No	Yes
Small Business Administration	Yes	Yes	Yes
U.S. Census**	Yes	No	Yes
Stanford University	No	No	Only Mexican American and Puerto Rican
Univ. of Texas⁺	No	No	Only Mexican American

* Pre-1996   ** U.S. Census treats Hispanic classification as an
⁺ Pre-1995   ethnic identity independent of its racial categories

jurisdictions). The data presented are drawn primarily from a survey of municipal MBE programs conducted in 2004 by, and on file with, the author.

   [59] *See* Alex Saragoza et al., *History and Public Policy: Title VII and the Use of the Hispanic Classification*, 5 LA RAZA L.J. 1, 4-10 (1992).

   [60] Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 201-03 (2d Cir. 2006).

Nor are Hispanics the only beneficiary group to inspire such definitional debates.   The boundaries of the "Asian Pacific" classification are equally variable and contested.[61] Ohio courts fielded a flurry of litigation when the state decided that contractors from India and Lebanon no longer qualified for affirmative action set-asides.[62] Oregon administrators wrestled with a similar ambiguity when a Kazakh contractor claimed eligibility.[63]

Even African American has become a contested category. Commentators have questioned whether black immigrants should qualify for affirmative action in light of recent studies showing that forty percent of African American students admitted at Harvard and other elite universities were immigrants or children of immigrants.[64] Studies have also shown that employers in New York City are much more willing to hire Jamaicans and Africans than non-immigrant blacks.[65]

"African-ness" is itself contested.   Affirmative action programs typically define African Americans in circular fashion as descended from "black racial groups."[66] Yet, racial distinctions in Africa are not always clear-cut.   While philanthropist Teresa Heinz Kerry faced ridicule for implying that her (Caucasian) Afrikaner heritage made her "African American,"[67] minority contracting programs have had a much

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[61] Formal definitions of the "Asian" category vary widely.   Some exclude subcontinental Asians or Filipinos; others leave out Pacific Islanders and/or Native Hawaiians. Some include Afghanis; the city of Charlotte also included Persians. *See* George La Noue, *Standards for the Second Generation of* Croson-*Inspired Studies*, 26 URB. LAW. 485, 491 (1994); Miranda Oshige McGowan, *Diversity of What?*, 55 REPRESENTATIONS 129, 130 (1996).

[62] The case of Lebanese American contractor Nadim Ritchey went all the way to the Ohio Supreme Court (he lost). Ritchey Produce Co. v. State, 707 N.E.2d 871, 927 (Ohio 1999).

[63] Telephone Interview with Jill Miller, Certification Specialist, Oregon Office of Minority, Women & Emerging Small Bus., in Portland, Or. (May 27, 2004).

[64] Rimer & Arenson, *supra* note 56. The University of Texas explicitly excluded black immigrants from affirmative action.   Hopwood v. Texas, 78 F.3d 932, 936 n.4 (5th Cir. 1996) (describing Texas's admissions preferences as applying only to "American blacks," but not "a black citizen of Nigeria"). At least one federal court of appeals has questioned giving "African American a hemispheric meaning." Podberesky v. Kirwan, 38 F.3d 147, 158 n.11 (4th Cir. 1994) (questioning award of racial scholarship to student from Jamaica).

[65] *See* Lee, *supra* note 56, at 184.

[66] *E.g.*, 13 C.F.R. § 124.103 (2007); 49 C.F.R. § 26.5 (2007).

[67] Maureen Dowd, *Out of Africa*, N.Y. TIMES, July 18, 2004, at D-13.

harder time deciding whether Sudanese and Ethiopians qualify as "black."[68]

Meanwhile, other ethnic groups currently classified as white have sought "minority" status in part to gain inclusion in affirmative action. While Middle Eastern Americans lobbied unsuccessfully for Census recognition in 2000, they did win eligibility for affirmative action in San Francisco. French Acadians were eligible in Louisiana. The City University of New York at one point recognized Italian Americans.[69] Congress championed rural Appalachian whites as equally deserving.[70] And while Hasidic Jews failed to win recognition from the Small Business Administration ("SBA"), they are included in other federal affirmative action contexts.[71]

As such contests over categorical boundaries find their way into the courts, the result has been alarmingly inconsistent rulings. For example, the Seventh Circuit recently held that accepting Iberian Americans as Hispanic for purposes of affirmative action violated the narrow tailoring prong of strict scrutiny.[72] The category definition was deemed overinclusive. Judges in the Eleventh Circuit reached the opposite conclusion on the same question.[73] Meanwhile, the Fifth Circuit suggested that counting only Mexican Americans could be *under*inclusive.[74]

If you read these opinions, there seems little driving them besides the judges' underlying intuitions. Judge Richard Posner stated flatly that Iberians have not been victims of discrimination and challenged the defendant to produce evidence to the contrary.[75] The Eleventh

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[68] Interview with Hayden Lee, Lee Associates, in S.F., Cal. (Jan. 28, 1998); *cf. The World Notices Darfur*, THE ECONOMIST, July 31, 2004, at 39 (describing racial ambiguities in Darfur).

[69] YANOW, *supra* note 57, at 67.

[70] *See* La Noue & Sullivan, *supra* note 36, at 443 (describing legislative history to congressional authorization of federal MBE program).

[71] *Compare* La Noue & Sullivan, *supra* note 36, at 449 (describing exclusion of Hasids from SBA definition of presumptively socially disadvantaged groups), *with* CONG. RESEARCH SERV., COMPILATION AND OVERVIEW OF FEDERAL LAWS AND REGULATIONS ESTABLISHING AFFIRMATIVE ACTION GOALS (1995) (citing 48 C.F.R. § 2426.101 (1994)) (minority definition for public housing includes Hasidic Jews). Hasidic Jews were also eligible for other SBA programs at some point. La Noue & Sullivan, *supra* note 36, at 461.

[72] Builders Ass'n of Greater Chi. v. Cook County, 256 F.3d 642, 647 (7th Cir. 2001).

[73] *See* Peightal v. Metro. Dade County, 26 F.3d 1545, 1560 (11th Cir. 1994).

[74] Hopwood v. Texas, 78 F.3d 932, 948 n.37 (5th Cir. 1996).

[75] *Builders Ass'n*, 256 F.3d at 647.

Circuit reversed the burden of proof, requiring the plaintiff to prove that Iberians did not qualify as a protected group.[76] Meanwhile, the Fifth Circuit simply assumed the underinclusiveness of Mexican Americans is self-explanatory.[77]

The wildly different stratagems courts have employed to cope with such disputes testifies to the inability of current doctrine to resolve them. Some courts avoid grappling with definitional issues directly.[78] Some falsely assume that disparity testing can itself validate the initial choice of categories.[79] Others struggle to locate definitional disputes within equal protection doctrine. Such classificatory challenges could be cognized in two different ways: either (1) as a facial attack on the definition *qua* racial classification, or (2) as a narrow tailoring challenge to the remedy that follows from it. Courts have followed both approaches, sometimes even in the same opinion.[80] They also differ as to the level of scrutiny they apply.[81] Still others treat

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[76] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1164 (10th Cir. 2000).

[77] *Hopwood*, 78 F.3d at 948 n.37.

[78] Courts have invoked obstacles of standing to deflect definitional challenges, *cf. Peightal*, 940 F.2d at 1409 n.39 (questioning plaintiff's standing as white male to object to Hispanic definition); limited their assessment to the facts "as applied," *cf. id.* at 1545; Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., No. 5:04-CV-635 (N.D.N.Y. Oct. 28, 2004)(mem.) *aff'd*, 438 F.3d 195 (2d Cir. 2006); or demanded evidence of bad intent, *cf.* Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 200 (2d Cir. 2006). Others simply ignore the issue entirely. Rothe Dev. Corp. v. U.S. Dep't of Def., 324 F. Supp. 2d 840, 847 (W.D. Tex. 2004).

[79] *Cf.* Ritchey Produce Co. v. State, 707 N.E.2d 871, 917-23 (Ohio 1999). Such courts argue that disparity testing "validates" the categories being tested because it identifies discrimination against the population thus encompassed. Yet, such reasoning is circular. Because disparity testing merely infers "discrimination" statistically, the validity of such findings hinges on the assumptions underlying its inputs. For example, Hispanics might be found to be underrepresented whether or not Iberians are included in the relevant data set. While Hispanic underrepresentation might support a general inference of anti-Hispanic bias, it tells us nothing about whether Iberians experience the same discrimination. *Croson*'s methodology instead remains a black box to which the old saying applies: Garbage in, garbage out.

[80] *Compare Jana-Rock*, No. 5:04-CV-635 (applying facial classification approach), *with Jana-Rock*, 438 F.3d at 205 (pursuing both approaches), *and Peightal*, 26 F.3d at 1557-61 (applying narrow tailoring analysis).

[81] *Compare Jana-*Rock, 438 F.3d at 207, 212 (declining to apply either strict scrutiny directly or require narrow tailoring), *with* Builders Ass'n of Greater Chi. v. Cook County, 256 F.3d 642, 647 (7th Cir. 2001) (requiring narrow tailoring), *and Ritchey*, 707 N.E. 2d at 878 (quoting decision of trial court) (calling for strict scrutiny to be applied).

definitional uncertainties as a statutory interpretation issue, "more a question of nomenclature than of narrow tailoring."[82]

Courts have also differed widely as to the evidentiary criteria they examine. In trying to define what it means, for example, to be "Hispanic" for purposes of affirmative action, some courts have consulted dictionaries and turned to legislative history.[83] Some assume "Hispanic-ness" is a question of ancestry; others stress language, culture,[84] history,[85] community practice,[86] or even physical appearance.[87] For some courts, defining the boundaries of "Hispanic" is like asking where blue ends and green begins; they dismiss the category as meaningless.[88]

2. Heterogeneity

The problem goes beyond mere uncertainty as to the boundary lines between racial categories. The very logic of using such categories is arguably undermined by the heterogeneous nature of the groups contained within them. Across a wide array of socioeconomic indicators, the differences within the main racial groups appear as great as those between them. Such internal variance is particularly striking within the Asian and Hispanic categories.[89] Across the board, the "top performers" in these groups score well above the U.S. average, while those at the bottom measure well below the U.S. average.

For example, Asian Indian, Chinese, and Japanese Americans earn bachelors degrees at almost double the U.S. average, and their success at the graduate level is even more extreme: almost quadruple the U.S. average in the case of Indian Americans. Twice as many Asian Indians

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[82] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1185 (10th Cir. 2000).

[83] St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (defining race in part based on popular understandings at time § 1981 was enacted); *Ritchey*, 707 N.E.2d at 927 (construing "the common, ordinary, and everyday meaning of the term 'Oriental'").

[84] Lagrua v. Ward, 519 N.Y.S.2d 98, 99 (N.Y. Sup. Ct. 1987).

[85] *Builders Ass'n*, 256 F.3d at 647.

[86] Hernandez v. Texas, 347 U.S. 475, 479-80 (1954).

[87] Bennun v. Rutgers State Univ., 941 F.2d 154, 173 (3d Cir. 1991); *see also* Peightal v. Metro. Dade County, 940 F.2d 1394, 1408-09 (11th Cir. 1991) (Brown, J.).

[88] Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1069 n.17 (D. Colo. 2000) (describing Hispanic as inherently indeterminate category for which "there is no agreed working definition"); Alen v. State, 596 So. 2d 1083, 1084-85 (Fla. Dist. Ct. App. 1992) (questioning whether Hispanics constitute judicially cognizable ethnic group for jury selection purposes).

[89] *See infra* Table 2 for Asian Census data. For a comparable analysis of Hispanic subgroups, see *infra* notes 206-09 and Table 3.

occupy managerial or professional positions as the U.S. norm, with Chinese and Japanese also well above average. These groups' homes are valued at double the U.S. median. By contrast, Cambodian, Laotian, Samoan, and Tongan Americans show statistics that present almost the reciprocal image of their East and South Asian compatriots.[90] Cambodian Americans garner half as many bachelor's degrees and a quarter the number of graduate degrees as the U.S. average, their representation among the professional class is half the U.S. rate, and their poverty rate more than double. Laotians, Samoans, and Tongans fare only slightly better.

Table 2. Socioeconomic Breakdown of Asian Pacific Subgroups

Population Group	Education % earning degree Bachelors	Graduate	Occupation Managerial or Professional	Property Median Home Value	Income % below Poverty Level
ALL U.S.	15.5%	8.8%	33.6%	$119,600	12.4%
ASIANS	26.7%	17.3%	44.6%	$199,300	12.6%
Asian Indian	29.6%	34.3%	59.9%	$210,200	9.8%
Japanese	28.7%	13.1%	50.6%	$238,300	9.7%
Chinese	24.1%	23.8%	52.2%	$232,200	13.5%
Koreans	29.1%	14.6%	38.7%	$209,500	14.8%
Vietnamese	14.5%	4.8%	26.9%	$151,400	16.0%
Samoan*	7.5%	3.0%	18.6%	$153,200	20.2%
Tongan*	7.3%	1.3%	13.3%	$149,100	19.5%
Laotians	6.3%	1.4%	13.3%	$100,500	18.5%
Cambodian	6.9%	2.2%	17.8%	$120,800	29.3%
BLACKS	9.5%	4.8%	25.2%	$80,600	24.9%

*Not included in Asian totals   Source: 2000 U.S. Census

Such intragroup differences call into question the statistical inferences of discrimination on which *Croson* is premised by potentially skewing the data used in disparity analyses. For example, consider the variation in business formation rates among Asian

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[90] The socioeconomic standing of Southeast Asians and Pacific Islanders thus more closely resembles African Americans than the "model minority" stereotype associated with the Asian group overall.

Americans (a key variable used in disparity analyses): Koreans have the highest business formation rate of any ethnic group, while Laotians have the lowest.[91] If a disparity study lumps these groups together, its conclusions may not tell you much based on numbers alone.

Disparate business formation rates have been specifically cited by courts as undermining the results of disparity studies.[92] Such internal heterogeneity also raises the danger that nondisadvantaged subgroups may ride the coattails of their less fortunate group members. The problem is not just that a few jobs or contracts may go to a group that does not deserve them. *Less*-disadvantaged groups often end up usurping a disproportionate share.[93]

The risks cut both ways. Not only can undeserving subgroups piggyback on the underrepresented status of a larger group, but genuinely disadvantaged subgroups might be unfairly excluded if the larger, umbrella group they belong to is too successful. One sees this in higher education, where Asians are often overrepresented and no longer counted for diversity purposes. Yet, several Asian Pacific subgroups remain heavily underrepresented.[94] Samoan and Laotian students thus suffer from being lumped together with more successful East and South Asians.

Moreover, some arguably disadvantaged minority groups lie outside the quadrangle entirely. A recent study of employment discrimination in California looked at discrimination against job applicants with ethnically identifiable names.[95] The study revealed greater bias against applicants with identifiably Arab names than those of any other ethnic group, which is hardly surprising after 9/11. Yet, most affirmative

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[91] *See* La Noue & Sullivan, *supra* note 5, at 913.

[92] *Concrete Works*, 86 F. Supp. 2d at 1070; Houston Contractors Ass'n v. Metro. Transit Auth., 993 F. Supp. 545, 554 (S.D. Tex. 1997) (condemning "use of aggregate statistics [that fail to] show the variation within the groups").

[93] "[W]hen all members of minority groups are equally eligible for affirmative action, the best-off among them will prevail." Malamud, *supra* note 50, at 321. An extreme example of this phenomenon occurred in Washington, D.C., where a pair of Portuguese American brothers, duly certified as "Hispanic business owners," managed to claim more than 60% of affirmative action contracts. *See* GRAHAM, *supra* note 32 at 154; *see also* THOMAS SOWELL, AFFIRMATIVE ACTION AROUND THE WORLD: AN EMPIRICAL STUDY 12, 33 (2004) (providing further empirical evidence).

[94] Brief, *supra* note 28.

[95] DISCRIMINATION RESEARCH CTR., NAMES MAKE A DIFFERENCE: THE SCREENING OF RESUMES BY TEMPORARY EMPLOYMENT AGENCIES IN CALIFORNIA 7 (2004) (on file with author).

action programs count Arab Americans as white, which means they don't get counted at all.

3. Arbitrary Composition

Some argue that such internal differences are inevitable and beside the point. Race is not a logical construct but a projection of societal perceptions and stereotypes, however irrational.[96] Courts have therefore defended a "popular consensus" approach to the Who Question on the ground that race is best understood as "a matter of practice or attitude in the community."[97] Choosing affirmative action categories that reflect such conventions also accords with a long line of Supreme Court cases that have defined race according to a "popular belief" standard.[98]

However, to say that the categories used in affirmative action "reflect" a popular consensus may be to get the causality reversed. The federal government's establishment of formal categories for race has itself helped to manufacture the current consensus on race. One of the by-products of the Civil Rights Movement was that federal agencies suddenly felt the need to collect detailed racial data across a wide range of contexts. Federal statisticians therefore devised new standardized categories to record such data.[99] To some extent, the categories devised by federal statisticians tracked the "classic color codes" of an earlier era.[100] Yet, in other ways, the categories were

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[96] *See* Peightal v. Metro. Dade County, 26 F.3d 1545, 1561 n.25 (11th Cir. 1994) (bemoaning "irrationality of the definitional process underlying social stereotypes"); Ian F. Haney López, *The Social Construction of Race*, 29 HARV. C.R.-C.L. L. REV. 1, 53-57 (1994).

[97] *Peightal*, 26 F.3d at 1561 n.25.

[98] St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 (1987) (defining race based on popular understanding at time of § 1981's enactment); IAN F. HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 7-8 (1996) (describing naturalization cases).

[99] Prior to this time, the boundaries of race had remained ill-defined and were often regionally specific. Conceptions of race continued to evolve as ethnic minorities such as "Jews" and "Irish," initially stigmatized as racial outsiders, gradually assimilated into the white "majority." Thus, as Justice Powell observed in *Bakke*, "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments." Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 295 (1978); GRAHAM, *supra* note 32, at 40, 42; *see also St. Francis*, 481 U.S. at 610 ("Plainly, all those who might be deemed Caucasian today were not thought to be of the same race [in the nineteenth century]"). *See generally* NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 1-10 (1995).

[100] David A. Hollinger, *Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action*, 55 REPRESENTATIONS 31, 33 (1996).

clearly constitutive. The Hispanic category, in particular, crystallized a new popular understanding of race. The Mexican Americans of the southwest, the northeast's Puerto Ricans, and Florida's Cubans had rarely thought of themselves, or been thought of by others, as constituting a single group until somebody decided to lump them into a single statistical category of "Spanish Americans."[101] Moreover, the classic color codes expanded to "color in" all sorts of new immigrant groups whose racial identities may have been ambiguous upon arrival (and occasionally "recolored" existing groups). In the process, their boundaries have stretched almost beyond recognition. The "Asian Pacific Islander" category today joins together half the world's population.

Several recent studies have shed light on the genesis of our current racial consensus.[102] Three main themes emerge. First, the categories we use were largely created by midlevel bureaucrats acting with little or no policy guidance and virtually no public input other than selective lobbying by self-serving ethnic interests.[103] Instead, such decisions were made in essentially ad hoc fashion, with little thought as to their long-term consequences.[104]

Second, once the lists were created, included groups quickly assumed the status of "official" minorities.[105] Originally created as statistical measures to monitor equal opportunity, the federal

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[101] *Id.* at 879 n.258. In part, such a grouping was inspired by bureaucratic convenience. Political considerations also played a role: The Nixon White House actively lobbied to include Cubans in the nascent category to curry favor with this loyal bloc of Republican voters. La Noue & Sullivan, *supra* note 5, at 915. The artificiality of this new grouping was underlined by the initial confusion as to what to call it: Spanish Americans, Spanish-Speaking Americans, and Spanish-Surnamed Americans all vied for contention (each of which, taken literally, would embrace slightly different constituencies). Moreover, Puerto Ricans remained excluded from early definitions of this group. Only in 1976 was the category rechristened "Hispanic." GRAHAM, *supra* note 32, at 139 n.16.

[102] *See id.* at 134-47; La Noue & Sullivan, *supra* note 36, at 440-460; Cunningham et al., *supra* note 25, at 859-73; John D. Skrenty, *Inventing Race Development of Affirmative Action and Definition of Minorities*, 146 PUB. INT. 97, 97-113 (2002). *See generally* La Noue & Sullivan, *supra* note 36 (describing history and genesis of affirmative action).

[103] GRAHAM, *supra* note 32, at 134, 136; La Noue & Sullivan, *supra* note 36, at 440-41.

[104] Instrumental constraints also influenced the choices. For example, EEOC categories were intended to be used by employers classifying their workforce through visual inspection. White ethnic groups, which would be more to difficult to distinguish visually, were not included partly for this reason. Cunningham et al., *supra* note 25, at 862-64.

[105] *Id.* at 859-67.

categories were carried over into overtly preferential contexts without any second thought as to their suitability. Blindly propagated throughout all levels of government, the ethno-racial quadrangle became the template of affirmative action eligibility by default.

Third, while the original categories centered on groups with undeniable histories of persecution, they soon embraced newer immigrant groups with more tenuous claims to inclusion. Thus, while the standard categories have remained largely fixed since the 1960s, the groups included within these categories have expanded over time. Like a hungry Pacman devouring a global game board, the original "Oriental" category composed of Chinese and Japanese Americans rapidly engulfed other East and Southeast Asian groups as well as a broad swath of Pacific Islanders before veering westward to incorporate Indians and Pakistanis. Similarly, once the category of "Spanish-Speaking Americans" was rebranded "Hispanic," it came to include groups such as Brazilians who do not even *speak* Spanish.[106]

Such category inflation did not just happen. Ethnic lobbies pushed for expanded definitions out of self-interest.[107] Federal officials obliged, basing their decisions on "bureaucratic convenience rather than careful ethnographic analysis."[108] The main premise seems to have been proximity of geographical origin (at least as judged from Washington, D.C.). In what other sense can Samoans be said to be ethnically "like" Chinese? Or Vietnamese "related to" Pakistanis? These groups come from vastly different cultures and look almost nothing alike. How then do we justify grouping them together?

Such arbitrary origins and dubious ethnography might not matter if the categories we use make sense in the context of the United States today. The real question then is whether use of the quadrangle accords with the underlying purposes of affirmative action. Some commentators have expressed skepticism, arguing that any popular

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[106] *See* Alen v. State, 596 So. 2d 1083, 1094 (Fla. Dist. Ct. App. 1992) (noting South American "Hispanics" can also be from Belize and British and French Guyana, none of whom speak Spanish or Portuguese); *see also* GRAHAM, *supra* note 32, at 191 (questioning inclusion of Belize, Suriname, Guiana as non-Spanish speaking nations).

[107] Prior to 1971, South Asians and Iberians were both considered Caucasian. Each successfully petitioned the federal government to reclassify them as racial minorities based on conclusory allegations of ethnic disadvantage. La Noue & Sullivan, *supra* note 36, at 451-52.

[108] *Id.* at 459. Moreover, such decisions smack of double standards. The SBA turned down Persian Americans who had demonstrated undeniable evidence of racial prejudice on the ground that the record presented was insufficiently "longstanding," while letting in others, such as Tongans, who made even less of a showing. *Id.* at 453, 465.

consensus surrounding the quadrangle remains superficial, with no connection to underlying reality. To George La Noue, "these categories are merely bureaucratic conveniences around which political constituencies have been constructed."[109] Cunningham and his coauthors similarly criticize the quadrangle as "based on a mixture of inadequately examined folk categories and interest group politics."[110]

Others defend the standard categories on the ground that they capture the sort of intangible, inter-subjective phenomena that are salient to affirmative action. This line of argument would seem to have little merit under the diversity rationale as originally presented in *Bakke.* As a proxy for viewpoint, the broad quadrangular categories are simply too blunt.[111] Indeed, rather than conforming to existing stereotypes on race, the goal should be to challenge them.[112] Emphasizing the variation *within* group identities would encourage students to look beyond such stereotypes.[113]

In the context of remedial affirmative action, using categories that track the contours of societal prejudice makes more sense. After all, the basic law of remedies is to define the remedial class based on the scope of the injury.[114] David Hollinger argues that the quadrangular categories "serve well as predictors of the dynamics of mistreatment, and thus as a foundation for initiatives designed to protect people against such mistreatment or to compensate them for it."[115] The Tenth Circuit similarly justifies use of the quadrangle based on "the harsh

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[109]   *See* La Noue & Sullivan, *supra* note 5, at 917.

[110]   Cunningham et al., *supra* note 25, at 879.

[111]   Hopwood v. Texas, 78 F.3d 932, 946-47 (5th Cir. 1996); McGowan, *supra* note 61, at 135 ("Categorization by race or ethnicity fails to capture the complexity of social experience of many groups . . . . As a result, real diversity may suffer.").

[112]   *Cf.* Metro. Broad., Inc. v. FCC, 497 U.S. 547, 615 (1990) (criticizing assumption of single "minority" viewpoint).

[113]   The only justification for using broad categories would be to achieve a *particular* kind of viewpoint diversity: the shared viewpoint of minorities *subjected to discrimination* on the basis of existing racial stereotypes. But this argument, in effect, conflates the diversity justification with a remedial rationale. *See* McGowan, *supra* note 61, at 136.

[114]   *Cf.* Mont. Contractors' Ass'n. v. Sec'y of Commerce, 460 F. Supp. 1174, 1176 (D. Mont. 1978). "To define an Indian or a Black to determine who should be counted . . . [you] looked at the actual discrimination being rectified and treated as Blacks or Indians the same kind of people that the defendants had treated as Blacks or Indians." *Id.*

[115]   Hollinger, *supra* note 100, at 33.

fact that racial discrimination commonly occurs along lines of the broad categories."[116]

However, the extent to which the popular consensus on race maps the functional lines on which discrimination operates remains questionable. Are persons of European Spanish or Portuguese origin really subject to the kind of anti-Hispanic prejudices that Mexican Americans or Puerto Ricans experience in this country? The Seventh Circuit thought otherwise.[117] Even though Iberians might fall within the popular meaning of "Hispanic," this functional test of racial meaning would justify excluding them from affirmative action.[118]

Viewing race functionally in the context of discrimination might justify other departures from the conventional wisdom on race.[119] Such questions are not just academic. Where we draw the lines determines who benefits from affirmative action. For example, Pakistanis are considered racially "Asian" and hence presumptively disadvantaged. Just across the Khyber Pass, Persians and Afghanis are relegated to "whiteness" and, as such, ineligible for affirmative action.[120] Yet, the racial boundary line dividing them seems to have

[116] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1185 (10th Cir. 2000) (rejecting need for further inquiries at level of subgroups); Cunningham et al., *supra* note 25, at 872 (noting current categories make sense as "a prophylactic against anticipated future" discrimination).

[117] Builders Ass'n of Greater Chi. v. Cook County, 256 F.3d 642, 647 (7th Cir. 2001). One might similarly question the logic of the "Asian Pacific Islander" category: are Samoans, Japanese, and Pakistanis really subject to a common set of stereotypes that distinguishes them from such supposedly "non-Asian" ethnic groups such as Azerbaijanis, Kazakhs, and Mongolians that the federal definitions omit? *Cf.* Ritchey Produce Co. v. State, 1997 Ohio App. LEXIS 4590, at *6 (Ct. App. Oct. 7, 1997) (criticizing Ohio's inclusion of South Asians, but not Lebanese, in its "Oriental" category).

[118] *See Ritchey Produce*, 1997 Ohio App. LEXIS 4950, at *6. One sees a similar divergence between popular versus functional conceptions of race with black immigrant groups in New York City. Although most people would unquestionably identify Nigerians and Jamaicans as racially "black," these groups do not seem to attract the same degree of racial prejudice as African Americans. *See* Lee, *supra* note 56, at 184. At least in the job market, employers have either learned to look beyond color and differentiate by subgroup, or are otherwise responsive to cultural nuances that permit such immigrants to evade the full brunt of racial prejudice.

[119] For example, Arabs and Persians might emerge as "functionally different" from European whites. *Cf.* Hernandez v. Texas, 347 U.S. 475, 479-82 (1954) (contrasting then-popular view of Mexican Americans as racially white with systematic prejudice that marked them as something "other," functional equivalent of separate race).

[120] A trial judge in Ohio found this truncated geography preposterous, declaring it "repugnant to our constitutional system of government [to] exclude a group of United States citizens . . . [solely based on] the side of a river, a mountain range, or a desert their ancestor decided to settle." Ritchey Produce Co. v. State, 707 N.E.2d 871, 877-

rested on bureaucratic expediency rather than any evidence that the groups concerned experience discrimination differently in the United States.[121]

Courts have seized on such definitional vagaries to attack affirmative action remedies for being overinclusive or underinclusive and thus failing the narrow tailoring test under strict scrutiny.[122] Indeed, some courts regard the inherent imprecision of racial remedies as effectively fatal.[123] By its very nature, race is messy, and there are no perfect answers.[124] Yet, the Supreme Court has repeatedly insisted that when it comes to affirmative action, strict scrutiny must not be "strict in theory, but fatal in fact."[125] Finding "a permissible middle ground . . . between [an] entirely individualized inquiry . . . and an unconstitutionally sweeping, race-based generalization"[126] therefore requires some criterion of categorical tailoring against which category definitions can be tested.

Most affirmative action plans continue to adhere to the standard minority categories, often incorporating federal definitions verbatim. As we have seen, these definitions emerged in a fairly arbitrary process. Categories concocted without much thought were politically manipulated and expanded through dubious exercises in armchair ethnography, then blindly replicated and defended by entrenched interest groups. Such manipulation continues. For example, South

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78 (Ohio 1999).

[121] *See supra* notes 107-08. Indeed, Pakistanis never had to offer any evidence of racial subordination to win recognition as a "disadvantaged minority"; they were the passive beneficiaries of a petition for racial reclassification filed by Indian Americans. *See* La Noue & Sullivan, *supra* note 36, at 451-52.

[122] Hopwood v. Texas, 78 F.3d 932, 948 n.37 (5th Cir. 1996); Houston Contractors Ass'n v. Metro. Transit Auth., 993 F. Supp. 545, 557 (S.D. Tex. 1997); Adarand Constructors, Inc. v. Pena, 965 F. Supp. 1556, 1580 (D. Colo. 1997); *Ritchey Produce*, 1997 Ohio App. LEXIS 4590, at *5-6.

[123] *Adarand*, 965 F. Supp. at 1580; *Ritchey Produce*, 1997 Ohio App. LEXIS 4590, at *6-7.

[124] *Cf. Houston Contractors*, 993 F. Supp. at 557 ("Race has never been either narrow or accurate"); Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.,438 F.3d 195, 210 (2d Cir. 2006). The court in *Jana-Rock Construction* stated, "[W]e find it difficult to imagine what a 'correct' racial classification would be. It will always exclude persons who have individually suffered past discrimination and include those who have not." *Id.*

[125] Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

[126] Adarand Constructors v. Pena, 228 F.3d 1147, 1186 (10th Cir. 2000) (rejecting district court's tailoring analysis because "[r]equiring that degree of precise fit would again render strict scrutiny 'fatal in fact'").

Asians were retroactively added to Ohio's "Oriental" category by an executive order of the governor, which critics linked to campaign contributions from Indian donors.[127] Portuguese joined California's Hispanic category under similar circumstances.[128]

As one court summarized: "Race is politics, not biology."[129] It may be tempting to dismiss such definitional wrangling as the normal cut and thrust of identity politics. Yet, there are tangible benefits at stake on which people's livelihoods depend. It is one thing to argue that race is inherently subjective and that arbitrary divisions are inevitable. However, if the process by which such definitional lines are drawn is itself suspect, it becomes more difficult to justify according them a presumptive validity.[130]

Another criticism of the standard federal categories is that they make no allowance for regional variation. As one court observed, "[T]he needs of the Japanese in Hawaii are [not] the same as those of the Japanese in California . . . the needs of [American] Indians in New York are [not] the same as those of the Indians in Montana."[131] Accordingly, the ubiquity of the ethno-racial quadrangle stands in uneasy tension with *Croson*'s emphasis on particularized remedies. In *Croson*, the Court made a point of criticizing Richmond's use of beneficiary categories that did not reflect the city's demographic

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[127] *See* Andrew Zajac, *Inclusion of Asian Indians in Minority Contracting Causes Scandal in Ohio*, AKRON BEACON J., May 15, 1995, *available at* 1995 WLNR 5360734.

[128] Scott Herhold, *Little Portugal Displays Its Political Savvy Seeking Contracts: 'Minority' Classification Would Give Portuguese-American Businesses An Edge*, SAN JOSE MERCURY NEWS, Apr. 28, 1996, at 1B.

[129] *Houston Contractors*, 993 F. Supp. at 546.

[130] Because the choice of categories helps determine who is preferred (and who is excluded) on the basis of race, courts should arguably require some justification beyond the reflexive rubberstamping of federal definitions. *See* Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 209-10 (2d Cir. 2006) (arguing New York needed to tailor its categories to its own context in order to comply with strict scrutiny).

[131] Mont. Contractors' Ass'n. v. Sec'y of Commerce, 460 F. Supp. 1174, 1178 (D. Mont. 1978); *see also* CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION AND AMERICAN VALUES 175 (1996) (distinguishing social position of Aleuts in Anchorage versus Richmond).

makeup.[132]   Such "random inclusion" of implausible groups in affirmative action cast doubt on Richmond's remedial intent.[133]

Following *Croson*'s lead, lower courts have duly incorporated a "random inclusiveness" prong as part of their "strict scrutiny" of affirmative action. A Sixth Circuit panel found Ohio's definition of "Oriental" overinclusive, in part, because it included groups "who might never have been seen in Ohio until recently" such as Thai Americans.[134]   Increasingly, courts are thus requiring justification for the categorical lines being drawn that goes beyond the reflexive rubber stamping of federal definitions.[135]   Rejecting "laundry list" approaches to category-making, they have pushed for greater sensitivity to regional context.[136]

However, none of these opinions offers a coherent account of how a "*non*-random" method of category-making would actually function. Without a theory of "non-random inclusiveness" or indeed any clear definition of what constitutes a "group," such inquiries have a suspiciously ad hoc flavor. Why are Thai Americans taken to be the

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[132]   Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (criticizing inclusion of groups such as Aleuts and Eskimo when "[i]t may well be that Richmond has never had an Aleut or Eskimo citizen"). The Court also drew a broader distinction between Richmond's evidence of discrimination against blacks versus discrimination against the other minority groups that Richmond had included as beneficiaries. While the evidence of anti-black bias was ultimately deemed inadequate, the Court observed that there was "*absolutely no evidence* of past discrimination against" the non-black minority groups whatsoever. *Id.* at 506.

[133]   *Id.*

[134]   Assoc. Gen. Contractors of Ohio v. Drabik, 214 F.3d 730, 737 (6th Cir. 2000); *see also* Monterey Mech. Co. v. Wilson, 125 F.3d 702, 714 (9th Cir. 1997) (discussing same problem with Aleuts in California). San Francisco chose to omit Dominicans from its Hispanic category on similar grounds. Interview with Mara Rosales, Office of City Att'y, in S.F., Cal. (Feb. 2, 1998) (explaining Dominicans had not been represented in relevant population of contactors).

[135]   *See Jana-Rock*, 438 F.3d at 209-10 (holding New York State needed to "mak[e] an independent assessment of discrimination against [persons] of Spanish origin *in New York*" before including them in its Hispanic category) (emphasis added).

[136]   Builders Ass'n of Greater Chi. v. Cook County, 256 F.3d 642, 647 (7th Cir. 2001); *Monterey Mech. Co.*, 125 F.3d at 714 (speculating that "those who drafted the statute for the legislature copied from a model form and neglected to strike its inapplicable portions"); Hopwood v. Texas, 78 F.3d 932, 932-34 (5th Cir. 1996) (approving restriction of affirmative action categories to groups subject to historical discrimination in Texas); Houston Contractors Ass'n v. Metro. Transit Auth., 993 F. Supp. 545, 555 (S.D. Tex. 1997) (criticizing Texas for "cop[ying] whatever the federal government required to get federal funds without a determination of the reality of the categories or the applicability to Texas's experience").

relevant unit of analysis whose presence or absence proved material in the Ohio case? Why not examine, say, Southeast Asians, or even Asians as a whole? Or, alternatively, why shouldn't the category be people from Bangkok?[137] Once we have identified the salient group, how many members does it take to establish a legally cognizable presence? Does their presence have to be continuous? Would it matter if Ohio had evidence that local bigots cannot distinguish between Chinese and Thais? What if discrimination in the past has been solely against the former? Should the answer vary depending on whether the discrimination is ongoing? And what evidence should courts rely on to decide these questions?

   The judicial floundering such challenges have generated only confirms the undertheorized nature of the Who Question in U.S. law. Arguably, what's missing is a societal perspective grounded in empirical fact. In disagreeing as to whether Iberian Americans should be counted as Hispanic, the Second, Seventh, and Eleventh Circuits all framed the issue as whether Iberians faced the same societal discrimination as other Hispanics.[138] Yet, in none of these cases was any attempt made to answer through evidence. Instead, courts justify their underlying intuitions by manipulating the burden of proof[139] or rely on generalized *ipse dixit* as to the "nature of discrimination."[140]

C.   *The Limits of Antidiscrimination*

   At the core, such disputes turn on an empirical understanding of the sociopathology of racial bias. This brings us back to the challenge that Justice Powell saw as intractable: how to evaluate "amorphous" claims of societal discrimination? As we have seen, the Court has steadfastly declined to answer this question. This omission cannot be merely accidental. After four decades of affirmative action litigation, if the Court had wanted to probe the logic of racial categories, it surely

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   [137] Almost any group definition will include an identifiable subset of people who were or are not actually "present" at some relevant time. To exclude them would require individualized analysis to a degree that would preclude group remedies based on race.

   [138] Of course, the answer is unlikely to be all or nothing. One could assess the perceived "Hispanic-ness" of Iberians in terms of how often they are identified as Latino relative to other Hispanic subgroups.

   [139] *Builders Ass'n*, 256 F.3d at 647; *Jana-Rock*, 438 F.3d at 211; Peightal v. Metro. Dade County, 26 F.3d 1545, 1561 (1994); *see also* Ritchey Produce Co. v. State, 707 N.E.2d 871, 927 (Ohio 1999).

   [140] *Builders Ass'n*, 256 F.3d at 642; Adarand Contr., Inc. v. Slater, 228 F.3d 1147, 1185 (10th Cir. 2000).

could have found a way to do so.[141]   The comments of individual justices writing outside the majority betray a noticeable disquietude at the unanswered questions the Who Question raises. Several members of the Court have suggested that singling out certain minority groups but not others for preferred treatment may violate equal protection.[142] Yet, the Court's majority and plurality opinions have stuck doggedly within the confines of a majority/minority framework in which the question becomes whether racial preferences can be justified for *anyone*, rather than the merits of any particular group's claim.[143]

Viewed in this light, the Court's failure to address the logic of affirmative action categories can be seen as part of a larger pattern running through much of the Court's recent cases, namely the profound discomfort that the Court exhibits in coming to terms with race.[144]   In contrast to the racial jurisprudence of the nineteenth century where courts freely indulged in the racial classification game,[145] the modern Court shuns such inquiries, because it recognizes that there are no easy answers. Racial identities, the Court has belatedly acknowledged, reflect societal conventions more than

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[141] The Supreme Court selects the cases it wants to review through grant of certiorari and can direct parties to brief additional issues it deems relevant. *See* Pildes & Niemi, *supra* note 49, at 498.

[142] For example, Justice Douglas questioned the preference shown to Filipinos, but not Japanese, by the University of Washington. DeFunis v. Odegaard, 416 U.S. 312, 338 (1974) (Douglas, J., dissenting). Likewise, Justice Powell suggested that the list of groups targeted by University of California was both underinclusive, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 309 n.45 (1978) (stating "the University is unable to explain its selection of only the four favored groups"), and overinclusive, *id.* at 309 n.45 ("The inclusion of [Asians] is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process"). *See also* Metro. Broad. Inc. v. FCC, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting) (criticizing enumeration of preferred racial groups as underinclusive); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 284 n.13 (1986); Fullilove v. Klutznick, 448 U.S. 448, 537-39 (1980) (Stevens, J., dissenting) (suggesting selection of preferred classes failed rational basis test). Justice Kennedy has also questioned the politics underlying specific category definitions. Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J. dissenting) (relating attempt to exclude Cubans from Hispanic group "on the grounds that [they] were Republicans").

[143] *Cf. Bakke*, 438 U.S. at 359 n.35, "We are not asked to determine whether groups other than those favored . . . should similarly be favored. All we are asked to do is to pronounce the constitutionality of [the affirmative action]." *Id.* The one notable exception is *Croson. See supra* notes 132-33 and accompanying text.

[144] *Cf.* Pildes & Niemi, *supra* note 49, at 498 (noting "the caution and tentativeness that characterizes the current Court's approach to race").

[145] HANEY LÓPEZ, *supra* note 98, at 4-9.

biological truth.[146] However, rather than undertaking an accounting of such social realities, the Court prefers to rhetorically distance itself, referring to race instead in terms of its most superficial attribute — skin color.[147]

Indeed, the very model of strict scrutiny that defines the modern Court's equal protection jurisprudence posits race as an irrelevant, even distasteful phenomena to be tolerated only under extreme circumstances. The problem with a doctrinal structure premised on dismissing race as an irrelevancy is that affirmative action is one area where, by hypothesis, race does matter.[148] The question is how?

Redefining affirmative action as a project confined to discrete contexts such as university admissions or municipal contracting cabins this inquiry. By reconceiving racism as discrete acts of prejudice within a limited context, the Court obscures the underlying societal dynamics of racial disadvantage.[149] Likewise, stressing the instrumental value of racial identities as an educational tool shifts the focus away from the societal context in which such identities function.

Yet, as we have seen, by telling us how to count heads, but not which heads to count, the Supreme Court does not so much answer the larger societal questions as deflect them. By relying on numbers to sort through the complexities of race, the Court abstracts the question of selection from the problem of definition. The Court's failure to provide a functional definition of racial identity leaves policymakers to adhere to the quadrangle by default, which means counting categories that are themselves suspect, the product of the same "unthinking stereotypes or . . . racial politics" that the Court has feared all along.[150]

To confront the Who Question ultimately means navigating the minefield of race and addressing its enduring significance in society. Faced with this challenge, Justices Powell and O'Connor recoiled, declining to engage in the "variable sociological and political analysis" required. Indeed, Justice Powell not only questioned whether such analysis was feasible, but also whether it would be desirable.[151]

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[146] St. Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987).

[147] *See* Gotanda, *supra* note 18, at 40. An extreme example of such rhetorical distancing is Justice Thomas' dissent in *Grutter*. 539 U.S. at 355 n.3 (Thomas, J., dissenting) (likening racial preferences to "aesthetic" of skin color).

[148] *See* Gratz v. Bollinger, 539 U.S. 244, 299-301 nn.1-7 (2003) (Ginsburg, J., dissenting) (giving statistics to document); *Grutter*, 539 U.S. at 306 (majority opinion).

[149] Gotanda, *supra* note 18, at 43-44.

[150] Richmond v. J.A. Croson Co., 488 U.S. 469, 510 (1989).

[151] *See id.*

Instead, Powell retreated into a kind of historical relativism in which everyone has suffered and thus no one claim stands above another. Both theoretically and empirically, this accounting of racial equities seems seriously flawed. Even if other groups have suffered historically, the real issue is where the burdens of societal discrimination fall today.[152] Whether conceived of in terms of lingering effects or ongoing patterns of exclusion, contemporary evidence of racial disparities seems indisputable.[153] Yet Justices O'Connor and Powell seem to confuse this point almost willfully. They situate societal discrimination entirely in the past and then plead helplessness before the fog of history.

Justice Ginsburg challenges such evasiveness in dissenting opinions, citing a wealth of social science research documenting present day racial disparities which persist "[i]n the wake of 'a system of racial caste only recently ended.'"[154] Members of racial minorities — in particular Hispanics and blacks — are shown to fare much worse than whites across a wide range of societal indicators,[155] as well as in audit studies documenting disparate treatment directly.[156] On its face, such scholarship would seem to belie Justice O'Connor's claim that the effects of societal discrimination are "inherently unmeasurable."

Commentators have also challenged the Court's reasoning. They argue the Court's indifference to societal discrimination flies in the face of the Equal Protection Clause's historical origins as a vehicle for "negro emancipation."[157] They see the Court's emphasis on the personal nature of the equality right and its privileging of process over outcome as providing an incomplete account.[158] Moreover, the

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[152] *See Richmond*, 488 U.S. at 510; Fullilove v. Klutznick, 448 U.S. 448, 463 (1980) (stating purpose of preferential remedies is to address *present* effect of past discrimination).

[153] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 272 (1995) (Ginsburg, J., dissenting) (citing empirical evidence of "discrimination's lingering effects"); Ashar & Opoku, *supra* note 2, at 237-38 (documenting "continuing discrimination").

[154] *See* Gratz v. Bollinger, 539 U.S. 244, 299-303 & nn.1-9 (2003) (Ginsburg, J., dissenting); *Adarand*, 515 U.S. at 272 (Ginsburg, J., dissenting).

[155] *Adarand*, 515 U.S. at 272 (Ginsburg, J., dissenting); Ashar & Opoku, *supra* note 2, at 237-38; *see also* Brief of the Am. Sociological Ass'n et. al. as Amici Curiae Supporting Respondents, Grutter v. Bollinger, 539 U.S. 306 (2003); (No. 02-241).

[156] Audit studies typically involve matched "testers" with identical credentials who apply for jobs, loans, or housing in order to assess the effects of the applicant's race with other factors being equal. Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, 609 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 109-14 (2007).

[157] Ashar & Opoku, *supra* note 2, at 235-37.

[158] *See* Gotanda, *supra* note 18, at 40-47; Sunstein, *supra* note 6, at 1314-18.

Court's conclusory assertions about the unmeasurability of societal discrimination ring hollow in light of the abundant evidence of enduring racial inequalities. Its transparent attempt to portray such evidence as the remnant of a distant, murky past seems particularly duplicitous.[159] The Court's stated concerns about judicial competence are therefore dismissed as a mask to advance its underlying agenda of color-blindness. The Court's feigned helplessness is just another act in a series of crocodile tears shed at the altar of white privilege.[160]

Such critics have called for an alternative approach that would reinterpret equal protection review as concerned not with the form of state action, but rather its substantive effect.[161] Instead of scrutinizing racial classifications, the goal would be to eradicate racial hierarchies.[162] A societal perspective would replace the narrow focus on individuals. Under such a reading of equality, affirmative action would become a vehicle for enforcing equality directly, rather than a suspect and narrowly tolerated deviation from it.[163]

Justice Ginsburg's invocation of the rhetoric of "racial caste" in *Gratz v. Bollinger* seems an implicit endorsement of such an antisubordination approach and repudiation of the Court's apparent indifference to societal inequality.[164] Yet, is the topography of racial inequality as readily mapped as Justice Ginsburg's statistics seem to suggest? Moreover, even if societal evidence *could* be meaningfully evaluated, perhaps we should decline the opportunity on political grounds as Justice Powell cautioned. When it comes to race, is dabbling in societal reengineering so fraught with danger that it should be avoided? Other members of the Court have conjured ominous visions of such a project, invoking Nazi Germany and

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[159] *See* Ashar & Opoku, *supra* note 2, at 223 (stating judicial indifference to continuing discrimination "warrant[s] skepticism about the [Court's] good faith").

[160] *See* Harris, *supra* note 17, at 287-88*; cf.* McCleskey v. Kemp, 481 U.S. 279, 315-19 (1987) (pleading lack of institutional competency to counter discriminatory application of death penalty); Washington v. Davis, 426 U.S. 229, 247-48 (1976) (declining to exercise constitutional review over disparate impacts).

[161] Crenshaw, *supra* note 14, at 105-06; *see also* Alan David Freeman, *Legitimizing Discrimination Through Equal Protection*, in CRITICAL RACE THEORY, *supra* note 14, at 29-30.

[162] *See* Harris, *supra* note 17, at 289-90. The Court has taken notice of de facto caste systems in other contexts. *See* Hernandez v. Texas, 347 U.S. 475, 476-77 (1954) (describing social exclusion of Mexican Americans); *cf.* Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race To Latcrit Theory*, 85 CAL. L. REV. 1143, 1163 (1997) (arguing for generalization of *Hernandez* approach).

[163] Simmons, *supra* note 2, at 98-99.

[164] *See supra* note 157 and accompanying text.

Apartheid South Africa as the legal precedents we would have to draw upon to deal with the classificatory challenges entailed.[165] Yet, these admittedly distasteful examples do not exhaust the list of available models. There is another country that has committed itself to societal reengineering which may offer a more appealing precedent. That country is India.

II.   Lessons From Abroad: Does India Hold the Answer?

A.   India's Empirical Approach

Like the United States, India is a diverse, multi-ethnic democracy struggling to overcome the legacy of centuries of officially sanctioned segregation and discrimination. Although Indian affirmative action focuses on caste, not race, there are close parallels. In both cases, beneficiary groups are defined primarily by ancestry (unlike, for example, Brazilian affirmative action, which is based on color).[166] India and the United States also share the common challenge of sorting through competing claims to entitlement from multiple groups (unlike, for example, in Malaysia or Sri Lanka, where affirmative action focuses solely on one group).[167] Like the United States, India operates under a common law tradition. Its written constitution interpreted by an activist judiciary adheres closely to the U.S. model of public law.[168] In addition, India and the United States both operate federal systems in which responsibility for administering preferential policies is divided across multiple layers of government, further complicating classificatory decision making.[169]

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[165] Metro Broad, Inc. v. FCC., 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) (citing facetiously to South African Apartheid statute); Fullilove v. Klutznick, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (drawing analogy to Nazi Reich Citizenship Law).

[166] Seth Racusen, *Making the "Impossible" Determination: Flexible Identity and Targeted Opportunity in Contemporary Brazil*, 36 Conn. L. Rev. 787, 826 (2004).

[167] *See Sowell*, *supra* note 93, at 56, 84-88 (comparing affirmative action policies of Malaysia and Sri Lanka).

[168] Cunningham & Menon, *supra* note 27, at 1305-07. In this respect, India's legal system has more in common with the United States than other common law systems whose adherence to traditional notions of parliamentary supremacy inhibit the role that courts play in policymaking.

[169] Laura Dudley Jenkins, *Race, Case, and Justice: Social Science Categories and Antidiscrimination Policies in India and the United States*, 36 Conn. L. Rev. 747, 759 (2004).

Unlike the U.S. Supreme Court, however, which rejected any attempt to measure societal discrimination, India has developed a rather sophisticated methodology to measure such effects empirically. It uses such measures to select affirmative action beneficiaries. The criteria relied on have been studied by several high-profile national commissions and extensively litigated, with several cases reaching the Indian Supreme Court.[170]

The purpose of affirmative action in India is to remedy the societal effects of caste discrimination.[171] Caste is somewhat different from race. While racial distinctions in the United States are often associated with visible differences in physical appearance (skin color for example), in India, caste distinctions are conceived of most fundamentally as a matter of societal status.[172] The caste system began as a hierarchical system of social ordering within the framework of traditional Hindu belief. Based on birth, caste membership determined one's station in society. Groups at the top of the hierarchy enjoyed superior resources, status, and privilege, while those at the bottom endured ostracism and abuse.[173]

There were five main categories in the traditional caste system. Brahmins, Kshatriyas, Vaishyas, and Sudras made up the four official castes or *varnas*. Beneath them (and outside the formal caste system) were the outcastes, or so-called "untouchables." At each of these five levels, the broader categories divide into smaller caste groups known as *jatis* (or *jats*). The *jatis* were the focus of caste identities; they determined what you did for a living, where you lived, the deities you worshipped, the foods you ate, and whom you could marry. Even today, such identities exert powerful influence on Indian life. To be born to a lower caste retains an enduring stigma.[174]

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[170] Cunningham & Menon, *supra* note 27, at 1304-06.

[171] Sawhney v. Union of India, (1992) A.I.R. 1993 S.C. 477, 504-05 (India). India's history of preferential policies extends back to British rule. Quotas (or "reservations") have become a ubiquitous feature of Indian public life. A specified percentage of civil service posts, university admissions, and even parliamentary seats are reserved for members of groups deemed disadvantaged in Indian society.

[172] While the lower castes are sometimes associated with darker complexions and broader noses, it is not generally possible to tell a person's caste by visual inspection. Nonetheless, there are subtle clues, such as family name, and dietary and religious practices, from which an educated guess can be made. *See Jenkins*, *supra* note 25, at 46-52, 60 (describing dubious attempts by British colonial anthropologists to correlate caste with physiognomic differences, such as "nasal index" measurements).

[173] Cunningham & Menon, *supra* note 27, at 1302.

[174] *Sowell*, *supra* note 93, at 25-27.

Despite the differences in context, one can draw at least a superficial analogy as to the organizing schema under which caste and race function. The five broad caste categories parallel the five racial groups identified in the United States. Just as *varna* are composed of smaller subgroups — *jatis* — racial groups in the United States can be broken down by ethnicity or national origin.[175] While *jati* and *varna* stand in a very different sociological relationship than race and ethnicity, the key point is that Indian affirmative action focuses on the smaller groups — the *jatis* — whereas the United States focuses on much broader categories.[176]

Officially, caste discrimination has been banned. Yet, as with segregation in the United States, patterns of disadvantage continue. And because the caste system had a pyramidical structure, there are many groups in the lower echelons that can plausibly claim to experience such disadvantage — not unlike the "majority of minorities" that Justice Powell talked about in *Bakke*. However, where Powell rejected any attempt to choose between competing groups, India does exactly that.

The starting point in this process remains the caste hierarchy. For the groups at the very bottom — the so-called "Scheduled Castes and Tribes" — traditional status alone determines eligibility.[177] Under the Indian constitution, these groups are automatically allotted a "reservation" (quota) for all civil service jobs, university admissions, and electoral representation.[178]

For a much larger group of affirmative action beneficiaries, however, known as the "other backward classes" ("OBC"), caste disadvantage is no longer presumed from traditional status alone.[179] Some lower caste groups have become landowners and gained political power. Others have moved to urban areas where economic opportunities enable upward mobility. In some cases, lower castes have even succeeded in

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[175] The *jatis* were also subject to traditional hierarchies within each *varna*, although the relative rankings were generally less well-defined and could change over time. *Id.* at 162-63.

[176] *Sowell*, *supra* note 93, at 48, 185-66.

[177] The Scheduled Castes consist mostly of the former untouchables (now known as *Dalits*), while the Scheduled Tribes comprise tribal groups isolated from mainstream society.

[178] *Jenkins*, *supra* note 25, at 2.

[179] The term "backward classes" comes from the Indian Constitution and has been interpreted to transcend traditional caste status and incorporate a broader assessment of social standing. *See* Balaji v. Mysore, A.I.R. 1963 S.C. 649, 650 (India). The OBC receive a separate quota from the Scheduled groups.

redefining their caste status upwards.[180]   Therefore, in order to be included in affirmative action set-asides, each *jati* has to demonstrate that it's still "backward," a term of art in Indian affirmative action law.[181]

The process of identifying backward classes remains the responsibility of provincial governments as caste differences vary by region. Each province compiles initial lists of eligible groups based on a comprehensive review of the local populace.[182] "Backwardness" is determined empirically by looking at a wide range of socioeconomic indicators. The data is collected and analyzed on a group-by-group basis. In other words, the *jati* as a whole forms the unit of analysis. The criteria examined are supposed to be specifically chosen to identify the systemic effects of caste disadvantage.[183]

Both the breadth of criteria and level of detail to which such analysis extends are impressive. One standard form used to collect this information runs over seventeen pages.[184] The factors considered include the average income and education level of caste members,[185] literacy rates, occupational profiles,[186] land ownership, capital resources, political representation (i.e., number of caste members occupying elective or civil servant posts), housing quality, and access to infrastructure (roads, electricity, irrigation, etc.). The form also inquires whether the caste's position has improved or deteriorated during the last twenty years and requires applicants to furnish names of comparable caste groups at similar levels.[187]

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[180] M.N. Srinivas, Collected Essays 200 (2002).

[181] "Backward classes" need not be defined strictly by caste. Non-Hindu groups — Christians, Muslims — can also attain OBC status if they meet the "backwardness" standard. *See Jenkins*, *supra* note 25, at 197-214; Jenkins, *supra* note 169, at 754.

[182] Groups left excluded from the central OBC list can apply independently for inclusion by furnishing their own evidence of "backwardness."

[183] Indian affirmative action thus aims at corrective as well as distributional justice. Cunningham & Menon, *supra* note 27, at 1307.

[184] *See Jenkins*, *supra* note 25, at 197-214 (discussing "[q]uestionnaire for consideration of requests for inclusion and complaints of under-inclusion in the central list of Other Backward Classes").

[185] *Id.* at 208-09; *see also* Sawhney v. Union of India, A.I.R. 1993 S.C. 477, 562 (India) (stating income is permissible criteria to assess OBC, but only when accompanied by other factors).

[186] For example, the form inquires whether the caste is identified with a traditional occupation, whether such hereditary occupation is regarded as "lowly, undignified, unclear or stigmatized" or subject to bonded labor, and what proportion of the caste is still engaged in such occupation. *Id.* at 204-05.

[187] *Id.* at 214.

Wherever possible, the data are supposed to be disaggregated even below the *jati* level. Thus, if an identifiable subgroup of the caste is doing much better than the others, "backwardness" should be appraised for each subgroup separately so that the more "forward" subgroup can be potentially excluded. Similarly, individual caste members who have enjoyed an unusually privileged background may also be deemed ineligible.[188]

In other words, India attempts to choose beneficiary groups using precisely the "sociological and political analysis" that Justice Powell thought could not or should not be attempted in the United States. However, rather than attempt to sort between competing historical claims of past discrimination, India focuses on the here and now.[189] The idea is that groups shown to experience systemic disadvantage across a wide array of societal indicators can be presumed to be the ones most afflicted by discrimination. India thus answers the Who Question empirically. Instead of accepting the existence of caste hierarchies as frozen in time, India defines caste functionally in terms of subordination. It then quantifies such subordination through empirical proxies and targets its affirmative action accordingly.

In drawing inferences of discrimination from empirical measures, Indian methodology superficially resembles the underrepresentation model of *Croson*. Both rely on counting — using quantitative measures to determine affirmative action eligibility. However, very different kinds of counting are involved. Whereas India focuses on societal disadvantage, *Croson* confines its analysis to particularized contexts. India also employs a multifactoral, systemic analysis, whereas counting in the United States focuses solely on a single indicator: group representation.

The units being counted are also sized very differently. Most affirmative action programs operate within the standard four "minority" categories, roughly analogous to India's *varnas*. Samoans are thus lumped together with Pakistanis in a pan-Asian grouping counted en masse. By contrast, India's counting focuses on the *jatis* — the smaller units that make up each *varna*. The analogy in the U.S. context would be to analyze Samoans and Pakistanis separately.

Fundamentally different assumptions underlie these quantitative measures. In the United States, a statistically significant disparity is

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[188] This skimming off of the so-called "creamy layer" of caste elites is constitutionally required. *See Sawhney*, A.I.R. 1993 S.C. at 588-89. Thus, OBC membership only creates a presumption of eligibility.

[189] *See id.* at 556 (rejecting retrospective rationale of compensating for past injury).

taken as prima facie evidence of unlawful discrimination. In other words, the counting is (at least in theory) supposed to uncover actual "statutory or constitutional violations" traceable to the very institution seeking to grant the remedy. By contrast, India makes no effort to assign individual responsibility. It seeks to measure the systemic effects of enduring caste discrimination irrespective of their cause.[190]

To some extent these different emphases can be ascribed to differences in the way race and caste are conceived. In the United States, race is often considered an immutable trait, inhering in highly visible (albeit superficial and morally irrelevant) characteristics such as skin color.[191] As a result, racial discrimination is conceived of in terms of discrete acts of irrational prejudice triggered by such phenotypic differences — a matter of individuals responding inappropriately to "racial" stimuli.[192] Remedying discrimination thus entails neutralizing individual bad actors, as opposed to effecting broader institutional change.[193]

In India, however, caste is less associated with immutable traits than with explicit social hierarchies. It is thus more natural to think of caste discrimination as a societal problem that must be addressed systemically. In order to remedy such discrimination, the social hierarchies themselves must be attacked and rendered invisible.[194]

India also differs in its allocation of decisional authority to an administrative process only indirectly supervised by the judiciary.[195] By contrast, the constitutionalization of racial policy in the United States precludes similar efforts at social reengineering. The Supreme Court has rejected societal remedies because of concerns over judicial competence. Yet, its distrust of racial politics means the Court will not allow other branches to act in its stead.[196]

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[190] *Cf.* Freeman, *supra* note 161, at 29-30 (contrasting "perpetrator vs. victim" perspectives on discrimination).

[191] Indeed, "color" is often used synonymously with race.

[192] Gotanda, *supra* note 18, at 43-45.

[193] *Id.*

[194] Cunningham & Menon, *supra* note 27, at 1304.

[195] *See id.* at 1306-07; *infra* note 305 and accompanying text.

[196] As Justice O'Connor explained, "[O]ur history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." Richmond v. J.A. Croson Co., 488 U.S. 469, 510-11 (1989). The inability of courts to measure societal discrimination raises the "danger that [putative remedies are] merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 510. The inability of courts to control societal rationales means they cannot be relied on legislatively. *Id.* at 497, 506; Sean Pager, *Strictness and Subsidiarity: An Institutional Perspective on Affirmative*

B.   *From India to the United States: Applying the Model*

For some, the Indian approach based on societal disadvantage offers a more attractive means of selecting beneficiaries. The preoccupation with identifying intentional bias in U.S. law has been criticized for employing unrealistic assumptions about the etiology of discrimination.[197] Rather than focusing myopically on identifiable "bad actors," commentators have stressed the need to address systemic patterns of disadvantage.[198] In proposing this paradigm shift from antidiscrimination to antisubordination, Sunstein tellingly uses the metaphor of a constitutional "Anticaste Principle," and, in fact, his definition of "caste" in terms of systemic societal disadvantage is reminiscent of the way India actually goes about identifying "backwardness."[199]

That India offers a working model of an antisubordination program has not gone unnoticed by scholars of comparative affirmative action.[200] In advocating India's approach to the U.S. Supreme Court, Cunningham and his fellow scholars on the amicus brief made the case that the empirical validation supplied by Indian methodology should put to rest judicial concerns over the "amorphous" nature of societal discrimination.[201] Moreover, Sunstein and Cunningham both highlight the institutional advantages of shifting responsibility over questions of structural equality from the judiciary to the political branches.[202]

Action at the European Court of Justice, 26 B.C. INT'L & COMP. L. REV. 35, 70 (2003).

[197] *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1239-41 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 432-44 (1987).

[198] Freeman, *supra* note 161, at 30, 35. Some commentators also argue that the Court's existing jurisprudence already contains the seeds for such a paradigm shift. *E.g.*, Haney López, *supra* note 162, at 1200.

[199] Cunningham & Menon, *supra* note 27, at 1302-06; Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994).

[200] Cunningham et al., *supra* note 25, at 874-75; Cunningham & Menon, *supra* note 27, at 1302-06.

[201] Brief, *supra* note 28; Cunningham et al., *supra* note 25, at 874, 881 ("India's experience shows without a doubt that it is possible to design a program to remedy the effect of past discrimination in which beneficiary groups are designated through an objective process based on empirical research.").

[202] *See* Cunningham et al., *supra* note 25, at 858-59; Sunstein, *supra* note 199, at 2412-13, 2440 (describing "superior democratic pedigree and fact-finding capacities" of legislative and administrative bodies).

On its face, the multifactoral analysis applied under the Indian approach does seem like a more rational answer to the Who Question. Whereas *Croson* tells us simply to count heads without much thought about their underlying meaning, India employs empirical measures specifically chosen to correlate with the social phenomenon being targeted. Moreover, by analyzing the narrowest possible units — *jatis* instead of *varnas* — using definitions tailored to local context, the Indian approach achieves a greater degree of precision which helps to avoid overinclusive or underinclusive remedies and thus reduces the concern over definitional issues.[203]

India is able to work with smaller units because it is looking at caste societally, using a composite of many factors to map social hierarchies. In looking at this broader picture of underprivilege, group size becomes less of a limitation than with *Croson*'s particularized analyses in which statistical significance is often a limiting factor. By determining affirmative action eligibility through a centralized process, India's approach is also more efficient than the separate disparity studies that *Croson* demands for each remedial context. Moreover, unlike racial definitions in the United States, Indian methodology responds to regional variations in caste identities.

How might such a model translate to the U.S. context? To return to the Iberian cases discussed above, recall that the key question was whether Iberians experienced the same patterns of racial disadvantage as other Hispanics. Applying Indian methodology, this question could be answered by analyzing empirical data.

The idea would be to use societal disadvantage as a proxy for racial subordination. This would entail gathering statistics on Iberians and other Hispanic subgroups, using appropriate criteria designed to quantify patterns of subordination in the United States. This might include examining access to education, average household wealth, patterns of residential segregation, rates of interracial marriage,[204] political representation, and a host of similar criteria. If it turns out that Iberians do much better on these measures than Latinos, this

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[203] Smaller groups also generally have better defined identities, a phenomenon that applies in the United States as much as in India. *Cf.* Cunningham & Menon, *supra* note 27, at 1305, 1309-10. (describing benefits of disaggregating current affirmative action categories and shifting remedial focus to subgroups). Therefore, while counting small groups does not eliminate definitional ambiguity, it minimizes it.

[204] *See* Cunningham et al., *supra* note 25, at 873 n.216 (pointing to intermarriage rates and patterns of white flight).

could mean they are not experiencing the same patterns of discrimination.[205]

In fact, data from the 2000 U.S. Census reveal that on several such measures, Iberians are differently situated from other Hispanic groups. They are significantly wealthier, better educated, and engaged in higher status occupations than Mexican Americans and Puerto Ricans, who make up the bulk of U.S. Hispanics;[206] indeed, on many measures Iberians outperform the U.S. population at large. Almost twice as many American Spaniards, for example, hold a graduate degree than the U.S. average; they are twenty-five percent better represented in managerial or professional occupations; and they own homes valued at thirty-six percent above the national median.[207] Mexican Americans and Puerto Ricans living on the U.S. Mainland, by contrast, rank well below the U.S. average on all of these measures.[208]

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[205] As in India, allowance should also be made for possible regional variations.

[206] Mexican Americans (or Chicanos) are by far the largest Hispanic subgroup represented almost 60% of the total. Puerto Ricans account for just under 10%. *See infra* Appendix for Census data on Hispanic subgroups.

[207] Portuguese Americans do slightly less well than Spaniards on these measures. They are somewhat *less* likely to hold a college degree or be a manager or professional than the average U.S. resident. But they experience poverty at only two-thirds the national rate and the median value of their homes exceeds that of the general populace by 34%. *See infra* Table 3.

[208] Mexican Americans, for example, earn graduate degrees at a quarter the rate of the U.S. average; they are only half as well-represented in the managerial and professional classes; and their home values rank 20% below the national median. *See infra* Table 3.

Table 3. Socioeconomic Breakdown of Hispanic Subgroups

Population Group	Education % Earning Degree Bachelors	Education % Earning Degree Graduate	Occupation Managerial or Professional	Property Median Home Value	Income % Below Poverty Level
ALL U.S.	15.5%	8.8%	33.6%	$119,600	12.4%
HISPANIC	6.7%	3.8%	18.1%	$105,600	22.6%
Argentinean	16.2%	19.0%	42.5%	$180,000	13.8%
Spaniard	16.2%	13.7%	42.0%	$162,100	12.7%
Portuguese	13.0%	6.0%	29.9%	$160,100	8.1%
South American	14.5%	10.6%	27.7%	$153,100	15.0%
Cuban	11.5%	9.6%	31.6%	$135,700	15.0%
Central American	6.2%	3.4%	13.3%	$131,400	19.9%
Puerto Rican	8.3%	4.2%	24.2%	$112,500	26.0%
Mexican	5.0%	2.4%	14.9%	$95,300	23.5%
BLACKS	9.5%	4.8%	25.2%	$80,600	24.9%

Source: 2000 U.S. Census

If one accepts such societal indicators as appropriate criteria to determine affirmative action eligibility, the case for including Iberians seems weak.[209] Even if the popular consensus would regard them as Hispanic, they appear less burdened by the systemic handicaps associated with the larger group.[210] It may be that the success of Spaniards comes in spite of race, not because of it. But it is more likely that these differences in societal standing reflect genuine differences in how such subgroups experience race. Scholars have identified intra-Hispanic disparities based on skin color.[211] The lighter

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[209] A similar argument could be made for excluding Hispanics of South American and Cuban origin. Argentine Americans fare particularly well on these measures, outstripping even Spaniards.

[210] The popular consensus is, in any case, influenced by the terms on which formal race categories are constructed. Shifting to a narrower Latino classification would arguably reduce the tendency of the public to associate Iberians with other Hispanics.

[211] *See* Leonard M. Baynes, *If It's Not Just Black And White Anymore, Why Does Darkness Cast A Longer Discriminatory Shadow Than Lightness? An Investigation And Analysis Of The Color Hierarchy*, 75 Denv. U. L. Rev. 131, 133-34 (1997); Edward E. Telles & Edward Murguia, *Phenotypic Discrimination and Income Differences Among*

skin and European features of Spaniards could permit them to function more easily in mainstream U.S. society. Moreover, class differences may themselves insulate societally successful Hispanics from the patterns of prejudice that other group members encounter.

This does not mean that Iberians never encounter racial prejudice, but it does suggest that, like Jews or Irish, they have learned to navigate around it. And we may want to focus our affirmative action efforts on groups that *are* being held back. Since most affirmative action definitions of "Hispanic" still include Iberians, a disadvantage approach would lead to a narrowing of eligibility in this case.

Cunningham and his collaborators proposed to generalize such inquiries to "redraw the map" around which our racial compass is oriented. They called for a "national bipartisan commission" to be convened to replace the standard categories of the quadrangle with scientifically redesigned groupings built around systemic disadvantage.[212] Newly fashioned empirically validated categories could then serve to allocate affirmative action remedies in a more targeted, rationally defensible fashion.[213]

India's example of selecting affirmative action beneficiaries directly based on societal disadvantage closely approximates the antisubordination approach to affirmative action championed by U.S. scholars. The Indian model therefore serves as a useful thought experiment to examine the viability of such an alternative model.

C. Demographic Challenges

Could an Indian-style disadvantage model provide a workable answer to the Who Question as such commentators suggest? There are significant differences in moving to the U.S. context that would complicate the analysis. Moreover, even if such an approach proved workable, a further question remains whether the consequences would be desirable. Arguably, Justice Powell was right to resist societal rankings as a matter of practical politics. If so, the Indian model may serve as a negative example, more of a cautionary lesson than a model to emulate. Exploring the reasons why points to some of the dangers lurking within the Who Question.

Mexican Americans, 71 Soc. Sci. Q. 682, 693-94 (1990) (finding evidence of greater labor market discrimination against Mexican Americans with darker skin than those with lighter, more European complexion).

[212] Cunningham et al., *supra* note 25, at 880-81.

[213] *Id.* at 882.

First, consider the demographic contrasts. India remains a largely rural society in which patterns of caste oppression have been entrenched literally over millennia. As a result, caste identities remain well-defined.[214] Most caste groups still live in their traditional villages and engage in time-honored occupations. Inter-caste marriage is virtually unknown. Given these relatively stable baseline conditions, Indian policymakers can generally presume that empirical disadvantage flows from the lingering effects of caste, as opposed to extrinsic causes.

By contrast, the United States is a nation of immigrants, with a high degree of geographic and social mobility. Although "ethnic niches" in the workforce still exist,[215] occupational diversity is increasingly the rule. Ethnic and racial identities are not as well-defined, and interracial marriage rates are rising. All of this makes the dynamics of group disadvantage much more difficult to model because, as Justices O'Connor and Powell noted, it requires analyses of amorphous, moving targets.[216]

Dealing with immigration effects would present a particular challenge, one which Cunningham and his coauthors largely disregard and which many subordination theorists overlook.[217] Immigrants typically arrive in positions of relative disadvantage and then progress up the socioeconomic ladder. In general, the longer they have been in the country, the better they do.[218] Such immigration effects skew socioeconomic measures of status, and for groups with high rates of immigration, the distortions can be appreciable. Yet, affirmative action, properly understood, should target racial disadvantage that

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[214] This is not to deny the phenomenon of caste mobility, nor to deny the existence of gray areas in caste identity. The point is merely a comparative one: caste remains a much more stable marker of identity in India than race in the United States.

[215] *See generally* Malamud, *supra* note 50, at 327-29 (describing how certain ethnic groups gravitate to certain occupational niches).

[216] *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (describing "mosaic of shifting preferences"); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 296-97 (1978) (describing need for constant re-ranking of groups).

[217] Cunningham and his coauthors begin with a "mad bomber" parable that posits a model of lingering disadvantage traceable to a unitary injury at time zero. Cunningham et al., *supra* note 25, at 836. While their model contemplates internal migrations by the original inhabitants subsequent to their bombing injury, it fails to address the potential for immigration itself to constitute an independent source of "injury" as a causal phenomenon correlating with societal disadvantage. Nor does the model contemplate new or ongoing sources of racial prejudice.

[218] Many components contribute to success in navigating U.S. society: familiarity with U.S. customs, employment skills, language ability, social capital ("connections"), financial resources, and others. All of these take time to cultivate.

goes beyond such transitory phenomena. Unlike traditional welfare policies grounded in distributional equity, affirmative action takes its moral force from a corrective justice ideal. It targets a specific *type* of disadvantage arising from a morally irrelevant and seemingly immutable characteristic — race — the dynamics of which operate on a societal scale whose fundamental injustice transcends individual circumstances.[219] Moreover, affirmative action remedies function on a collective level that captures positive externalities beyond the individual recipients.[220] At its most ambitious, affirmative action seeks nothing less than to remake society in a new, less prejudicial image.[221] To accomplish this goal, we need appropriate adjustments to identify patterns of "intractable disadvantage" unrelated to immigration.[222]

This is more easily said than done. Adjusting for immigration effects requires dealing with myriad causal variables. Immigrants begin at differing starting points and their ability to progress also varies, based on the circumstances they face upon arrival.[223] Many Mexicans and Central Americans come across the border, often illegally, from poor, rural communities, with little education, and then remain concentrated in linguistically isolated communities that resist assimilation.[224] By contrast, Argentineans and Asian Indians often arrive with higher education degrees in hand and go on to achieve greater successes.

In general, Asian immigrants seem more successful at economically integrating than Hispanics. Language ability may account for at least part of this discrepancy. Roughly the same percentage of Asians as Hispanics are recent immigrants.[225] However, almost half of foreign-

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[219] Brest & Oshige, *supra* note 5, at 866-67.

[220] *Id.* at 868-71 (describing benefits of affirmative action in eliminating stereotypes and creating positive minority role models).

[221] RONALD DWORKIN, A MATTER OF PRINCIPLE 294-95 (1985).

[222] Brest & Oshige, *supra* note 5, at 873-74. The idea would be to target multigenerational patterns of disadvantage that are due to (as opposed to merely correlative with) race or ethnicity. *Id.*

[223] *See generally* Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577-606 (1998) (contrasting varying conditions met by Haitians versus Marielitos in 1980s); Anthony DePalma, *15 Years on the Bottom Rung*, N.Y. TIMES, May 26, 2005, at A1 (contrasting Greek and Mexican immigrant experiences).

[224] GRAHAM, *supra* note 32, at 182-83; DePalma, *supra* note 223.

[225] *Cf.* U.S. Census Bureau, 2000 U.S. Census Data, http://factfinder.census.gov/home/saff/main.html?_lang=en (click on "DATASETS," then click on "Census 2000 Summary File 4 (SF 4) - Sample Data," and "Detailed Tables," then click on "United States," then click "Add," then click on "Show Result." Select "PCT38. AGE BY LANGUAGE SPOKEN AT HOME BY ABILITY TO SPEAK ENGLISH FOR THE

born Hispanics lack the ability to function adequately in English compared to just over a quarter of their Asian counterparts.[226] About one in five Hispanic immigrants speak English "not at all" compared to a mere 5.6% of Asians.[227]   Accordingly, even legal Hispanic immigrants often remain excluded from opportunities for upward mobility. In addition, Hispanics do not seem to face the same barriers to spatial mobility as blacks, suggesting that their segregation is more a cultural choice than a condition of racism.[228]   Second-generation Hispanics are also much more likely marry outside their racial groups than African Americans, suggesting less ingrained racial antipathy against them.[229]

Nonetheless, there are clearly some Hispanic communities that have been held back for generations at least partly due to racism.[230] Isolating the "racial" headwinds that impede ethnic advancement from other contingent variables requires making a number of subjective and normatively problematic assumptions about the dynamics of racial prejudice and the uncertain divide between culture and race, all of which would severely test our understanding of "race" as a construct.[231]   Faced with such a demographic and sociological challenge, even the best social scientists given infinite time and resources might find it difficult to choose between competing claims of disadvantage in a way that would be generally accepted as fair.[232]

POPULATION 5 YEARS AND OVER [67]" and all tables until "PCT42. HOUSEHOULD LANGUAGE FOR LINGUISTIC ISOLATION [14]." Then select "Asian alone" and "Hispanic or Latino (of any race)." Then select "Show Result." (last visited Oct. 30, 2007).

[226] *See* U.S. CENSUS BUREAU, *supra* note 225.

[227] *See id.*

[228] *See* Daniel Farber, *The Outmoded Debate Over Affirmative Action*, 82 CAL. L. REV. 893, 925 (1994); Douglas Massey & Nancy Denton, *American Apartheid: The Perpetuation of the Underclass*, *in* COLOR CLASS IDENTITY: THE NEW POLITICS OF RACE 138-39 (John Arthur & Amy Shapiro eds., 1996).

[229] *See* GRAHAM, *supra* note 32, at 193.

[230] *See* Brest & Oshige, *supra* note 5, at 886-87 (citing conflicting evidence on links between Hispanic disadvantage and discrimination).

[231] Because race is itself a cultural phenomenon constructed intersubjectively, the boundaries between race and culture often blur. Other indicia of ethnic integration are subject to similar ambiguities. For example, rates of exogamy (interracial marriage) are often viewed as a negative indicator of prejudice, the ability to marry outside one's race being a proxy for societal integration. Yet, some groups exhibit preferences for endogamy for cultural reasons that have nothing to do with how outsiders view them.

[232] India's socioeconomic approach is by no means the only measure of societal subordination. However, alternative methodologies such as audit testing or attitudinal

Appreciating such difficulties provides a fuller explanation for the Court's antipathy toward societal rationales for affirmative action than the Court's stated reasons. Justices O'Connor and Powell stressed the "inherent[] unmeasurab[ility]" of *past* societal injuries.[233] However, these concerns also apply to an antisubordination model focused on the present. Moreover, while their comments focus on the limits of *judicial* competence, the ramifications extend beyond the judicial context. At the core lies a question of political, rather than merely technical, feasibility. An antisubordination approach to equality would be inherently subjective and contestable. Conditioning valuable societal benefits on such judgment calls, however well-intentioned, would be a recipe for social discord.

D.   Politicization and Backlash

In any case, in the real world, we should not expect that "disadvantage" would be determined through neutral social science because the whole process would inevitably become politicized. Competing interest groups would lobby for favorable criteria and attempt to "game" the system.[234] Threshold standards would be hard to maintain. All of this has happened in India.[235] Reservation politics dominate election campaigns and attract corruption. New groups are constantly being added to the OBC ranks, but very few ever get taken off the lists.[236] In this sense, the idealized account of Indian methodology provided by the amici scholars requires a dose of legal realism. Given the more complex and contestable terrain that the implementation of a "disadvantage model" in the United States would have to negotiate, one could expect the scope for politicization and manipulation of the process to increase dramatically.

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surveys have their own shortcomings and subjectivities whose details lie beyond the scope of this Article. Pager, *supra* note 156, at 114-17. Suffice it to say that a generalized assessment of societal hierarchies presents a daunting challenge by any method.

[233]   *See supra* notes 40-42 and accompanying text.

[234]   *See* Sunstein, *supra* note 6, at 1317 (noting risk "of strategic and self-interested behavior").

[235]   Cunningham & Menon, *supra* note 27, at 1306.

[236]   *See* Sowell, *supra* note 93, at 50-51; *With reservations*, THE ECONOMIST, Oct. 4, 2007, at 81, 83 ("Rather like guests at the Hotel California, those that join the [OBC reservation] list never leave — including one or two castes that were allegedly included by mistake."); *see also* Sawhney v. Union of India, A.I.R. 1993 S.C. 447, 537-38 (acknowledging political manipulation of OBC criteria for electoral advantage).

Fear of such "racial politics" underlies the Supreme Court's rejection of societal rationales. As Justice O'Connor tells us in *Croson*, the Court relies on strict scrutiny to "'smoke out' illegitimate uses of race."[237] Without an objective metric to measure societal injuries, affirmative action would too easily devolve into a pretext for the politically empowered to "negotiate a 'piece of the action.'"[238] Justice Powell similarly warns against "hitching the meaning of the Equal Protection Clause to . . . the ebb and flow of political forces."[239] It was to preempt such evils that the Court seemingly closed the door constitutionally to antisubordination arguments.

We already see a politicization of the disparity testing that contracting programs do under *Croson*; critics have accused them of relying on phony social science to achieve predetermined ends.[240] And as we saw, the process of creating our current racial categories was also not without its politics. Yet, disparity testing is confined to a particularized context and usually involves a contest between industry insiders, unbeknownst to the general public. Similarly, the racial prehistory of the quadrangle largely took place behind closed doors.

By contrast, an Indian disadvantage model would elevate the Who Question to a much more visible plane. Determinations of "backwardness" involve a holistic assessment of group standing, not in a limited context, but across society. Such assessments inevitably pit competing groups against one another in an adversarial process. At stake is not just eligibility for one program in one sector, but affirmative action benefits across the board. The result is a far more competitive, high profile contest where the winners take all. Inevitably, caste consciousness becomes sharpened, not reduced, in the process.[241]

This may seem an acceptable price to pay in a country where caste identities have already been entrenched as an instrument of oppression over three thousand years. Yet, as we have seen, racial identities in the United States are not so well-defined. Moreover, as

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[237] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[238] *Id.* at 510-11.

[239] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 298 (1978).

[240] La Noue, *supra* note 54, at 12-13.

[241] Indeed, Indian commentators commonly lament the "Mandalization" of Indian politics (referring to the government commission expanded caste reservations nationally). Some link the rise of the Hindu right to the upper caste backlash against "Mandalism." *See* Thomas B. Hansen, The Saffron Wave: Democracy and Hindu Nationalism in Modern India 164-66 (1999); Achin Vanaik, The Furies of Indian Communalism: Religion, Modernity and Securalization 51, 319 (1997).

with our demographics, race presents a moving target. U.S. Census categories on race have changed dramatically over the years; they continue to be redefined today.[242]   Such permeability of racial identities arguably has a positive value. Avoiding overt intergroup rivalries helps to minimize the hardening of such identities through forced political mobilizations.

The competitive element of Indian affirmative action has other troubling features. Because more forward groups tend to usurp a lion's share of benefits, groups ranked lower down the hierarchy inevitably demand their own separate quotas. India already has two established tiers of beneficiaries, the Scheduled Castes and Tribes having precedence over the OBC. Competition within these groups has increasingly led to further distinctions whereby groups deemed "more disadvantaged" demand separate reservations, requiring ever more intricate rankings.[243]   Again, for a country dealing with the effects of an entrenched caste system, such inverted hierarchies may seem like an acceptable, even desirable remedy. South Africa has taken a similar approach: prioritizing affirmative action eligibility according to the degree of oppression that the various beneficiary groups experienced under Apartheid (which was itself a rigidly hierarchical system).[244]

Cunningham has hypothesized an analogous remedial hierarchy in which blacks and Native Americans — the two groups that suffered the greatest historical injury in the United States — would be first in line for affirmative action.[245]   Several U.S. courts have already hinted that equal protection may require that such distinctions be made.[246]

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[242] YANOW, *supra* note 57, at 83-85 (charting evolution of categories).

[243] *Sowell*, *supra* note 93, at 34.

[244] *Id.*

[245] Cunningham, *supra* note 21, at 673 (drawing further analogy comparing blacks and Indians with, respectively, India's Scheduled Castes and Tribes). Cunningham stresses in a footnote that the analogy is made for illustrative purposes only, not as an "import model." *Id.* at 673 n.37. However, there is a logical case to be made for such a proposal. It's revealing, for example, that the SBA justified its minority set-asides by emphasizing the unique historical experience of these two groups. *See* La Noue & Sullivan, *supra* note 36, at 450 (quoting SBA interim rule explaining "blacks had suffered 'enslavement and subsequent disfranchisement' and Indians had endured 'near extermination,'" while omitting explanation of other included groups).

[246] *See* Hopwood v. Texas, 78 F.3d 932, 955 n.50 (5th Cir. 1996) (stating "one would intuit that the minority group that has experienced the most discrimination . . . would be entitled to the most benefit from the designated remedy"); Assoc. for Fairness in Bus. v. State, 82 F. Supp. 2d 353, 362 (D.N.J. 2000) (same); Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1077 (D. Colo. 2000) (same).

Once racial disadvantage can be empirically quantified, the demand for differential remedies calibrated in proportion to the injury would become all but irresistible. Making such distinctions would only intensify intra-minority competition at all levels of the disadvantage ladder.[247]

The spectacle of so many groups competing in a collective airing of dirty linen would be one that many Americans would instinctively resist. Such special pleading runs strongly against the grain of American egalitarianism.[248] Even from the start, when affirmative action was so clearly focused on redressing injustices against African Americans, policymakers were loathe to single out any one group for preferential treatment. This reluctance to play favorites in favoritism appears to be widely shared, even among African Americans themselves.[249] Similarly, it is notable that claims based on Native American singularity have focused on reclaiming traditional homelands and privileges rather than the more general demand for societal preference voiced by other indigenous groups, for instance, in Malaysia or Fiji.[250] The United States likes to think of itself as a classless society and a nation founded on universal equality. However imperfectly that ideal has been applied in practice, we would likely be uncomfortable with a hierarchical system of affirmative action that so overtly belied it.

The Who Question thus has its tradeoffs. Gains in distributive or corrective justice from pursuing increased precision and clarity might be outweighed by sharpened group consciousness and polarization.[251]

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[247] *See* Sunstein, *supra* note 6, at 1317 (describing danger of "play[ing] the game of 'more victimized than thou' ").

[248] Admittedly, affirmative action already requires a break from formal equality. However, it's easier to accept that "minorities" generally deserve a leg up than to engage a whole spectrum of claims to differential levels of entitlement.

[249] Studies have also shown that African Americans would be loathe to assume the stigma of being the only group singled out for special benefits. DAVID SABBAGH, U.N. DEV. PROGRAM, HUMAN DEV. REPORT OFFICE, AFFIRMATIVE ACTION POLICIES: AN INTERNATIONAL PERSPECTIVE 26 n.148 (2004), *available at* http://hdr.undp.org/docs/publications/background_papers/2004/HDR2004_Daniel_Sabbagh.pdf.

While African Americans have at times protested the diminishment of their share of the affirmative action pie due to competition from other groups, the dominant ideology espoused by black leaders is that of "solidarity" among "people of color." *Id.*; GRAHAM, *supra* note 32, at 5-6, 132.

[250] *See generally* Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?*, 44 WM. & MARY L. REV. 1521, 1553-56 (2003) (describing preferences in Malaysia).

[251] Cunningham, *supra* note 21, at 675 (describing "[t]he concern that the fruit of 'strict scrutiny' of group selection and definition might be a counter-productive perpetuation of racial identity").

Justice Powell adverted to such concerns in *Bakke* when, after dismissing a sociological ranking of racial disadvantage as outside the judicial competence, he questioned whether such rankings would even be "politically feasible and socially desirable."[252] Powell's solution in *Bakke* was to advance a model of "pluses" awarded based on an individualized assessment of each applicant's diversity contribution. Powell's approach thus preserves a symbolic commitment to individualism, maintaining the illusion that everyone can compete equally with no group enjoying a superior a priori claim.[253] Likewise, *Croson*'s disparity testing reduces group entitlement to a question of statistical analysis in particularized settings. The Supreme Court thus pursues a strategy of judicial indirection designed to disguise the workings of race consciousness and reduce the polarizing effects such policies engender.[254] It is not that the Court cannot choose between groups, but that it chooses not to.

In this sense, critics of the Court may be correct to dismiss claims of "inherent unmeasurab[ility]" as judicial hyperbole. However, they are too quick to accuse Justices O'Connor and Powell of having a hidden agenda. At root, the Court's concerns are pragmatic, rooted in the realm of practical politics rather than the kind of ideological hostility to race consciousness that critical race theorists often assume.

Indeed, the lacuna in American law when it comes to the Who Question can be seen as part of a broader strategy of legal ambiguity in affirmative action rulings in which vagueness, if not an actual virtue, becomes a necessary evil.[255] On this account, the Court's apparent disregard of social context when it comes to affirmative action can be seen as a pragmatic accommodation of the political sensitivities surrounding race. It follows the old adage: "If you don't have something good to say, better say nothing at all."[256]

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[252] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 292, 297 (1978).

[253] *See* Pager, *supra* note 196, at 51-52 (drawing comparison with similar approach by European Court of Justice).

[254] *See* Robert Post, *Introduction: After* Bakke, 55 REPRESENTATIONS 4, 7 (1996); Daniel Sabbagh, *The Judicial Uses of Subterfuge*, 118 POL. SCI. Q. 411, 419, 433 (2003) (arguing "affirmative action . . . being . . . a deliberate attempt at reducing the degree of racial identification in the United States must be concealed in order to achieve its intended effect").

[255] *See* Keith J. Bybee, *The Political Significance of Legal Ambiguity*: *The Case of Affirmative Action*, 34 LAW & SOC'Y REV. 263, 272-75 (2000) (summarizing commentary on judicial use of ambiguity in affirmative action).

[256] Critics have sometimes accused the Court of engaging in a form of subterfuge, a judicial shell game in which intentionally opaque rationales mask the realities of racial preferences. Kingsley R. Browne, *Affirmative Action: Policy-Making by Deception*, 22

Such intentional ambiguity runs directly contrary to the Indian approach of targeted reservations based on explicit reckonings of comparative societal disadvantage. Yet, as the preceding sections have argued, when it comes to the Who Question, too much clarity can prove counterproductive. Indeed, understanding this conflict between precision and polarization helps to explain the Supreme Court's preference for an antidiscrimination approach over antisubordination.

A degree of ambiguity as to racial identities is tolerable within an antidiscrimination model because the doctrinal structure is symmetric: all racial classifications are equally suspect, reducing the need for precise definitions as to categorical boundaries.[257] A theory of equal protection that treats groups asymmetrically, however, favoring certain groups over others based on their perceived downtrodden status, puts a much greater premium on precise criteria to delineate who falls in which category.

Limiting an antisubordination rationale to non-immigrant African Americans could, in theory, simplify matters.[258] However, a theory of equality focused solely on a single group seems unlikely to gain traction as a practical matter, even ignoring the constitutional challenges such a move would encounter.[259] Whether rightly or wrongly, affirmative action has always included other groups almost as a matter of reflex. Some argue the widespread acceptance of

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OHIO N.U. L. REV. 1291, 1291, 1294 (1996). Yet, intentionally opaque rulings are not always bad. They can serve as a judicial strategy to avoid entering unnecessarily divisive territory and preserve a space for political compromise. Pildes & Niemi, *supra* note 49, at 505-06; Robert C. Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 158 (1994); Sunstein, *supra* note 6, at 1315. Powell's opinion in *Bakke*, for example, represents a carefully crafted formula that finesses the most objectionable and problematic aspects of affirmative action while appealing to symbolism around which Americans can unite. *See* Post, *supra* note 254, at 7; Sabbagh, *supra* note 254, at 433-34.

[257] *Cf.* Power, *supra* note 256, at 88 (describing symmetry/asymmetry distinction).

[258] There is certainly a strong case to be made for African American exceptionalism. Such an approach would find support in the legislative history of the Equal Protection Clause. K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 25-27 (1992). Moreover, Supreme Court Justices and commentators have advanced it in the context of affirmative action. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting); GRAHAM, *supra* note 32, at 132; ORLANDO PATTERSON, THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA'S "RACIAL" CRISIS 192-93 (1998); Glenn C. Loury, *Double Talk*, THE NEW REPUBLIC, Aug. 25, 1997, at 23.

[259] *See* Pillai, *supra* note 258, at 34-36; *see also Edley*, *supra* note 131 (arguing Native Americans have even stronger claim to remedial justice than African Americans).

affirmative action has sprung directly from its pluralist nature.[260] There is little to suggest we are ready to revisit such practices now.[261] Indeed, the political economy of today's identity politics is increasingly stacked against it.[262]

An antisubordination approach thus makes the Who Question unavoidable. The ambiguity embraced through vague formulas such as "people of color" would dissolve in a highly public process of adjudicating competing claims. Even if such determinations were possible, they might come at a prohibitive social cost. Proponents of antisubordination theory often ignore such practical and prudential concerns, writing as if the victims of racial disadvantage were self-evident.[263] They focus on doctrinal implications of the theory, while taking its feasibility for granted. However, a theory of equality whose central concept cannot — or should not — be measured has questionable value.

III.   FINDING THE BALANCE

This Article has suggested reasons to hesitate before pushing the Who Question too far. Such concerns provide a powerful argument against relying on societal disadvantage to select affirmative action beneficiaries directly. Moreover, they should give pause to those who advocate antisubordination as the controlling principle of equal protection review.

That said, the impracticability of antisubordination as a stand-alone theory does not make it irrelevant to analyses of equality. The objections to antisubordination arise from second order concerns regarding implementation. The Court has taken societal remedies off the table because it fears an antisubordination approach would be unworkable, not because it objects on principle. As a result, its doctrinal preference for antidiscrimination should not preclude a sensibility to antisubordination values as a normative matter. Indeed,

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[260] *See supra* note 249 and accompanying text.

[261] *Cf. Bakke*, 438 U.S. at 295 ("It is far too late to argue that the guarantee of equal protection permits the recognition [of Blacks as] special wards entitled to a degree of protection greater than that accorded others").

[262] As African Americans have become outnumbered demographically by Hispanics, politicians increasingly compete for the latter's support. Likewise, the financial clout wielded by Asian Americans gives them a growing political voice.

[263] Sunstein offers a notable exception in explicitly distinguishing groups subject to discrimination, but not systemic subordination (e.g., Asian Americans, Jews) who thus fall outside his "anticaste principle." Sunstein, *supra* note 199, at 2443.

antisubordination and antidiscrimination ultimately represent two sides of a single coin.[264]

Moreover, the argument for ambiguity in affirmative action is based on a tradeoff between competing values, and where we draw the line is open to debate. The risk in raising the Who Question does not mean we should blithely accept the status quo. Indeed, recent case law threatens to make continued avoidance of the Who Question untenable. As lower courts continue to take a skeptical look at the categories used to allocate affirmative action remedies, the tradeoffs between clarity and ambiguity will need to be addressed. Even if India's methodology is not the answer to our Who Question, it might have more modest uses.

A.   Antisubordination After All

Affirmative action constitutes an anomaly within equal protection doctrine: the rare instance in which race *is* relevant. As such, it remains notably undertheorized.[265] Our existing answers to the Who Question privilege method over meaning. Too often, we count heads without knowing whom we are counting or why. As a doctrinal matter, such formalism may be understandable. Yet, the narrowly circumscribed confines in which such doctrine is articulated should not blind us to the broader social context in which affirmative action operates. Antisubordination theory can help to fill this normative gap, eliminating needless ambiguities in existing doctrine.

The value of such an approach is most obvious under remedial rationales for affirmative action. For example, *Croson* tells us that cities can justify remedial preferences by inferring discrimination from racial disparities. Some courts, however, have regarded such disparities as merely prima facie evidence that can be rebutted by showing an absence of racially discriminatory intent.[266] By this logic, racial disparities arising from entrenched "old boy networks" would

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[264] Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 13 (2003).

[265] Hollinger, *supra* note 100, at 31-32; Power, *supra* note 256, at 158-59.

[266] *See* Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1066 (D. Colo. 2000) (requiring disparity to be result of *intentional* discrimination). The court declined to draw an inference of actionable discrimination from disparity evidence where the evidence suggested non-racially motivated selection biases that may explain the disparities. *Id.* at 1070-71. The court also rejected anecdotal evidence of discrimination as similarly attributable to non-racial motivations. *Id.* at 1074. *See also id.*, *cert. denied*, 540 U.S. 1027, 1030-31 (2003) (Scalia, J., dissenting) (arguing inferences of discrimination are insufficient and actual proof is required).

not be actionable so long as its members discriminate based on insider status rather than race.[267]   The fact that such practices perpetuate existing patterns of racial inequalities would be irrelevant so long as the inequalities sprang from sources of discrimination extrinsic to the context at hand.[268]

Viewing affirmative action through the lens of an antisubordination perspective would make such "rebuttals" untenable. The whole point of the remedy would be to overcome patterns of subordination. A showing of statistical disparities in the particularized context would still serve to meet *Croson*'s demand for a measurable nexus between injury and remedy. However, the cause of the disparities need no longer be the focus of judicial inquiry.[269]

Moving from a "perpetrator's perspective" to a broader societal frame would eliminate much of the theoretical uncertainty that currently surrounds racially targeted remedies.[270]   Courts have struggled to reconcile the existence of such group remedies with the dominant reading of equal protection as an individual right.[271] As a group-based theory of equality, antisubordination would place group remedies on a more secure normative foundation. The result would be more straight forward doctrine that would bypass the need to pretend to find "actual victims" or villains,[272] obviate concerns over state action,[273] and eliminate the canard of the "innocent White."[274]

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[267]   In other words, such "old boys" would be deemed equal opportunity excluders.

[268]   *Cf.* Richmond v. J.A. Croson Co., 488 U.S. 469, 503 (1989) (dismissing "dearth of minority participation [linked to] past societal discrimination in education and economic opportunities").

[269]   In other words, the "by whom" question would become irrelevant.

[270]   *Cf.* Freeman, *supra* note 161, at 30.

[271]   *See also Croson*, 488 U.S. at 526-27 (Scalia, J., concurring) (rejecting idea of group remedies entirely since victims of race discrimination can be identified by injury rather than their race). *Compare* Int'l Bhd. of Teamsters v. United States., 431 U.S. 324, 364-67 (1977) (stating purpose of group remedy limited to reaching actual or potential victims of past discrimination), *with* Local 28 Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 449-50, 477 (1986) (stating broader prospective goals of reforming internal dynamics to remove ongoing barriers to minority advancement).

[272]   *Cf. Croson*, 488 U.S. at 508 (perpetuating fiction of individualized review to eliminate group members who have not suffered personally); Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1070 (D. Colo. 2000) (suggesting discrimination needs to be traced to identifiable wrongdoer in order to be actionable).

[273]   Existing doctrine requires disparities be linked to state action. Since it is rare (post-*Brown*) for governments to engage directly in discrimination, theories of "passive participation" are needed to link private discrimination to state (in)action. *See generally* Ian Ayres & Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577 (1998) (exploring ambiguous

Evidence of entrenched barriers preventing certain groups from entering the relevant market would be justification enough.

At the same time, the presumption that disparities imply discrimination should only apply to groups that are at least plausibly the victims of societal subordination. For example, if tomorrow Swedish contactors happened to be found statistically underrepresented in New York City, a court would hesitate to presume discrimination from such prima facie evidence because Swedes are not a racially subordinated group.[275] This same logic should be extended to non-European groups for whom indicia of subordination is equally lacking. Newly arrived immigrants often find themselves included in affirmative action despite a lack of history of discrimination in the United States. They may be underrepresented for all sorts of reasons pertaining to their immigrant status; yet, we presume that race is the culprit. [276]

Particularly in economic contexts such as public contracting, there seems little justification for awarding blanket preference to socioeconomic overachievers such as East and South Asians.[277] The same argument applies to Iberians and South Americans. This is not to deny that even successful minority groups encounter incidents of racial prejudice. However, existing discrimination law already affords

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nature and scope of passive participation rationales). By avoiding blame games, an antisubordination approach bypasses such theoretical and evidentiary complexities.

[274] *Cf.* Ronald Turner, *The Too-Many-Minorities and Racegoating Dynamics of the Anti-Affirmative-Action Position: From* Bakke *to* Grutter *and Beyond*, 30 HASTINGS CONST. L.Q. 445, 446 (2003) (critiquing myth of "innocent white" as affirmative action victim). One might still take account of injuries to settled expectations and avoid undue inflexibility in crafting a narrow tailored remedy. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986). Yet, a full accounting of the social windfall conferred by white privilege would diffuse much of the moral force behind such concerns. *See* Harris, *supra* note 17, at 286-88.

[275] There is precedent for making such a distinction in the analogous context of disparate impact theory under Title VII. Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 528 (2003).

[276] Immigrant underrepresentation may reflect unfamiliarity with U.S. customs, lack of social capital, linguistic hurdles, etc. — things that have nothing to do with race and can be expected to disappear with the passage of time. *See* GRAHAM, *supra* note 32, at 132 (describing inclusion of immigrants as "a historical accident for which there is no possible justification"); *see also* EDLEY, *supra* note 131, at 176 (relying on assumption of risk rationale); PATTERSON, *supra* note 258, at 193.

[277] *See, e.g.*, Timothy Bates, *The Changing Nature of Minority Business: A Comparative Analysis of Asian, Nonminority, and Black-Owned Businesses*, 18 REV. BLACK POL. ECON. 25, 26 (1989) ("Asians are *not* a disadvantaged group: their eligibility for government minority business set-aside[s] . . . is completely inappropriate.").

them retrospective relief.[278]   The mere possibility of localized discrimination does not justify entitlement to a proactive remedy in the absence of systemic bias. Arab Americans also face discrimination, as do Hasidic Jews. But these groups are generally denied affirmative action because our current racial orthodoxy deems them white. Such classificatory formalism aside, on what basis can Spaniards or South Asians justify being treated differently?[279] The extraordinary remedy of voluntary affirmative action should be reserved for those who face more intractable racial barriers. It is the need to proactively root out such entrenched hierarchies that ultimately provides the most persuasive justification for affirmative action.

Making such distinctions obviously requires some ability to assess societal disadvantage. Formal determinations as to which groups qualify as subordinated would be problematic for the reasons stated above. Identifying groups who are unquestionably not subordinated, however, would be much easier and less controversial.[280] A more modest use of Indian methodology would therefore be to rely on societal data to rule out groups that are clearly *not* being held back on account of race and focus on those that *might* be. Such societal assessments could thus serve as a threshold test to refine the categories we count with in particularized contexts.[281]

For example, the dispute described above as to whether Iberians should count as Hispanic is one that almost every jurisdiction faces: deciding who qualifies as a "minority." A societal disadvantage perspective, even if imperfect, would at least provide a metric to draw definitional lines that would be preferable to the uninformed intuition of judges and federal bureaucrats.[282] Even minor improvements in existing definitions could help to prevent the benefits of affirmative action from being disproportionately consumed by those who need them least.

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[278] State and federal laws provide a panoply of statutory remedies to address proven instances of racial discrimination. *See, e.g.*, Civil Rights Act of 1964, 42 U.S.C. § 2000e-17 (2000); Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (2007).

[279] *Cf.* Sunstein, *supra* note 199, at 2443 (equating Asian Americans with Jews).

[280] It is hardly stigmatizing to label a group as "advantaged." A relatively high threshold could be set so that no one falling on the "advantaged" side of the line could credibly claim the contrary.

[281] Thus, rather than using societal disadvantage to determine eligibility directly, we would apply such data at an initial definitional stage to reconstruct the basic categories by which beneficiaries are identified based on underrepresentation.

[282] *Cf.* Sunstein, *supra* note 6, at 1313-14 (urging emphasis on empirical facts in resolving affirmative action disputes).

Iberians represent an easy case being as much European as Hispanic. However, it is time to challenge presumptions of affirmative action eligibility that turn solely upon "non-white" status. Counting heads using categories confined to at least plausibly disadvantaged minority groups would make *Croson*'s blind equation of underrepresentation with discrimination far more tenable.

Implementation of this "subordination-light" approach need not entail formalized rankings à la India, nor indeed should the socioeconomic data be treated as dispositive. In fact, the problem with India's approach may have as much to do with its reliance on high-profile, winner-takes-all contests as with its underlying aims. As a starting point, we could begin merely by gathering the necessary data and funding social science research to interpret it. Such research should also examine more carefully the links between immigration and ethnic disadvantage to help control for immigration effects and enable a more meaningful debate on immigrant participation in affirmative action.[283] Policy responses to the findings that emerge could then be determined on a program-by-program basis, primarily through legislative and/or administrative initiative rather than judicial fiat.

The relevance of an antisubordination perspective to a diversity rationale for affirmative action is less obvious, if only because diversity remains an amorphous concept embracing multiple aims.[284] These aims point in different directions as to the beneficiary groups you might select.[285] *Grutter*'s recent embrace, however, of a broader vision

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[283] *See* Hugh Davis Graham, *Affirmative Action for Immigrants: The Unintended Consequences of Reform*, *in* COLOR LINES, *supra* note 50, at 54-55 (noting dearth of scholarly analysis or empirical data exploring connections between immigration and affirmative action).

[284] Justice Powell's original account of diversity in *Bakke* emphasized the heuristic benefits of bringing diverse viewpoints into the classroom. Grutter v. Bollinger, 539 U.S. 306, 324-25 (2003) (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J., concurring)). *Grutter* shifts the focus from benefits to students to benefits to society at large by cultivating "a set of leaders with legitimacy in the eyes of the citizenry." *Id.* at 332. Along the way, *Grutter* also defends diversity as providing a civics lesson in "cross-racial understanding," a response to globalization, and a public service to corporate recruiters. *Id.* at 308.

[285] For example, should foreign-born immigrants count for diversity purposes? It depends on what you think "diversity" is designed to accomplish. If it's to expose students to a kind of model United Nations which helps them compete in the global marketplace, then the more immigrants the better. And why limit it to immigrants of color? Alternatively, if it's the "unique experience of being a racial minority" in the United States that we seek to bring into the classroom, then immigrants may not serve the purpose as well, if their formative years were spent elsewhere. *Grutter*, 539 U.S. at

of diversity as an agent of societal legitimization and its explicit acknowledgement that "race unfortunately still matters" suggests that a societal disadvantage approach could feature prominently in the diversity context as well.[286]   If nothing else, a subordination perspective offers a principled basis for privileging racial diversity above all other sources.

Although beyond the scope of this Article, incorporating an antisubordination perspective has important implications for other aspects of equal protection as well.   As others have noted, antidiscrimination discourse often "conceals other values that do much of the work."[287]   Acknowledging the relevance of antisubordination values could resolve doctrinal uncertainties such as whether whites can bring disparate impact actions under Title VII[288] and whether discriminatory intent is actionable in a remedial context.[289]

B.   *India Revisited — À la Carte*

India's example suggests further grounds for improvement on current practice. For example, even if we continue to count heads under an underrepresentation model, it would not hurt to follow the Indian practice of disaggregating categories to their logical limit. Where underrepresentation is measured on a national scale, it makes no sense to collect data using only a few broad racial categories.[290]

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333.   As noted, this has become a controversial question.   *See supra* text accompanying notes 64-65.

[286]   *Grutter*, 539 U.S. at 332-33.

[287]   Balkin & Siegel, *supra* note 264, at 13.

[288]   In one view, disparate impact claims function as merely a procedural device to flush out hidden bias. The more robust interpretation sees disparate impact as serving an antisubordination function by eliminating the structures of racial hierarchy whether intentional or not. *See* Primus, *supra* note 275, at 527-29. Endorsing this latter view would obviously restrict the class of potential beneficiaries.

[289] In general, equal protection forbids government action that is intended to benefit certain racial groups at the expense of others. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977). However, recent case law has suggested that race-neutral forms of affirmative action might fall outside this rule, despite being intentionally designed to benefit underrepresented minorities. *See* Primus, *supra* note 275, at 540 (citing dicta in *Croson* and *Grutter*). An antisubordination viewpoint would legitimize such asymmetrical treatment.

[290] Incredibly, the federal government's most recent disparity study did not even bother to disaggregate that far. *See* Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042 (May 23, 1996) (calculating underrepresentation of "minorities" as single mass).

Even in local contexts, where particular ethnic groups have a strong presence and a distinct identity, cities should consider counting them separately where possible.[291]

Working with narrower categories would minimize definitional ambiguities. It's much easier to agree on who is Iberian or Argentinean than who is Hispanic, as national origin provides a stable reference point.[292] Counting with smaller units would also permit more narrowly tailored remedies to be drawn, preventing Iberians from usurping benefits at the expense of Puerto Ricans. The converse could also be true: groups now excluded from affirmative action — Samoans and Laotians in the context of higher education — might benefit from being counted separately.

Some universities already make such distinctions. The University of Hawaii targets only selected Asian Pacific subgroups for diversity admissions. Stanford University limits Hispanic eligibility to Chicanos and Puerto Ricans.[293] The University of Texas used to exclude African American immigrants. Such practices should be expanded.

This is not to deny the relevance of broader racial identities or to attempt to replace race with ethnicity.[294] It is simply to recognize that the fault lines of prejudice may only imperfectly track popular conceptions of race and may vary in ways that are contextually contingent. Disaggregation would also challenge the assumption that the quadrangle represents the only organizing paradigm by which race can be viewed, undermining monolithic assumptions about racial identities and perhaps helping us to transcend them.

India's example also underscores the importance of attentiveness to local context.[295] Affirmative action categories should reflect patterns of regional disadvantage, even if this means departing from quadrangular conventions. French Acadians have a history in Louisiana that justifies distinguishing them from whites. Likewise,

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[291] In other words, choose the narrowest categories of ethnic identity to which the sociopathology of stereotyping and discrimination might conceivably be responsive and for which statistically meaningful results can be obtained.

[292] There would admittedly still be definitional challenges posed by multiple migrations. *Cf.* Bennun v. Rutgers State Univ., 941 F.2d 154, 172-73 (3d Cir. 1991) (accepting descendant of non-Hispanic Jews born and raised in Argentina as bona fide Hispanic). However, such inevitable controversies can be resolved on a case-by-case basis.

[293] Brest & Oshige, *supra* note 5, at 855.

[294] Data compiled based on subgroups can always be reconstituted to provide a picture of the larger group.

[295] *Cf.* Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (noting context matters in racial equality cases).

counting Native Hawaiians separately makes sense in Hawaii. Even nonethnic groups such as Appalachian whites may deserve special attention.[296]

We've been painting our racial landscape in primary colors for too long. It's time to take a more chromatically differentiated view that takes note of the ever more diverse spectrum of hues represented in our citizenry. India's example offers a useful starting point to accomplish this.

C.   The Meta-Question: Who Decides?

Perhaps the more pressing challenge, however, is not to decide *how* to answer the Who Question, but *who* should decide. In allocating decisional authority between courts and political actors, India again offers an instructive example.

From an institutional standpoint, the construction of beneficiary categories is better suited to legislative and administrative bodies than to courts. The former have superior fact-finding capabilities and democratic legitimacy in order to balance competing policy interests and arrive at a comprehensive solution.[297] By contrast, as Justice Powell noted, courts are not institutionally suited to perform the "variable sociological . . . analysis" to evaluate questions of comparative racial entitlement.[298]

Yet, the Supreme Court has blocked legislative efforts to enact societal remedies in part because it fears such remedies could devolve into a racial spoils systems that it would be unable to control.[299] The Who Question is thus caught in a Catch-22. While courts remain loathe to tackle the imponderables of race and are ill-equipped to do so, strict scrutiny permits little leeway for them to defer to anybody else. The result has been a tenuous stalemate in which the Court has only partly constitutionalized the Who Question while remaining silent on its definitional aspects. Meanwhile, in the absence of judicial prodding, political actors lack any incentive to depart from the status quo.

The price of avoidance and ambiguity at the top has been judicial incoherence below. While the Supreme Court can rely on docket control to avoid answering awkward questions, lower courts have no such luxury. Their efforts to dispose of definitional challenges have

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[296]   *See supra* note 70 and accompanying text.

[297]   Sunstein, *supra* note 199, at 2440.

[298]   Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 297 (1978).

[299]   *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 510-11 (1989).

been almost farcical.[300]   Moreover, given the hydraulic pressure exerted by strict scrutiny to constitutionalize questions of race, the doctrinal lacuna bequeathed by the Supreme Court appears untenable. As we have seen, lower courts are increasingly challenging definitional assumptions underlying affirmative action under the rubric of narrow tailoring.[301]

Further constitutionalization of the Who Question is doomed to failure.   Defining racial boundaries does not lend itself to precise judicial standards.   Race is messy.   To normalize it within fixed categories requires imposing an artificial rigidity on inherently fluid identities.[302] Such arbitrary decisions are not the sort of thing that can be easily justified under strict scrutiny.[303]

When it comes to constructing categories, is there an alternative between these equally unpalatable extremes of abdication and constitutionalization?   India's solution demonstrates a useful midpoint, it defers most of the aspects of the Who Question to administrative processes that operate only indirectly under judicial supervision.   Although the Indian Supreme Court remains an active protagonist in shaping the constitutional doctrine governing caste reservations, the court has recognized that the selection of affirmative action beneficiaries is primarily a political decision.   It has confined the role of the judiciary to articulating principles that bind the exercise of such political discretion and ensure that selection processes are conducted in an objective, transparent manner, pursuant to established standards.[304]

There is already a precedent in U.S. equality law for this kind of "hands-off" approach to category making in the case law on race-conscious voter districting.[305] The U.S. Supreme Court has recognized

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[300]   *See supra* notes 75-88, 137-40 and accompanying text.

[301]   *See supra* notes 72-74, 88, 92, 117-18, 122-23, 131-36 and accompanying text.

[302]   *See* YANOW, *supra* note 57, at viii, 150; *cf. Jenkins*, *supra* note 25, at 67-68 (making similar argument regarding classification of identities generally).

[303]   If every disgruntled plaintiff can force a city to muster compelling evidence to justify its choice of affirmative action categories with respect to every possible subgroup, whether included or omitted, strict review would become effectively fatal in fact, contrary to *Adarand*'s assurances.   The challenge is to find a principled stopping point short of that.

[304]   *See* Sawhney v. Union of India, A.I.R. 1993 S.C. 447, 558-59 (India) (endorsing proposed weighting of 11 socioeconomic factors as meeting constitutional requirement of "objective" assessment of caste disadvantage, while not precluding comparable alternatives); *see also* Cunningham et al., *supra* note 25, at 876-77.

[305]   Race-conscious voter districting is itself the political equivalent of affirmative action.   *See* Farber, *supra* note 228, at 925.

that drawing election district lines is a political exercise in which courts should hesitate to intervene.[306] Instead, the Court will apply strict scrutiny only where racial considerations so override "traditional districting principles" that a racial gerrymander becomes manifest.[307]

U.S. courts could undertake a similar role with respect to the Who Question: requiring only that affirmative action categories be chosen through a transparent process and conform to minimum standards of rationality and impartiality. Judicial interventions would be justified only when the results are manifestly inconsistent with these basic guidelines or otherwise exhibit indicia of favoritism.[308] The equivalent of "traditional districting principles" could gradually develop in common law fashion. As a starting point, some of the suggestions this Article has made could be adopted: for example, requiring disaggregation into subcategories where feasible, eliminating "forward" groups, controlling for immigration effects, and focusing on regional context.[309] Courts have already begun to tinker with several such steps.[310] This proposal would merely unify their efforts under a coherent doctrinal framework. As with the voter districting cases, the scope of such judicial review might prove erratic, although perhaps no worse than the status quo. In any case, this Article has already suggested that when it comes to the Who Question, there are benefits to ambiguity as well as costs.[311]

CONCLUSION

Affirmative action sits at the fault line between two diverging readings of equal protection. Existing doctrine configured around antidiscrimination theory remains incomplete, and continuing to count heads using outdated and overinclusive categories perpetuates an arbitrary and unfair distribution of benefits. If we are going to continue to select affirmative action beneficiaries by the numbers, we need to think about counting the ones that matter most.

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[306] *See* Miller v. Johnson, 515 U.S. 900, 905 (1995).

[307] *See* Shaw v. Reno, 509 U.S. 630, 646-47 (1993).

[308] *Cf.* Jana-Rock Constr. Inc. v. N.Y. State Dep't of Econ. Dev., 438 F.3d 195, 212-14 (2d Cir. 2006) (scrutinizing construction of Hispanic category for signs of favoritism).

[309] *See supra* notes 291-97 and accompanying text.

[310] *See supra* notes 92, 117-18, 131-36 and accompanying text.

[311] *Cf.* Sunstein, *supra* note 6, at 1315-16 (describing benefits of Supreme Court's "casuistical, rule-free, fact-specific course in the context of affirmative action" as simultaneously provoking public debate through incremental rulings while leaving space for democratic resolution of underlying issues).

Yet, understanding the limitations inherent in the Who Question can also help us to appreciate the tradeoffs involved in shifting to an antisubordination model.   Any explicit effort to target racial hierarchies would have to overcome ambiguous group identities, shifting demographics, and inevitable politicization.   Gains in distributive and corrective justice could be outweighed by sharpened group consciousness and racial polarization. This Article argued for an integration of antidiscrimination and antisubordination values and offered some practical suggestions to that end in the context of the Who Question.   Ultimately, however, the answer may lie in a reallocation of decisional authority between the judiciary and the political branches as much as any doctrinal synthesis.   In both respects, India offers an instructive model that we can usefully consider, both to emulate — and to avoid.

APPENDIX: CENSUS DATA SUMMARY

Population Group	Population Size	Education % Earning Degree Bachelors	Education % Earning Degree Graduate	Occupation Managerial or Professional	Property Median Home Value	Property Home Ownership	Income Median Family Income	Income % Below Poverty Level
ALL U.S.	281,421,906	15.5%	8.8%	33.6%	$119,600	66.2%	$50,046	12.4%
BLACK	34,658,190	9.5%	4.8%	25.2%	$80,600	46.3%	$33,255	24.9%
Jamaican	736,513	13.3%	7.0%	30.1%	$126,900	49.6%	$44,668	13.5%
ASIAN	10,242,998	26.7%	17.3%	44.6%	$199,300	53.2%	$59,324	12.6%
Asian Indian	1,645,510	29.6%	34.3%	59.9%	$210,200	46.9%	$70,708	9.8%
Japanese	795,051	28.7%	13.1%	50.6%	$238,300	60.8%	$70,849	9.7%
Chinese	2,422,970	24.1%	23.8%	52.2%	$232,200	58.4%	$60,058	13.5%
Korean	1,072,682	29.1%	14.6%	38.7%	$209,500	40.0%	$47,624	14.8%
Vietnamese	1,110,207	14.5%	4.8%	26.9%	$151,400	53.2%	$47,103	16.0%
Samoan*	85,243	7.5%	3.0%	18.6%	$153,200	34.4%	$41,091	20.2%
Tongan*	27,686	7.3%	1.3%	13.3%	$149,100	48.1%	$46,261	19.5%
Laotian	167,792	6.3%	1.4%	13.3%	$100,500	52.4%	$43,542	18.5%
Cambodian	178,043	6.9%	2.2%	17.8%	$120,800	43.6%	$35,621	29.3%
HISPANIC	35,305,818	6.7%	3.8%	18.1%	$105,600	45.7%	$34,397	22.6%
Spaniard	112,999	16.2%	13.7%	42.0%	$162,100	57.0%	$53,002	12.7%
Portuguese	1,176,615	13.0%	6.0%	29.9%	$160,100	64.9%	$55,100	8.1%
South American	1,419,979	14.5%	10.6%	27.7%	$153,100	41.2%	$42,824	15.0%
Argentinean	107,275	16.2%	19.0%	42.5%	$180,000	51.9%	$53,689	13.8%
Cuban	1,249,820	11.5%	9.6%	31.6%	$135,700	58.0%	$42,642	15.0%
Central American	1,811,676	6.2%	3.4%	13.3%	$131,400	31.7%	$34,150	19.9%
Puerto Rican	3,403,510	8.3%	4.2%	24.2%	$112,500	34.0%	$32,791	26.0%
Mexican	20,900,102	5.0%	2.4%	14.9%	$95,300	48.0%	$33,516	23.5%
LEBANESE	440,279	24.3%	17.0%	45.9%	$159,000	68.9%	$63,499	8.6%
PERSIAN	338,266	29.7%	27.5%	52.8%	$268,100	58.7%	$69,590	10.3%

*Not included in Asian totals

Source: 2000 U.S. Census