

enough numbers that politicians must appeal to them to win elections. But this does not require that they constitute a majority in any district. Packing blacks into majority-minority districts makes the remaining districts overwhelmingly white, insular, and free to promote racially polarizing policies. Racially integrated districts should rather be designed to motivate the largest number of whites to pay attention to the claims of all, and to motivate candidates to frame their campaigns around unifying rather than polarizing themes.

Segregation is a fundamental cause of injustice in three broad domains: socioeconomic opportunity, public recognition, and democratic politics. It stands to reason that integration should help dismantle these injustices. This chapter surveyed some evidence bearing on this question. Integration consists in the participation as equals of all groups in all social domains. It proceeds in four stages: formal desegregation, spatial integration, formal social integration, and informal social integration. Each stage helps dismantle different injustices. Formal desegregation removes the official stamp of state authority from stigmatizing practices that constitute blacks as untouchable, but without undoing spatial and social segregation. Spatial integration provides blacks access to the public goods of socioeconomically more advantaged neighborhoods—better housing, orderly neighborhoods, lower crime and blight—and the psychic and social benefits that follow from these goods, including lower psychological stress and freedom to allow children to play outside. Without social integration, however, it does not provide better access to jobs. Formal social integration at school advances blacks' educational achievement and job opportunities. Sustained formal social integration under moderately favorable conditions, including institutional support and cooperative interaction, reduces prejudice, stigma, and discrimination and increases intergroup comfort in the long term, but not without initial difficulties. Informal social integration, if it rises to the level of genuine friendship, has similar effects. Formal social integration has important democratic effects, especially in enabling agents of government—juries, police, schools—to reduce discrimination and respond more effectively to the claims of the disadvantaged. It works through at least two causal routes—epistemic diversity, whereby members of disadvantaged groups bring relevant considerations to the attention of agents who would otherwise be ignorant of them, and accountability, whereby agents respond to the presence of diverse others by expanding the circle of justification to address them as well as in-group members. This results in a more deliberative, public, and democratic politics.

• SEVEN •

UNDERSTANDING AFFIRMATIVE ACTION

7.1 Four Models of Affirmative Action

Since the demise of court-ordered busing for school integration, affirmative action has been the most controversial race-conscious policy in the United States. By “affirmative action,” I refer to any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through “outreach” (targeting the group for publicity and invitations to participate) or “preference” (using group membership as criteria for selecting participants). In the United States, affirmative action is practiced in three domains: employment, education, and government contracting.

This chapter compares four models of race-based affirmative action in the United States: compensatory, diversity, discrimination-blocking, and integrative. The compensatory model represents racial preferences as a way to compensate for the effects of past discrimination. Since blacks have suffered discrimination, they are entitled to compensation in the form of access to the opportunities that discrimination has unjustly denied them. Compensatory affirmative action is backward looking: it aims to restore justice by undoing wrongs of the past. Its principal legal foundation can be traced to Justice Blackmun's concurring opinion in *United Steelworkers of America v. Weber*, which upheld affirmative action in employment.¹

The diversity model represents racial preferences as a means to increase the cultural and epistemic diversity of the institution practicing it. In this view, blacks, by virtue of their historical and cultural differences from other groups, have diverse ideas and perspectives from other racial groups. This epistemic diversity enriches the educational mission of schools, the public discourse needed to advance democracy, and the ability of corporations to design and market products and services that appeal to diverse consumers. This is a present-oriented and forward-looking rationale: it views the participation of racially diverse individuals

as advancing institutional objectives. The principal legal foundation of this rationale is Justice Powell's opinion in *Regents of the University of California v. Bakke*, supporting race-based affirmative action in college admissions.²

The discrimination-blocking model represents affirmative action as a tool for counteracting continuing discrimination. It is founded on the fact that, without pressure on institutions to meet race-conscious goals, anti-discrimination laws fail to produce race-neutral hiring and promotion in the face of entrenched and often unconscious discriminatory habits. This is a present-oriented rationale: hiring goals and timetables are means to force institutions to stop discriminating. The principal legal foundations for this model include a series of executive orders requiring federal agencies and their contractors to comply with antidiscrimination laws, and *Sheet Metal Workers v. EEOC*,³ which affirmed the power of federal courts to order employers found guilty of discrimination to adopt remedial affirmative action programs.⁴

The integrative model represents racial preferences as a means to racially integrate the main institutions of civil society. Segregation is the linchpin of unjust systematic race-based disadvantage because it blocks blacks' access to public and consumer goods, employment, and financial, human, social, and cultural capital and causes pervasive antiblack racial stigmatization and discrimination (chapters 2 and 3). Integration helps dismantle these underlying causes of race-based injustice (chapter 6). Integration is also needed to advance a democratic culture, by providing opportunities for citizens from all walks of life to communicate on matters of public interest, forge cooperative relationships, and construct an integrated collective identity, and to advance democratic governance, by creating an integrated and thereby more competent and accountable elite, better disposed and able to honor the rights and serve the interests of all members of society, regardless of their group identities (chapters 5 and 6). This is a forward-looking rationale: it views the integration of mainstream institutions as essential to advancing justice and democracy. The principal legal foundation of the integrative rationale for affirmative action can be traced to a line of cases from *Brown v. Board of Education* (prohibiting racial segregation of schools),⁵ including *Swann v. Charlotte-Mecklenburg Board of Education* (upholding race-based assignment of students as a means to desegregate schools),⁶ and culminating in *Gutter v. Bollinger* (upholding race-based affirmative action admissions at the University of Michigan Law School).⁷

Public discourse about affirmative action is dominated by the compensatory and diversity models. The discrimination-blocking and integrative models are not well understood. I shall argue that the latter models have several virtues not shared by the former: they better fit the practice of

affirmative action, do not foster racial myths or lend themselves to stigmatizing interpretations, do a better job explaining the continuing causes of race-based disadvantage, and answer or avoid the objections that undermine the other two models.

Affirmative action enjoys strong elite support. When the constitutionality of affirmative action in higher education was challenged in *Gutter*, sixty-nine amicus briefs were filed on behalf of the university, representing, among many other interested parties, officers in the U.S. military, leading universities, Fortune 500 corporations, major media companies, the American Bar Association, and many states and elected officeholders.⁸ Yet affirmative action is in peril. An ongoing campaign to ban it state by state has succeeded in eliminating state-sponsored affirmative action in California, Washington, Michigan, Florida, and Nebraska, with more states on the way. The Supreme Court also threatens affirmative action by severely constraining its freedom to operate.⁹ Advancing a better rationale for affirmative action will not by itself overcome popular opposition. The integrationist rationale predicts that opposition will be overcome mainly through practical experience with integration, not through abstract arguments. Nevertheless, a policy under popular assault in a democracy is at additional risk if its practitioners do not fully grasp the principles that make sense of it, if their rationales feed racial myths and stigmas, if they fail to educate the population about the continuing causes of race-based disadvantage, and if they have only weak answers to fundamental objections.

7.2 The Compensatory Model

Every model of race-based affirmative action offers an account of its purpose, which determines (1) which agents may practice affirmative action, (2) who should be a targeted beneficiary, and why, (3) how much weight may be given to group preferences, (4) who should bear the costs of affirmative action, and (5) the meaning and relevance of race to the purpose of affirmative action. In addition, if the model is based on considerations of justice, it also presupposes (6) an account of the causes of race-based injustice.

The compensatory rationale typically draws on an individualized model of compensatory justice.¹⁰ In this model, if a person has suffered from wrongdoing, she is entitled to compensation from the wrongdoer, to the extent of the damages the wrong inflicted on her. This implies that (1) the agents who should practice affirmative action are those who had previously engaged in racial discrimination; (2) the beneficiaries are targeted by virtue of being the victims of past racial discrimination by the agents;

(3) they should be compensated to the extent of the harm they suffered, and (4) the agents who had engaged in discrimination should bear the costs. Membership in a disadvantaged racial group is a relevant basis for targeting beneficiaries for affirmative action, on the assumption that (5) membership serves as an accurate proxy for the morally relevant characteristic of having been victimized by racial discrimination. This model supposes that (6) past racial discrimination is the main cause of current race-based injustice.

Critics object that the practice of affirmative action does not fit the compensatory rationale very well.¹¹ Schools, government bodies, and employers practice affirmative action even if they have not been found guilty of discrimination. They do not attempt to identify and compensate the victims of their own discrimination but target their benefits to others on the basis of their shared racial identity with those presumed to be victims of their own or others' discrimination. They do not adjust the degree of benefit to any measure of damages that targets suffered from discrimination. Those who bear the costs of the policy are not its practitioners, but innocent whites and Asians who are displaced by racial preferences. Finally, race is an imperfect proxy for victimization-by-discrimination. It is overinclusive, in selecting some individuals in the target groups who have not experienced discrimination, and underinclusive, in excluding individuals outside the targeted groups who have suffered discrimination.

Because affirmative action fails to meet the exacting standards of individualized remedies, the compensatory model is sometimes cast in terms of group compensation.¹² In this view, society is fundamentally divided into racial groups who constitute the relevant units of moral agency and considerability. A discriminatory act by one white constitutes whites as a debtor class, creating a group obligation to compensate that could be discharged by any other white. A discriminatory injury to any black constitutes blacks as a creditor class, creating a group entitlement in which an injury to one black can be made up by a preference to any other. This group model does a better job fitting the practice of affirmative action to a rationale. But it is unacceptable. Individuals, not racial groups, are the relevant units of moral entitlement. In addition, the group rationale advances a divisive conception of society that undermines the democratic aspiration to unite all citizens under a common identity.

The compensatory model must therefore address the objections lodged against it within an individualist conception of justice. Start with the agents practicing affirmative action. Whether an agent has discriminated in the past is relevant only to the question of whether they are *obligated* to compensate, not whether they are *permitted* to do so. There is nothing morally objectionable about an agent compensating for damage caused

by others' wrongdoing,¹³ Americans committed no wrong in donating money to help the victims of 9/11.

Now consider the targets of affirmative action and the amount of their damages. The individualized ideal of case-by-case adjudication makes little sense where it is known that there are victims, but it is too costly, difficult, or impossible to precisely identify who they are or how much they were damaged. Individuals usually do not know whether a particular agent has discriminated against them because they do not know how that agent has treated others.¹⁴ Moreover, people have a cognitive bias against seeing themselves as victims, even when they know they belong to a group often subject to discrimination.¹⁵ Discriminating agents also may not know who their victims are. A firm notorious for discrimination cannot know who was discouraged from applying for a job because they knew they would get no consideration. A firm that publicizes job openings only to its all-white staff may know that no blacks will learn of its opportunities. But there is no answer to the question of which blacks would have applied, had the firm adopted a nondiscriminatory publicity policy. There are many fair policies it could have adopted, each of which would have led to a different black applicant pool.

In such cases, we know that people have been unjustly disadvantaged because of their race but we cannot identify who they are. Many discriminatory policies inflict their damage probabilistically, like air pollution. In pollution cases, that the causal connection is statistical and not provable in any single instance does not undermine the case for compensation in a class action suit. Racial discrimination often works the same way and is often similarly settled under Title VII of the 1964 Civil Rights Act through class actions that offer affirmative action as a remedy.

The "innocent white" objection to who bears the costs of affirmative action also has little normative force. Some defenders of affirmative action argue that whites enjoy unjust enrichment, in the form of competitive advantages due to past antiblack discrimination, and thus have no valid complaint against affirmative action programs that take this advantage away from them.¹⁶ I am disinclined to press this divisive argument. It is enough to observe that *all* compensatory projects undertaken by corporate bodies place burdens on innocents. Whenever a corporation helps the victims of some wrongdoing, the costs are borne by innocent individuals who are or would like to be associated with it. Firms that offered jobs as compensation to the survivors of 9/11 victims denied these jobs to other innocent job applicants. We observe no protests about such compensatory acts, nor should we.

The "innocent white" objection also neglects the fact that as long as discrimination or its effects persist, there will be innocent victims suffering

unjust burdens. The only question is whether these burdens should be borne exclusively by disadvantaged racial groups or more widely shared. There is no injustice in sharing the costs of widespread injustice. A main point of government is to share the costs of injustice by sharing the costs of protection from and punishment of crime. That one has neither committed nor benefited from any crime constitutes no claim against paying the taxes used to help the victims of crime.

These considerations support a compensatory model of race-based affirmative action as a kind of "rough justice."¹⁷ Where the wrongdoing against a group has been pervasive enough, the harm so great that there is little chance that compensation would overshoot the aggregate damages, and individualized compensation is too costly or impossible, then general compensation to the group comes closer to the ideal of compensatory justice than a refusal to compensate without individualized proof.¹⁸ The "rough justice" defense of affirmative action also explains why it is not unjustly underinclusive to focus on affirmative action for blacks and similarly disadvantaged groups, while not targeting groups that have not suffered extensive discrimination.

Thus, the compensatory model of affirmative action can be defended against common objections. Yet it suffers from an inadequate conception of the wrongs its beneficiaries suffer. In focusing on past discrimination, it suggests that discrimination is only in the past, and that current group disadvantage consists only of the inherited effects of past events. This inspires impatience about the continuation of the policy once antidiscrimination laws have been in place for decades since it does not explain why the current beneficiaries of affirmative action have been unable to overcome the legacy of discrimination against their ancestors, unlike many groups, such as Asians and Irish, who have suffered severe discrimination in the past.

The compensatory model also does not offer a satisfactory explanation of why affirmative action, which is practiced only by selective colleges, large corporations, and governments, is an appropriate form of compensation. It benefits only a small proportion of the members of such groups, often the best-off among them—those who already have enough education to handle the work at a selective college, enough qualifications to function in a corporate job, and enough assets to own a business capable of executing government contracts. Rough compensatory justice would be better served if we distributed lump-sum cash reparations to every member of the disadvantaged group, or concentrated compensation on the least well-off within the group.¹⁹

Finally, the compensatory model offers an inadequate conception of the role of beneficiaries in the institutions practicing affirmative action. They are represented as passive victims of injustice, rather than as active

contributors whose participation contributes to the mission of these institutions. This representation feeds stigmatizing thoughts that affirmative action's beneficiaries are not pulling their own weight in these institutions, that they do not deserve to be there, and that they lack real merit.

An adequate, nonstigmatizing conception of the beneficiaries of affirmative action would represent them as meritorious, as contributing to the missions of participating institutions through the roles they occupy. It would explain why, within the targeted classes, affirmative action often prefers the relatively more advantaged—those *least* injured by past discrimination. It would not locate the rationale for affirmative action in far-receding events of the past, but in present- and future-oriented concerns. The diversity model of affirmative action meets these criteria.

7.3 The Diversity Model

The diversity model represents affirmative action as promoting a "robust exchange of ideas."²⁰ In this model, (1) the institutions eligible to practice affirmative action are those whose mission would profit from a greater diversity of ideas brought by participants. (2) The targeted beneficiaries should be members of any group that would contribute to the epistemic diversity of the institution. (3) The weight given to preferences for including members from any group should be proportional to the diversity of ideas they bring, and inversely proportional to the degree to which they are already represented. (4) Those who should bear the costs of affirmative action are those whose perspectives and ideas are already well represented in the institution. (5) Race is presumed relevant to diversity because it is viewed as a proxy for possession of ideas distinct from well-represented groups. Finally, (6) individuals are targeted by affirmative action not to remedy injustice, but to advance the missions of the institutions that practice it.

The diversity model answers the surviving objections against the compensatory model. It is future-oriented, locating the point of affirmative action in continuing institutional needs for epistemic diversity rather than in receding events that, over time, lose their claim on how current institutions should be structured. It explains why affirmative action favors the more advantaged members of targeted groups. To effectively contribute to epistemic diversity, the beneficiaries must be otherwise qualified to perform up to the institution's standards. The more advantaged within the targeted groups possess those qualifications to a greater degree. The diversity model offers a nonstigmatizing account of why members of targeted racial groups are preferred: they bring valuable features to the institution—epistemic diversity—that advance the institution's mission.

This is a meritocratic rationale, which represents the targets of affirmative action as contributing, deserving agents rather than as pitiful subjects of an institution's beneficence. It gives other participants positive reasons to value the presence of affirmative action's beneficiaries.

Yet the diversity model, when divorced from the aims of social justice,²¹ suffers from several flaws. First, its rationale does not fit the *scope* of the practice. It best suits educational institutions and the award of broadcast licenses. It can be extended to certain jobs that deal with producing new ideas and marketing products and services to diverse populations. It is harder to justify diversity-based affirmative action in employment for routinized blue- and pink-collar jobs that do not ask their occupants to contribute ideas, or for enterprises that produce undifferentiated commodities such as oil and coal, or undifferentiated services such as driving a bus or delivering mail. The diversity model seems inapplicable to much government contracting: it is hard to see how having a diverse set of subcontractors improves a road-building project. It even has a hard time explaining the scope of racial preferences by educational institutions. While it is plausible that the racial diversity of a classroom would enhance discussion of social, political, and cultural subjects by enriching the variety of perspectives, it is hard to see the cognitive relevance of racial diversity to investigations in mathematics, engineering, or the physical sciences. Yet schools extend racial preferences in admission to graduate programs in the latter fields.²²

Second, the diversity model, when separated from considerations of justice, cannot account for the special *weight* institutions give to race compared to other dimensions of diversity. In principle, race should figure no more than other background factors that affect a person's perspective, such as practicing an unusual religion, having lived abroad, or having grown up on a farm. In practice, schools give race enough weight to produce a "critical mass" of students from disadvantaged racial groups but are satisfied with mere token representation of people with other unusual backgrounds. The special weight given to admitting U.S. citizens from disadvantaged racial groups is even stranger. Blacks in the United States are as American as apple pie: they bring less cultural diversity to American schools than blacks, Asians, and Latinos from abroad and are already more heavily represented than the latter in most schools. Yet schools still place greater weight on admitting American blacks than the latter groups.

Third, the diversity model, when separated from justice concerns, promotes racial myths that may be stigmatizing. In stressing how different African Americans are from other Americans, it potentially primes stereotypes of blacks as alien and blocks recognition of common perspectives and identities. To the extent that it avoids issues of social justice,

treats racial groups on a par with cultural groups, and refuses to specify precisely what kind of diversity race brings to the table,²³ the diversity model invites the inference that the diversity represented by race is a matter of racially distinct cultures. Yet "race" denotes an identity group, a social category that has been made the basis of social inequality by means of in-group closure and out-group stigmatization. This is not the same as a cultural group.²⁴ To suppose otherwise invites several potentially injurious ideas. In searching for the supposedly cultural content of black difference, people are liable to fix on stigmatizing representations of blacks in the folk anthropological account of black disadvantage, attributing such "underclass" behavior as gang membership, criminal conduct, welfare dependence, disdain for "acting white," and single teenage childbearing as cultural values of the black community (§4.3). Blacks who do not conform to these stereotypes may thereby appear to be not "diverse" enough to satisfy the diversity model, while those who behave in ways that trigger these stereotypes (say, in listening to gangsta rap or wearing dreadlocks) may appear to lack the values needed to succeed in mainstream institutions and hence seen unqualified to participate. The multiculturalist account of diversity also suggests that all "cultural" differences ought to be celebrated and preserved. This thought undermines the quest for racial equality insofar as it insists on self-segregation within mainstream institutions for the sake of cultural preservation, and on the preservation of distinct forms of cultural capital, when black advancement requires social integration and the construction of common forms of cultural capital (§2.3, §6.1). Finally, the representation of the difference blacks make to institutions as "cultural" invites the misleading thought that "all blacks think alike."

The last thought misunderstands how the logic of diversity works. Consider the argument that students of ecology, to fully grasp biodiversity, need to study plants not just in temperate regions but in the tropics. This argument, far from supposing that all tropical plants are alike, claims that the class of tropical plants includes a range of diverse characteristics not well represented among temperate plants. Similarly, the diversity defense says not that all blacks think alike, but that blacks have a range of diverse experiences and perspectives not well represented by the range of experiences and perspectives of members in other groups. This claim is hard to square with a cultural representation of the relevance of race. Cultures are understood, at least within folk anthropology, as shared, and hence as bases of in-group homogeneity. What is needed is an account of the difference race makes that is not cultural in this sense.

A fourth objection to the diversity model is that, in treating race as a proxy for relevant features—diversity of ideas and perspectives—it has a hard time explaining why institutions should not select directly for

diverse ideas. If all that matters is that the whole range of ideas worth considering should be heard, why care about the racial identities of those who voice them? Schools should simply select students for ideological diversity, rather than using race as a crude proxy for this.²⁵ Furthermore, if diversity of ideas is all that matters, why do we need the actual presence of racially diverse persons in schools? Why can't instructors and reading assignments represent all the diversity of information and opinion students need?

Finally, the diversity model, when divorced from social justice, raises worries about the justification of racial preferences in terms of institutional goals. If such goals are sufficient to justify racial preferences in favor of disadvantaged groups, why aren't they sufficient to justify discrimination *against* these groups?²⁶ People in racially heterogeneous groups feel more stress and conflict than when they are in racially homogeneous groups.²⁷ Yet diversity advocates do not allow that an institution's interest in promoting internal work group harmony by means of racial homogeneity may override its interest in epistemic diversity.

An adequate model of affirmative action would explain the full scope and weight given to race in the institutions that practice it. It would not represent the significance of race in misleading ways that trigger alienating or stigmatizing stereotypes. It would not represent race as a proxy for some independently relevant characteristic that could be directly targeted. It would explain why the presence of blacks is needed in institutions, and not just their ideas. Finally, it would explain why, if the role of racial preferences in affirmative action is instrumental to institutional goals, such goals cannot justify preferences for racial homogeneity.

7.4 The Discrimination-Blocking Model

The discrimination-blocking model of affirmative action focuses on the practical difficulties of stopping current discrimination in a world saturated with stigmatizing stereotypes of disadvantaged groups and structured by entrenched habits that favor advantaged groups. To remedy this problem, merely passing antidiscrimination laws is insufficient to stop discrimination. Affirmative action is needed. In this model (1) the agents eligible to practice affirmative action are any institutions that are still discriminating. (2) The targets of affirmative action are qualified members of disadvantaged groups who would not gain access to opportunities in the absence of affirmative action. (3) Discrimination-blocking programs generally allow only "tie-breaking" preferences for members of disadvantaged groups. (4) The costs to innocents are very small since racial

preferences that override meritocratic criteria are generally not involved. (5) Race, in the discrimination-blocking model, helps identify those who, but for affirmative action, would be victims of ongoing discrimination. (6) The discrimination-blocking model represents *current* discrimination as the fundamental cause of unjust race-based disadvantage.

The discrimination-blocking model arose from the experience of administrative agencies charged with enforcing antidiscrimination laws. They found that after the passage of antidiscrimination laws, nothing changed. Employers continued to discriminate, and members of groups suffering from discrimination made virtually no inroads into occupations and businesses that had been excluding them. The complaint remedy, based on an individualized compensation model, proved ineffective in combating this discrimination. Individual victims of discrimination had a hard time identifying themselves and proving discrimination (§7.2). When they managed to do so and filed suit, they still saw little relief. Huge, intractable caseloads overwhelmed the ability of courts and administrative agencies such as the EEOC to handle them in a timely way.²⁸ Case-by-case litigation imposed enormous costs on plaintiffs and employers alike.

Why does discrimination persist, despite antidiscrimination laws? Whenever the law has attempted to dismantle antiblack segregation and discrimination, it has met with massive resistance from recalcitrant whites. This was true for abolition, voting rights, school desegregation, and housing desegregation. It is true for equal employment opportunity as well. When recalcitrant actors repeatedly refuse to stop discriminating, antidiscrimination law must force outcomes on them that mirror what nondiscriminatory processes would produce.²⁹

Several additional mechanisms besides deliberate ethnocentric or prejudicial discrimination continue to operate despite antidiscrimination law. Some reflect entrenched habits formed when overt racial discrimination and segregation were the norms. For example, a firm that advertises job openings through word-of-mouth to a racially homogeneous, segregated workforce will continue to reproduce segregation (§2.3).³⁰ The stereotype incumbency effect (§3.2) is also resistant to change. This may reflect statistical discrimination: managers worry that individuals who do not fit the demographic stereotypes for their jobs will not work out.³¹ Or it may reflect evaluative discrimination: demographically nonstandard candidates may *seem* less able to do the job, even if their qualifications are equivalent (§3.5).³² The stereotype incumbency effect explains why job segregation declines more slowly in older organizations than in newer ones after enforcement of antidiscrimination laws.³³ Aversive racism—where people discriminate when nondiscriminatory rationales are available (§3.1)—has free rein in hiring practices that rely on subjective

assessments such as interviews, which are notoriously unreliable vehicles for measuring merit—in part because of anxiety-based discrimination (§3.5).³⁴

Discriminatory habits and unconscious evaluative biases can be somewhat offset by group-blind policies that reduce the scope for such biases to operate.³⁵ Employers can advertise jobs formally, in places excluded groups regularly consult, abolish interviews, and “blind” job applications. They can formalize objective criteria for hiring, firing, and promotion, and reject subjective criteria that leave room for evaluative bias and aversive discrimination. They can create formal promotion ladders linking jobs. Affirmative action policies typically incorporate such group-blind measures.³⁶

Yet such measures are not sufficient to eliminate discrimination, especially if it is unconscious. Race can be inferred from many factors, such as applicants’ addresses, association memberships, letters of recommendation, schools attended, and vocal signs recognized over the phone. Internal promotion decisions usually cannot be blinded and often rely on softer criteria that cannot be fully shielded from evaluation biases. Because biases can insinuate themselves at many points, formalized group-conscious measurement of outcomes is needed to ensure that discrimination has really ended. Hence, affirmative action programs typically include regular monitoring of employment practices to check for unexplained group disparities.

Even such group-blind measures combined with group conscious monitoring is not enough to stop discrimination in the absence of pressure to improve outcomes in the face of unexplained group inequalities. Habits and unconscious biases continue to operate to the extent that they are not checked by countervailing motives. Hiring goals and timetables help supply such motives.³⁷ When a firm adopts an affirmative action plan due to a court order in a class action that found systematic discrimination, because of pressure from the EEOC or the Office of Federal Contract Compliance (OFCC), or in voluntary compliance with Title VII, the goal is to achieve a racial composition of workers in each job that reflects the racial composition of the pool of workers qualified for those jobs in the firm’s locality.

Critics of such plans complain that they amount to a racial spoils system, reflecting a divisive conception of society as sorted into racial groups, each entitled to its proportional share of opportunities.³⁸ Yet these plans do not generally require hiring goals out of line with the background qualifications and employment preferences of individuals in each group, as a “proportional representation” system would. They do not assume that racial groups are subjects of distributive claims. Rather, they assume that if employers stopped discriminating, then the racial composition of

workers in their jobs would reflect the local racial composition of the pool of workers qualified for those jobs. Substantial, persistent, unexplained group inequalities should be closed because their most likely cause is ongoing discrimination. Since there is no meritocratic justification for these inequalities, whatever business practices are generating them amount to arbitrary obstacles to equal opportunity. The purpose of hiring goals is thus to block current discrimination that unjustly deprives individuals of equal opportunity.³⁹

Critics of discrimination-blocking race-conscious affirmative action goals also complain that they lead to reverse discrimination. Although there are some highly publicized cases—for instance, female firefighters—in which qualifying criteria have been substantially relaxed for traditionally excluded groups—the vast majority of employer-based affirmative action plans apply the same hiring and promotion criteria for members of all groups. Neither the purpose nor the result of affirmative action pressure in most employment contexts has been to override meritocratic criteria.⁴⁰ Individuals hired or promoted under affirmative action programs perform as well as other employees.⁴¹ Private, for-profit establishments that employ more blacks do not suffer lower productivity than establishments with fewer black employees.⁴² Only a handful of reverse discrimination claims have been found credible in the courts.⁴³

A mild racial preference does occur when goals are joined with timetables. Without timetables, vigorous race-conscious outreach would produce a pool of applicants with a racial composition equal to the racial composition of the local qualified talent pool,⁴⁴ and race-neutral procedures combined with race-conscious goals would, without any racial preferences, result in hires from that pool with a similar racial composition.⁴⁵ However, timetables introduce pressures to reach goals more quickly than would be brought about through a neutral hiring process. In such cases, group preferences function as tiebreakers.

Can the costs of tie-breaking preferences to innocent whites be justified by a discrimination-blocking rationale? Some have defended tiebreakers, or even somewhat stronger preferences, on the grounds that stereotype threat artificially depresses the test performance of stigmatized candidates (§3.4), and that evaluation bias causes their ability to be underestimated.⁴⁶ Yet we cannot suppose that such factors always operate—especially not for timetables applied to jobs for which employers do not care about differences in qualifications past a minimal threshold. To justify the urgency implied by timetables, we need to be more future-oriented. The point of trying to quickly achieve proportional hiring goals would then be to eliminate the underlying causes of discrimination—for example, by eliminating the stereotype incumbency bias—rather than just to oppose continuing causes by countervailing forces.

The discrimination-blocking model is indispensable to understanding how affirmative action operates in employment contexts.⁴⁷ It introduces no novel or controversial moral principles. It simply requires recognition of the difficulty of avoiding discrimination in contexts organized around discriminatory habits and pervaded by group stigmatization. In the absence of concerted pressure to produce results, discrimination continues to undermine opportunities for stigmatized groups.⁴⁸ Discrimination-blocking affirmative action is simply an application of Aristotle's point that to do the right thing in the face of a contrary inclination, we must drag ourselves in the opposite direction, as an archer must aim against the wind to hit the bull's-eye.⁴⁹

Although indispensable, the discrimination-blocking model offers an incomplete rationale for affirmative action. To justify attaching timetables to goals, a more future-oriented rationale is needed—one that represents affirmative action as dismantling the continuing causes of discrimination, rather than simply opposing it with a countervailing force. The discrimination-blocking model also offers an incomplete account of current obstacles to equal opportunity: it focuses only on current discrimination, not on segregation and the lingering effects of past discrimination. This defect is particularly significant for affirmative action in higher education. Human capital deficits are among the stubborn legacies of historic discrimination, perpetuated by continuing segregation (§2.3). To correct for these deficits, selective educational institutions that practice affirmative action give a weight to race that exceeds what can be justified on a discrimination-blocking model. To justify this weight, we need to resort to compensatory or integrative models of affirmative action.

7.5 The Integrative Model

The integrative model of affirmative action begins with the observation that Americans live in a profoundly racially segregated society. De facto racial segregation unjustly impedes socioeconomic opportunities for disadvantaged racial groups, causes racial stigmatization and discrimination, and is inconsistent with a fully democratic society. To remedy these problems, we need to practice racial integration. In this model, (1) the agents eligible to practice affirmative action are any institutions capable of promoting racial integration. (2) The targets of affirmative action are those individuals best placed to act as agents of racial integration. (3) The weight given to preferences for admitting these targets depends on how much integration is needed for its positive effects to be realized. I shall argue below that this justifies seeking a critical mass of any segregated and stigmatized racial group. (4) Since all citizens have a duty to promote the

justice of social arrangements, and integration is instrumental to justice, it is just to expect all citizens to bear their fair share of the costs of integration. (5) Race, in the integrative model, is not a proxy for some other relevant characteristics but directly relevant to the integrative mission of affirmative action. (6) The integrative model represents racial segregation and stigmatization as the fundamental causes of unjust race-based disadvantage, treating discrimination as but one consequence of stigmatization. Affirmative action is a tool for dismantling the continuing causes of unjust race-based disadvantage. It offers a comprehensive defense of affirmative action that fits the practice and meets or avoids the objections against the other three models.

The integrative model solves the scope problem by covering all institutions that practice affirmative action. Institutions may promote integration whether or not they have or are engaged in racial discrimination. The integrative model has wider scope than the diversity model because it affirms that integration plays multiple roles, in addition to epistemic ones, in a just and democratic society. Across all domains of interracial interaction, integrative affirmative action helps people learn to cooperate across racial lines, breaks down racial stigmatization, interracial discomfort, and habits of segregation, makes decision makers more aware of and accountable for the impact of their decisions on all racial groups, and invigorates democratic exchange in civil society (chapter 6).

Integration also has distinct roles to play in particular domains. For professional schools, affirmative action helps remedy the severe deficit residents of segregated neighborhoods suffer in access to professional services (§2.2). Black physicians are far more likely than white physicians to locate in underserved minority neighborhoods and serve far more black, Latino, and Medicaid patients, even after controlling for their location.⁵⁰ For routinized, unskilled jobs, affirmative action ensures that blacks are not always in the back of the employment queue for lack of social connections. For government contracting, affirmative action promotes the acquisition of social, cultural, and human capital on the part of business owners from disadvantaged segregated groups, increases employment for racial groups suffering from high rates of unemployment, and provides its beneficiaries with experience working for racially diverse clients. In the case of black-owned businesses, the latter functions are particularly important because of the strong relation between the race of owners and the race of their employees. Fifty-eight percent of white-owned firms in major metropolitan areas where minorities live have no minority employees, whereas 89 percent of black-owned firms have workforces that are at least 75 percent minority. This correlation is not merely a function of firm location. Even among white-owned firms located in black neighborhoods, one third still have no minority employees.⁵¹ Government contracting

programs that favor black-owned businesses thus have a greater impact on reducing stubbornly high black unemployment rates than race-neutral programs because black-owned businesses open opportunities to the social networks to which blacks have access. Such programs also promote integration, by connecting black-owned businesses to a wider, racially diverse customer base.⁵²

The integrative model offers a nonstigmatizing representation of affirmative action's targets. It identifies the proper targets of affirmative action as those who can function as agents of integration and destigmatization. They are not passive recipients of compensation delivered to them as victims, but partners with the practitioners of affirmative action in breaking down the barriers that block segregated groups' access to mainstream opportunities. Justice is part of the mission of all institutions of civil society, and the targets of affirmative action play an active, indispensable role in advancing this mission. They therefore win their places on the merits, by virtue of their capacity to contribute to institutional goals through their performance in their role. The beneficiaries of affirmative action play this role in multiple ways, corresponding to the ways integration breaks down segregation and stigmatization and promotes democracy. The targets of affirmative action remain linked to social networks of family, neighborhood, and friendship that are largely black and typically poorer than they are.⁵³ They serve as sources of social capital to less advantaged black relatives, acquaintances, and neighbors. They transmit human and cultural capital (including knowledge of how to operate successfully in integrated settings).⁵⁴ Through demonstrably successful functioning in their roles, the targets of affirmative action help break down racial stereotypes that underlie stigmatization and discrimination. This effect is not simply a matter of bringing counterstereotypical individuals to the attention of other participants in institutions practicing affirmative action. On a larger scale, affirmative action aims to break the public association of blacks with poverty and associated dysfunctional behaviors by moving blacks to secure middle-class positions, reproduced across generations. This reduces statistical discrimination against blacks and destigmatizes by reducing the usefulness of race as a basis for making inferences about an individual's position in society and conduct correlated with that position.⁵⁵ Finally, the targets of affirmative action advance the democratic project of integrating civil society in central sites—schools and workplaces—making information about the asymmetric impacts of policies and other social phenomena on segregated communities more salient to others, and holding decision makers accountable for responding to this information.

The integrative model's representation of beneficiaries of affirmative action as agents of justice explains why affirmative action programs tend

to select from within the disadvantaged racial groups those who are likely to be better skilled and more highly educated, who have suffered less from the racial caste system than their peers. These individuals are usually better able to perform their integrative roles since successful integration requires successful functioning in the position to which affirmative action opens access. The integrative model is based on a recognition of the fact that sometimes an effective way to help the disadvantaged is to give opportunities to their more privileged peers, who will then be better situated to help them.⁵⁶

The integrative model explains why affirmative action should give enough weight to race to yield a critical mass of representatives from disadvantaged racial groups, beyond tokenism. Integration of a critical mass of workers from underrepresented groups reduces the salience of social-group membership, enables others to view them as individuals, facilitates meritocratic evaluation, and undermines the stereotype incumbency effect (§3.2, §6.3).⁵⁷ A critical mass is also needed to raise the probability that whites will have contact with blacks in large institutions, and thereby learn to interact more competently and comfortably with them.⁵⁸

Race, in the integrative model, does not function fundamentally as a proxy for some other morally relevant property. It is the direct object of moral and instrumental concern. It refers not to a biological classification, but to an identity that has been constituted as a ground of categorical inequality through segregation and stigmatization (§8.2). The causal power of a person's race to break down race-based barriers to opportunity through integration is directly linked to these features. If the problem is racial segregation, then the most direct way to remedy this problem is to practice racial integration. Integration directly opens up hoarded opportunities to the targets of affirmative action and their ingroup associates (§6.2). As the contact hypothesis holds, institutionally supported cooperative interaction with members of stigmatized groups on terms of equality reduces stigmatization of and discrimination against them (§6.3). As the accountability effect holds, the presence of members of stigmatized or excluded groups as equals in decision-making bodies reduces discrimination and increases responsible deliberation by decision makers (§6.4).

The integrative model might be thought to use race as a proxy in the case of the epistemic diversity effect (§6.4).⁵⁹ In the integrative model, epistemic diversity follows from the ways racial segregation and stigmatization shape individuals' experiences. People who live in disadvantaged, segregated communities have personal knowledge of the conditions of life in such communities, as the stigmatized have personal knowledge of what it is like to be stigmatized. These kinds of knowledge, important for just and democratic decision making, are salient to members of

stigmatized, segregated groups, and hence likely to be practically engaged. Members of privileged groups who have grown up in racially isolated, sheltered environments have no such personal knowledge or experience. Even if they learn about such matters in books, such knowledge is less likely to be salient or practically engaged, except in integrated settings, where the accountability effect operates.

Even here, at the integrative model's point of closest contact with the diversity model, the former avoids the problems associated with the latter. It does not treat race as a proxy for cultural difference, but as a proxy for personal knowledge of what it is like to live as and be treated as a member of one's race. This latter relationship is so tight—being treated as a member of one's race is a necessary and nearly always sufficient condition of having personal, firsthand knowledge of what this is like—that calling it a “proxy” relation suggests a misleading contingency. This knowledge is inherently dependent on possession of specific racial identities. The integrative model, by refusing to base the epistemic diversity argument on claims of race-based cultural difference, also does not threaten to trigger feelings of alienation, stigmatizing stereotypes of out-group pathology, or exaggerated perceptions of out-group homogeneity.

The integrative model stresses several effects of affirmative action that require the participation of affirmative action's targets in institutions because they work through interracial interaction rather than mediated information exchange. Interracial cooperation more effectively reduces stigmatization than teaching tolerance in segregated settings.⁶⁹ The accountability effect depends on interracial interaction. Integrating social networks requires interracial personal acquaintance. Finally, there is one particular kind of know-how that can only be constructed in integrated groups: knowledge of how to effectively cooperate and communicate on terms of equality across group lines, in a relaxed and comfortable way. This requires the construction of common forms of cultural capital. Here, at the one point where the integrative model alludes to race-based cultural differences, the point is not to preserve such differences but for all sides to overcome their mutual ignorance and construct shared norms of respectful interaction.

Instrumental defenses of racial preferences raise the worry that they could be used to justify segregation, or discrimination in favor of advantaged racial groups, if this is useful for achieving sound institutional goals. The integrative model restricts the use of racial preferences to promoting justice and democracy. Optional institutional goals cannot justify racial segregation.

The compensatory, discrimination-blocking, and integrative models identify justice as the goal of affirmative action. They differ in their conceptions of the injustices that require correction, and their accounts of

how affirmative action corrects it. For the compensatory model, the core injustice that affirmative action aims to remedy is past racial discrimination. Its remedy is post hoc: it waits for discrimination to happen and compensates for its effects after the fact. This stance raises questions about how long claims to compensation for long-past acts of discrimination should last. The discrimination-blocking model avoids this challenge by focusing on current discrimination. But it still offers a limited discrimination-based account of the causes of unjust racial disadvantage and only blocks discrimination without attacking its underlying causes. For the integrative model, the core injustices that affirmative action aims to remedy are segregation and stigmatization. Segregation has unjust effects that are not mediated by discrimination (§§2.2–2.4, §3.7). So does stigmatization: it constitutes an expressive harm (§3.3), depresses performance through stereotype threat (§3.4), and promotes public policies that have harsh differential impacts on the stigmatized (§3.6). The integrative model takes a proactive stance toward these injustices: its aim is to *dismantle* the continuing causes of racial injustice.

This chapter has examined four models of affirmative action: compensatory, diversity, discrimination-blocking, and integrative. All but the diversity model aim at correcting race-based injustice. The compensatory model survives the conventional criticisms lodged against it but suffers from a limited account of the causes of current unjust race-based disadvantages, threatens to stigmatize the targets of affirmative action by failing to represent them as meritorious, lacks a clear explanation of why many affirmative action programs target the better-off within target groups, and raises worries about how much longer these programs can be justified. The diversity model avoids or answers these challenges but fails to account for the scope and weight of affirmative action preferences, invites ideas about racial differences that threaten to trigger alienating or stigmatizing stereotypes, and faces difficulties in explaining why, if race is a proxy, the relevant characteristic cannot be directly targeted instead, why people rather than disembodied ideas need to be present, and why, if racial preferences can be justified as instrumental to institutional goals, they cannot be turned against disadvantaged groups. The discrimination-blocking model relies on uncontroversial normative premises, avoids stigmatizing the targets of affirmative action, has a better account than the compensatory model of the causes of current race-based injustice, and explains why affirmative action is still needed today. The minimal weight it gives to racial preferences overcomes conventional meritocratic objections to affirmative action and explains how most affirmative action programs work in employment contexts. It is an indispensable model. But it does not account for the full scope and weight of racial preferences in

affirmative action and suffers from an incomplete account of the causes of race-based injustice. The integrative model offers a complete account of the scope and weight of affirmative action preferences and of race-based injustice and answers or avoids the objections to the other models. It is uniquely proactive: instead of waiting for injustice to happen and compensating afterward, or merely blocking discriminatory mechanisms that retain their force, it aims to dismantle the continuing causes of race-based injustice by practicing integration, which is an essential tool for undoing segregation and stigmatization.

• EIGHT •

THE FOLLY AND INCOHERENCE OF COLOR BLINDNESS

8.1 Color Blindness as Ideal, Policy, and Principle

The preceding defense of race-based affirmative action policies does not address what many critics have thought to be a decisive objection: that they offend the moral requirement of color blindness. This chapter finds this supposed moral requirement to be conceptually confused, empirically misguided, and lacking a morally coherent rationale.

Color blindness can be understood as a moral ideal or a policy. As an ideal, color blindness extols a world in which no one draws racial distinctions. In such a world, race would no longer serve as a basis for social inequality, segregation, or stigmatization. It would also no longer serve as a basis for ethnocentric identification or affiliation, even if this never led to racial inequality.

As a policy, color blindness rejects intentional uses of racial preferences by institutions. Some advocates of color-blind policy reject racial preferences for their purportedly bad consequences: they are divisive, stigmatizing, and inefficient, depress motivation, and harm their intended beneficiaries. These advocates also claim that if only people would stop intentionally discriminating by race, then racial discrimination would end.

Other advocates of color-blind policy reject racial preferences on principle. They claim that formally race-conscious preferences and sometimes also underlying race-conscious purposes are inherently morally objectionable. Various accounts of their supposedly inherent moral flaws include that they mistakenly treat races as really existing, are vengeful or racist, discriminate on irrelevant grounds, violate the principle of merit, depend on unsound collectivist conceptions of justice, regard their intended beneficiaries paternalistically, and offend individuality by evaluating people according to racial stereotypes. To distinguish such grounds for color-blind policy from consequentialist ones, I shall refer to them separately as underwriting a color-blind *principle*.

I shall argue that the color-blind principle is conceptually confused

118. David Canon, *Race, Redistricting, and Representation: The Unintended Consequences of Black Majority Districts* (Chicago: Univ. of Chicago Press, 1999).
119. Richard Pildes, "Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s," *North Carolina Law Review* 80.5 (2002): 1517-73.

Chapter Seven Understanding Affirmative Action

1. 443 U.S. 193, 209-15 (1979).
2. 438 U.S. 265, 311-324 (1978). See also *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (upholding, on diversity grounds, affirmative action in federal awards of broadcasting licenses).
3. 478 U.S. 421 (1986).
4. For histories of discrimination-blocking affirmative action, see Reskin, *The Realities of Affirmative Action in Employment*, 7-18; and John Skrentny, *The Ironies of Affirmative Action* (Chicago: Univ. of Chicago Press, 1996), 111-44.
5. 347 U.S. 483 (1954).
6. 402 U.S. 1 (1971).
7. 539 U.S. 306, 332 (2003). In "Racial Integration as a Compelling Interest," *Constitutional Commentary* 21 (2004): 15-40, I argue that *Grutter* follows the integrative logic of *Brown*.
8. "Amicus Briefs Filed with the U.S. Supreme Court in *Grutter v. Bollinger*," http://www.vpcomm.umich.edu/admissions/legalgrn_amicus-ussc/um.html.
9. See *Parents Involved in Community Schools v. Seattle School District #1*, 127 S. Ct. 2738 (2007) (barring a voluntary racial integration program by a school district not found to be guilty of unconstitutional segregation).
10. James Nickel, "Should Reparations Be to Individuals or to Groups?" *Analysis* 34.5 (1974): 154-60; Andrew Valls, "The Libertarian Case for Affirmative Action," *Social Theory and Practice* 25.2 (1999): 299-323.
11. George Sher, "Justifying Reverse Discrimination in Employment," *Philosophy and Public Affairs* 4.2 (1975): 159-70; Stephen Kershnar, "Uncertain Damages to Racial Minorities and Strong Affirmative Action," *Public Affairs Quarterly* 13.1 (1999): 83-98.
12. Paul Taylor, "Reverse Discrimination and Compensatory Justice," *Analysis* 33.6 (1973): 177-82; Owen Fiss, "Groups and the Equal Protection Clause," *Philosophy and Public Affairs* 5.2 (1976): 107-77.
13. It is frequently claimed that the equal protection clause of the Fourteenth Amendment prohibits state bodies from using racial preferences to remedy "societal discrimination," understood as any other discrimination than their own. I argue in "Integration, Affirmative Action, and Strict Scrutiny," *New York University Law Review* 77 (2002): 1254-66, that this is absurd as a moral norm and has no foundation in the Supreme Court opinions frequently cited on this point.
14. Gertrude Ezorsky, *Racism and Justice* (Ithaca, N.Y.: Cornell Univ. Press, 1991), 29-30.
15. Susan D. Clayton and Faye J. Crosby, *Justice, Gender, and Affirmative Action* (Ann Arbor: Univ. of Michigan Press, 1992).

16. William Banner, "Reverse Discrimination: Misconception and Confusion," *Journal of Social Philosophy* 10 (1979): 15-18.
17. See Adrian Vermeule, "Reparations as Rough Justice," University of Chicago Law and Economics, Olin Working Paper no. 260, 2005 (forthcoming in *Nomos 50: Transitional Justice*), for an application of this argument to the case of group reparations.
18. Nickel, "Should Reparations Be to Individuals or to Groups?"
19. As Justice Stevens argued in dissenting from the judgment of the Supreme Court in *Fullilove v. Klutznick*, 448 U.S. 448, 537-40 (1980). I oppose such a reparations program for two reasons. First, allocating lump-sum reparations to blacks is like serving water to the thirsty in a sieve. Unless the continuing causes of race-based disadvantage are dismantled, such reparations will offer only temporary relief. Second, reparations' focus on compensating for injustices in the past distracts attention from current injustices and is liable to encourage whites to feel that, once paid, they have done everything needed to end racial injustice, and to place all responsibility for continuing racial inequality on blacks alone.
20. *Bakke*, 438 U.S. 313.
21. Theorists of the diversity model argue that diversity promotes justice—for example, by breaking down racial stereotypes and promoting toleration and com-fort in cooperating with diverse others. See, for example, Gurin, "Expert Report of Patricia Gurin," 99-234. Practitioners of the diversity model—most important, university administrators—tend to efface social justice rationales by assimilating racial diversity to cultural diversity. This is a response to legal constraint. Powell's *Bakke* opinion set up a sharp dichotomy between justice and diversity rationales, approving of only the latter. See Anderson, "Integration, Affirmative Action, and Strict Scrutiny," 25-27.
22. Sanford Levinson, "Diversity," *University of Pennsylvania Journal of Constitutional Law* 2 (2000): 593.
23. Institutional practitioners of diversity virtually never specify the types of expected differences in ideas and perspectives racial diversity is supposed to bring. Theorists also rarely spell this out. An exception is Iris Young, who, as I do, locates the source of epistemic diversity of racial groups in their different structural positions in the system of social stratification. See her *Inclusion and Democracy*, 92, 116-17. However, even Young sometimes slips into a cultural gloss on racial difference (see, e.g., 103-4, 216-17). Thus, even though few defenders of racial diversity embrace a cultural interpretation of it, the lack of specification combined with background multiculturalist rhetoric tends to promote a conflation of racial with cultural diversity.
24. Kwame Anthony Appiah, "Race, Culture and Identity: Mismatched Connections," in *Color Conscious: The Political Morality of Race* (Princeton, N.J.: Princeton Univ. Press, 1996), 30-105; David Hollinger, "Group Preferences, Cultural Diversity, and Social Democracy: Notes toward a Theory of Affirmative Action," in *Race and Representation: Affirmative Action*, ed. Robert Post and Michael Rogin (New York: Zone Books, 1998), 97-109.
25. Cf. *Metro Broadcasting*, 497 U.S. 547, 621 (1990) (O'Connor, J., dissenting).
26. Richard Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities," *Supreme Court Review* 1974 (1974): 1-32.

27. Charles O'Reilly, David Caldwell, and William Barnett, "Work Group Demography, Social Integration, and Turnover," *Administrative Science Quarterly* 34.1 (1989): 21-37.
28. Skrentny, *The Ironies of Affirmative Action*, 120-24.
29. This was the case in *Sheet Metal Workers v. EEOC*. A similar solution was affirmed by the Supreme Court in *United States v. Paradise*, 480 U.S. 149 (1987) (permitting quotas to remedy unrelenting discrimination in state trooper promotions).
30. Reskin, *The Realities of Affirmative Action in Employment*, 32. Reskin notes that word-of-mouth advertising is the most popular recruitment technique. Only 40 percent of job openings are formally advertised (33).
31. Barbara Bergmann, *In Defense of Affirmative Action* (New York: Basic Books, 1996), 78-79.
32. Michael Yelnosky, "The Prevention Justification for Affirmative Action," *Ohio State Law Journal* 64 (2003): 1385-1425.
33. Reskin, *The Realities of Affirmative Action in Employment*, 35.
34. Jerry Kang and Mahzarin Banaji, "Fair Measures: A Behavioral Realist Revision of Affirmative Action," *California Law Review* 94 (2006): 1094-95.
35. *Ibid.*, 1092-96.
36. Reskin, *The Realities of Affirmative Action in Employment*, 62-65.
37. *Ibid.*, 64-65.
38. See, e.g., *Fullilove*, 448 U.S. 539, 542 (Sewens, J., dissenting); *Metro Broadcasting*, 497 U.S. 547, 614-17 (1990) (O'Connor, J., dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 510.
39. Reskin, *The Realities of Affirmative Action in Employment*.
40. J. Ralph Lindgren, "The Irrelevance of Philosophical Treatments of Affirmative Action," *Social Theory and Practice* 7.1 (1981): 1-19.
41. Harry Holzer and David Neumark, "Are Affirmative Action Hires Less Qualified? Evidence from Employer-Employee Data on New Hires," *Journal of Labor Economics* 17.3 (1999): 534-69; Harry Holzer and David Neumark, "What Does Affirmative Action Do?," *Industrial and Labor Relations Review* 53.2 (2000): 240-71.
42. Donald Tomaskovic-Devey and Sheryl Skaggs, "An Establishment-Level Test of the Statistical Discrimination Hypothesis," *Work and Occupations* 26.4 (1999): 422-45.
43. Reskin, *The Realities of Affirmative Action in Employment*, 73.
44. Given the high involuntary unemployment rate among blacks and their well-documented willingness to accept what are regarded as undesirable jobs, such as fast-food work, employers should assume that racial disparities in the qualified applicant pool reflect insufficiently vigorous outreach rather than racial differences in taste for jobs.
45. For most entry-level jobs and trainee programs—the majority of places subject to employer-based affirmative action programs—differences in qualifications are irrelevant to the hiring process because the standard personnel practice is to hire the first basically qualified applicant who appears in the job queue.
46. Kang and Banaji, "Fair Measures," 1098-1101; Laura Purdy, "In Defense of Hiring Apparently Less Qualified Women," *Journal of Social Philosophy* 15.2 (1984): 26-33.
47. This model also plausibly explains affirmative action in contracting. Government bodies may insist that their prime contractors set aside a certain percentage of subcontracts to businesses owned by members of traditionally excluded groups to avoid "passive participation" in the habitual discrimination of prime contractors. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-92.
48. Kevin Stainback, Corie Robinson, and Donald Tomaskovic-Devey, "Race and Workplace Integration: A Politically Mediated Process?," *American Behavioral Scientist* 48.9 (2005): 1200-1228.
49. Aristotle, *Nicomachean Ethics*, trans. Terence Irwin (Indianapolis: Hackett, 1985), 1109b.
50. Joel Cantor, Joel Erika Miles, Laurence Baker, and Dianne Barker, "Physician Service to the Underserved: Implications for Affirmative Action in Medical Education," *Inquiry* 33 (Summer 1996): 167-80; Miriam Komaromy et al., "The Role of Black and Hispanic Physicians in Providing Health Care for Underserved Populations," *New England Journal of Medicine* 334 (May 16, 1996): 1305-10; Vera Thurmond and Darrell Kirch, "Impact of Minority Physicians on Health Care," *Southern Medical Journal* 91 (Nov 1998): 1009-13.
51. Timothy Bates, *Banking on Black Enterprise* (Washington, D.C.: Joint Center for Political and Economic Studies, 1993), 140.
52. *Ibid.*, 16, 9-12, 90; Thomas Boston, *Affirmative Action and Black Entrepreneurship* (New York: Routledge, 1999), 1-4, 75.
53. See Mary Pattillo-McCoy, *Black Picket Fences: Privilege and Peril among the Black Middle Class* (Chicago: Univ. of Chicago Press, 1999), 28 (observing that the black middle class lives in neighborhoods with more poor people than the white middle class does); Bart Landry, *The New Black Middle Class* (Berkeley and Los Angeles: Univ. of California Press, 1987), 86 (discussing deep links of the black middle class to poor and working-class blacks); Bowen and Bok, *Shape of the River*, 158-64 (providing evidence that blacks at selective schools participate and lead community, neighborhood, social services, and youth organizations at a higher rate than their white classmates do).
54. See Michael Hout, "Status, Autonomy, and Training in Occupational Mobility," *American Journal of Sociology* 89 (1984): 1402-1404 (identifying fathers' status as self-employed professional as a key determinant of sons' upward occupational mobility).
55. See Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard Univ. Press, 1985). Daniel Sabbagh elaborates on Dworkin's argument, with extensive empirical support, in *Equality and Transparency: A Strategic Perspective on Affirmative Action in American Law* (New York: Palgrave Macmillan, 2007).
56. See Bates, *Banking on Black Enterprise*, 13-14 (arguing that affirmative action in government contracting would have greater impact on black employment if it targeted college-educated, financially well-off black business owners because they are better able to generate economic development in ghettos).
57. Reskin, McBrier, and Kruec, "Determinants and Consequences of Workplace Sex and Race Composition," 348. A critical mass also appears to improve the performance of underrepresented groups by reducing stereotype threat (347).
58. Bowen and Bok, *Shape of the River*, 234-37.

59. It does use race as a proxy in the case of professional services to the disadvantaged. Given the urgency of such services, and the unreliability of alternatives, this proxy use of race may be justified. Alternative selection criteria are unreliable since ex ante declarations and even experience serving the underserved on the part of members of advantaged groups have little probative value for future service in the face of overwhelming ex post incentives and opportunities to serve advantaged groups once a professional degree is in hand. Race works as an effective proxy because those opportunities are mostly closed to blacks: most therefore find their best professional opportunities in serving the underserved.

60. Willis Hawley, "Designing Schools That Use Student Diversity to Enhance Learning of All Students," in *Lessons in Integration: Realizing the Promise of Racial Diversity in American Schools*, ed. Erica Frankenberg and Gary Orfield (Charlottesville: Univ. of Virginia Press, 2007), 31-56; Peter Wood and Nancy Sonliner, "The Effect of Childhood Interracial Contact on Adult Antirace Prejudice," *Journal of Intercultural Relations* 20.1 (1996): 1-17.

Chapter Eight The Folly and Incoherence of Color Blindness

1. The following discussion is indebted to Sally Haslanger, "Gender and Race: (What) Are They? (What) Do We Want Them To Be?" *Nous* 34.1 (2000): 31-55; and Blum, "I'm Not a Racist . . . but," 98-163.
2. Jacqueline Stevens, *Reproducing the State* (Princeton, N.J.: Princeton University Press, 1999), 191-92; Haslanger, "Gender and Race."
3. David Hollinger, *Postethnic America*, 8.
4. The asymmetries in the definitions of white and other races are due to the American rule of hypodescent, according to which no one with a non-European ancestor is white, and anyone with a black ancestor is black. The temporal conditions are needed to account for the facts that white South Africans are still white even though their parents were born in Africa, and that not everyone is black even though all humans can ultimately trace their ancestry back to Africa.
5. Blum, "I'm Not a Racist . . . but," 147; Haslanger, "Gender and Race," 44.
6. *Fullilove v. Klutznick*, 448 U.S. 448, 525, quoting *Hirabayashi v. United States*, 320 U.S. 81, 100. Justice Thomas erred in a similar way in characterizing the University of Michigan Law School's interest in affirmative action as "as-theric." *Gruiter*, 123 S. Ct. 2325, 2352 n. 3 (Thomas, J., dissenting) ("the Law School wants to have a certain appearance, from the shape of the desks and tables in its classrooms to the color of the students sitting at them"). This supposes that the Law School took skin color to be the relevant characteristic, on the assumption that the only concept of race is minimal race.

7. *Ibid.*

8. *Civil Rights Cases*, 109 U.S. 3, 21 (1883) ("Congress has a right to enact all necessary and proper laws for the obliteration and prevention of slavery with all its badges and incidents").

9. Deborah Malamud also offers a concise account of the ways race-based factors specifically disadvantage the black middle class in "Affirmative Action,

Diversity, and the Black Middle Class," *University of Colorado Law Review* 68 (1997): 967-88.

10. I have defined biological races as a subset of character races, to capture the sense of race that figured in pseudoscientific racial doctrines of the last two centuries. This does not rule out the possibility that biological notions of race detached from ideas of virtue and talent—used, for example, to screen for vulnerability to certain diseases—may be scientifically useful. See Ian Hacking, "Why Race Still Matters," *Daedalus* 134.1 (2005): 102-16.

11. Statistical discrimination against groups disadvantaged by unjust racialization is morally objectionable because it reproduces categorical inequality in three ways. First, it stigmatizes these groups. Second, it violates equal opportunity and reproduces a caste system by denying those who possess the relevant underlying merits any chance to demonstrate that fact (§3.5). Third, it is often unfair to magnify and perpetuate group-based disadvantage by selecting for underlying characteristics that are themselves the product of group-based disadvantage. This complaint applies on behalf of those who are not equally qualified with their competitors, but who would develop such qualifications if they got the opportunity they are competing for.

12. "Narrow tailoring" refers to how well the means track the underlying purpose, so as to minimize the weighted sum of type I (overinclusion) and type II (underinclusion) error: When a group suffers from pervasive unjust disadvantage, failing to block or remedy discrimination against group members (type II error) is morally worse than offering advantages to group members who have not suffered or face little prospect of suffering discrimination or its effects. Such considerations support the "rough justice" rationale for compensatory affirmative action since individualized (nonproxy) remedies are vastly more underinclusive than affirmative action is overinclusive (§7.2). They also support the presumption behind affirmative action goals for discrimination-blocking affirmative action—unexplained disparities between the racial composition of employees in a job and the racial composition of the qualified local work force reflect intentional, unconscious, or negligent discrimination (arbitrary and hence unjust obstacles to equal opportunity on the part of disadvantaged groups) (§7.4).

13. See, e.g., *Croson*, 488 U.S. 527-28 (Scalia, J., concurring) ("[T]hose who believe that racial preferences can help 'even the score' display, and reinforce, a manner of thinking by race that was the source of injustice"); Carl Cohen, "When Turnabout Is Not Fair Play," in *Contemporary Debates in Social Philosophy*, ed. Laurence Thomas (Oxford: Blackwell, 2008), 250-59.

14. See, for example, *Fullilove*, 448 U.S. 448, 529 (1980) (Stewart, J., dissenting) (complaining that Congress's racial set-aside constitutes "discrimination for its own sake," quoting *Balke*, 438 U.S. 307); Carl Cohen, *Naked Racial Preference: The Case against Affirmative Action* (Lanham, Md.: Madison Books, 1995).

15. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring) (criticizing racial preferences for "stamp[ing] minorities with a badge of inferiority").

16. David Schmidtz, "How to Deserve," *Political Theory* 30.6 (2002): 778-84.

17. See, e.g., *Fullilove*, 448 U.S. 539, 542 (Stevens, J., dissenting).