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The Rhetoric of Equality

Neal Devins

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I. INTRODUCTION

The affirmative action debate appears intractable. On one side, those employing the "rhetoric of innocence"[1] use contemporaneous findings of actual discrimination as the gauge that defines victim status. This rhetoric proclaims affirmative action plans that define eligibility by group status, rather than by individualized proof of victim status, both harmful to innocent whites and beneficial to undeserving minorities. In sharp contrast, those employing the "rhetoric of guilt"[2] contend that "unconscious racism"[3] makes it impossible for whites to treat minorities as equals. Under this view, "[b]ecause racial discrimination is part of the cultural structure, each person of color is subject to it, eve-

* Associate Professor of Law, Lecturer in Government, College of William and Mary. A.B., Georgetown University, 1978; J.D., Vanderbilt University, 1982. The Author thanks the political theory discussion group for its insight on an earlier version of this Article. The Author also thanks the *Vanderbilt Law Review* for encouragement to pursue this project. A summer research grant from the Marshall-Wythe School of Law supported the Author's work on this Article.

1. For a full description of this "rhetoric of innocence," see Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 299-308 (1990).

2. The term "rhetoric of guilt" is my own invention. It derives from and is a counter to the "rhetoric of innocence." Parallel construction, however, is not the only purpose served by the use of this term. Individuals who speak about the "rhetoric of innocence" view this "rhetoric" as incorrect, as a smokescreen to unconscious racism, noting that "[w]hen we create arguments, when we act as rhetoricians, we reveal ourselves by the words and ideas we choose to employ." *Id.* at 297. While much of this unconscious racism critique has force, it is important to recognize that those who criticize the innocence rhetoric also act as rhetoricians.

3. Unconscious racism, as used in this Article, is the term of art used by Professor Charles Lawrence in his intriguing and important article *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987); *see also* Ross, *supra* note 1, at 310-15.

rywhere and at all times."[4] Thus, the "rhetoric of guilt" turns the "rhetoric of innocence" on its head. Whites "generally have benefited from the oppression of people of color,"[5] whereas minorities are victims of pervasive racism.

Professor Thomas Ross's *Innocence and Affirmative Action*[6] is an excellent presentation of what I have labeled the "rhetoric of guilt." Ross argues that the "rhetoric of innocence" serves as a smoke screen to unconscious racism and hence is a "very dangerous idea which simply does not belong in the affirmative action debate."[7] On this level, Ross's argument is sound.[8] Ultimately, however, Ross misses the mark. Although the "rhetoric of innocence" is too constrained, the "rhetoric of guilt" is too expansive. Because unconscious racism cannot be detected solely through evidence of discriminatory intent, disparate impact becomes the talisman of Ross's equality model. But court-imposed disparate impact analysis is a poor substitute for the "rhetoric of innocence."[9]

In order to avoid the pitfalls of these competing rhetorics, a new investigation of the rhetoric of equality is needed. This investigation will implicate two central values of equality, namely, the antidiscrimination principle disfavoring group-conscious decisions[10] and the separation of functions principle that recognizes the breakdown of the democratic process associated with race-conscious decision making.[11] The articulation of a position that emphasizes both values will explain why minorities and nonminorities are deemed similarly situated individuals, not members of groups, and will reveal a viable middle ground between the competing rhetorics of innocence and guilt. This middle ground allows a limited judicial and a broad legislative role to redress the problems of unconscious racism.[12] After examining the strengths and pitfalls of the competing rhetorics, this Article will advance an argument in support of the middle-ground position.

II. Guilt and Innocence: A Preliminary Assessment

Proponents of the rhetorics of innocence and guilt, despite all their differences, use the same analytic model of compensatory justice to

4. Ross, *supra* note 1, at 313.
5. *Id.* at 301.
6. *Id.* at 297.
7. *Id.* at 315.
8. *See infra* note 23 and accompanying text.
9. *See infra* notes 22-27 and accompanying text.
10. *See infra* subpart III(B).
11. *See infra* subpart III(A).
12. *See infra* Part IV.

gauge the correctness of affirmative action. Rather than justify affirmative action based on such forward-looking reasons as averting racial tension or increasing diversity,[13] the guilt and innocence models limit affirmative action to the eradication of racial discrimination. Neither model rejects what the Justice Department under President Reagan characterized as the "cardinal rule that government may neither favor nor disadvantage a person solely because of race or ethnicity."[14]

The difference between the innocence and guilt models lies in their identification of discrimination. The innocence model rejects theories of institutional discrimination, draws sharp lines between "equality of opportunity" and "equality of results," and demands specific proof of intentional, particularized discrimination for every individual who seeks race-conscious relief.[15] This demand for specificity is rooted in the belief that racial discrimination and racial imbalance are essentially unrelated. According to William Bradford Reynolds, Assistant Attorney General for Civil Rights during the Reagan years:

> [While] much racial bias sadly remains today . . . the devastating failures of today are not the civil rights causes that divided a nation and a people in years gone by. The obvious and not-so-obvious barriers that once marked blacks as inferior and second-class citizens largely have been eliminated.[16]

Consequently, because discrimination does not explain imbalance, the innocence model suggests that our world might be imbalanced naturally. As Harvard sociologist Nathan Glazer stated: "It is a perfectly soimd American path [to assume] that groups are different and will have their own interests and orientations, but [also to insist] that no one be penalized because of group membership. . . ."[17]

The guilt model considers the rhetoric of innocence's conception of discrimination naive and insensitive. For the guilt rhetorician, discrimination is pervasive and explains the bulk of racial imbalance. Consider the following example:[18] A zoning board considers a proposal to rezone a single-family housing area to enable the construction of low-income housing. The sole focus of debate was a fight between environmentalists seeking to preserve green space and developers seeking to make a dol-

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13. *See* Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96-97 (1986); *see also* Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329-34 (1986).

14. Brief for the United States at 28, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (No. 84-1340) [hereinafter *Wygant* Brief].

15. *See* Fullinwider, *Introduction to* R. FULLINWIDER & C. MILLS, THE MORAL FOUNDATIONS OF CIVIL RIGHTS (1986).

16. Reynolds, *The Reagan Administration's Civil Rights Policy: The Challenge for the Future*, 42 VAND. L. REV. 993, 1001 (1989).

17. Glazer, *Is Busing Necessary?*, COMMENTARY, Mar. 1972, at 39, 52.

18. This example derives from Lawrence, *supra* note 3, at 348-49.

lar. That racial minorities would be the principal beneficiaries of the low-income housing was not considered. Proponents of the guilt model would view this failure affirmatively to consider minority interests a "selective indifference or misapprehension of costs that occurs entirely outside of consciousness."[19] In other words, by failing to consider psychological theories that explain submerged racism,[20] the demand for proof of discriminatory intent permits race-influenced decision making to go undetected and unremedied. According to Professor Charles Lawrence, leading proponent of the guilt model, "[t]raditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional . . . nor unintentional."[21] Consequently, the guilt model argues that discrimination must be understood through disparate impact and suggests that in the absence of discrimination our world might be integrated naturally.

The guilt and innocence models are true opposites. The guilt model sees discrimination when ostensibly neutral government action has a disparate impact.[22] The innocence model, in contrast, sees no discrimination in this scenario. Furthermore, the guilt model sees affirmative action as a remedy for discrimination. The innocence model, however, views affirmative action itself as pernicious discrimination.

The choice between the rhetorics of guilt and innocence is ultimately a reflection of one's world view. On one hand, Professors Lawrence and Ross's critique of the rhetoric of innocence is effective. Their claim that "there are mental processes of which we have no awareness that affect our actions and the ideas of which we are aware" is beyond peradventure.[23] Consequently, the demand of the rhetoricians of innocence, and the Supreme Court,[24] that plaintiffs prove discriminatory in-

19. *Id.* at 349.

20. Lawrence offers two psychological theories to explain the emergence of racism—psychoanalytic theory and cognitive psychological theory. Psychoanalytic theory explains both the presence of racial stereotypes and the lag time between changes in discriminatory behavior and corresponding attitudes. *Id.* at 331-36. Cognitive theory views "human behavior, including racial prejudice, as growing out of the individual's attempt to understand his relationship with the world . . . while at the same time preserving his personal integrity." *Id.* at 336. Through processes of categorization, assimilation, and the search for coherence, attitudes are learned tacitly; thus, the individual is not even aware that he or she has been taught racist beliefs. *Id.* at 336-39.

21. *Id.* at 322 (footnote omitted).

22. The guilt model does not extend to all disparities. Disparities not understood in racial terms are presumably valid. For example, a gasoline tax or bridge toll, while causing greater hardship among the poor, who are disproportionately minorities, is devoid of cultural meaning. Disparities in employment, education, and housing, however, are understood in racial terms. The guilt model then is an impact test with a cultural meaning trigger. *See generally id.* at 317.

23. *Id.* at 329.

24. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

tent, is troublesome. At the same time, however, there is force to the claims of Reynolds and other proponents of the rhetoric of innocence that choice,[25] culture,[26] and a "breakdown in both our educational and our moral systems"[27] at least partially explain group isolation. For this reason, effects-based proofs of discrimination are also problematic.

That neither the guilt nor innocence model is completely correct does not mean that one is forced to choose among these imperfect models. There are middle-ground solutions,[28] and this Article will offer one. Unlike other middle-ground approaches that are rooted in a substantive evaluation of the guilt and innocence models, however, this Article offers a solution based on the institutional capacity of the fact finder. Specifically, this Article will contend that the equality principle—that like persons be treated alike—cautions against the judiciary's adoption of an impact standard. At the same time, the equality principle *does not* preclude elected government's recognition of unconscious racism. The explanation for this apparent inconsistency is rooted in the fundamental difference between judicial and legislative fact-finding.

III. Equality and the Limits of Judicial Intervention

Equality, according to Aristotle, demands that people who are alike be treated alike, and correlatively, people who are unlike be treated unlike in proportion to their unlikeness.[29] But how do we define likeness and unlikeness?[30] People are like and unlike in an infinite number of ways—age, wealth, race, religion, gender, eye color, and so on. How, then, can we measure whether government is treating likes alike and unlikes differently? Are methadone users unlike alcoholics with respect to employability?[31] Are business persons who advertise on their own de-

25. *See generally* Glazer, *supra* note 17.

26. *See generally* T. Sowell, The Economics and Politics of Race: An International Perspective (1983).

27. Reynolds, *supra* note 16, at 1001.

28. *See, e.g.*, Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633 (1983) (advocating an evidentiary effects test that uses the res ipsa loquitur concept in tort law as a model for identifying purposeful discrimination); Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. Rev. 36 (1977) (proposing a "causation theory" under which present disparities proximately caused by prior discrimination would trigger strict review); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540 (1977) (advocating heightened rationality review for neutral laws with disproportionate impact).

29. 3 Aristotle, Ethica Nichomachea 1131a-1131b (W. Ross trans. 1925).

30. For an argument that the subjectivity associated with this determination is suggestive of the superfluous nature of equality analysis, see Westen, *The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982). For a counterargument, see Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 Mich. L. Rev. 575 (1983).

31. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (upholding such line drawing).

livery vehicles different from business persons who advertise by renting space on delivery vehicles owned by others?[32]

As an example, take the case of affirmative action. Defenders of preferential treatment argue that race- and gender-conscious measures may be consistent with Aristotle's equality principle. Under this argument, preferences for minorities over whites, or women over men, treat unlikes differently. Since unlikes may be treated differently, these preferences are permissible. In contrast, preferences for men over women or whites over minorities treat likes differently.

For example, when Alan Bakke is denied admission to medical school because the University of California at Davis reserves slots for minority students, his different treatment neither would stigmatize him as racially inferior nor frustrate state efforts to combat historic racial discrimination.[33] In these ways, Alan Bakke is unlike his minority counterparts. Compare this to the University of Texas's denial of admission in 1946 to Heman Sweatt, an otherwise qualified black applicant, on the basis of race. Sweatt's educational qualifications are not different from his white counterparts. Only racial prejudice can explain this difference in treatment.[34] The argument for the preferential treatment of women is much the same. Virginia Military Institute's male-only policy perpetuates negative stereotypes without advancing an important state objective. Mills College's women-only policy inflicts no real harm on men.[35]

Opponents of affirmative action reject these distinctions. The Reagan Administration, for example, persistently argued that race should play no role in decision making.[36] Viewing all race-conscious measures as abhorrent, William Bradford Reynolds argues, discrimination "can indeed begin to be discussed largely as a problem of the past . . . [however, if we] continue to view group-oriented social issues as civil rights issues . . . [we] could well find ourselves . . . in a racially ordered society."[37] Under this absolutist ideal of equality, then, minorities and whites are *always* alike.

The above arguments reveal that the equality principle, by itself, does not provide all the tools needed to solve the problem of govern-

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32. *See* Railway Express Agency v. New York, 336 U.S. 106 (1949) (upholding such line drawing).

33. *See* Westen, *supra* note 30, at 582-83.

34. *See id.* at 581-82.

35. *See* Raspberry, *How Do You Justify Separate Schools?*, Wash. Post, May 25, 1990, at A21, col. 2.

36. *See generally* Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524 (1987).

37. Reynolds, *Individualism vs. Group Rights: The Legacy of Brown*, 93 YALE L.J. 995, 1005 (1984).

ment classification. Instead, equality must work in tandem with other values. Supreme Court equality decisions reveal two such values—the separation of judicial and lawmaking functions (separation of functions principle), and the moral imperative that government should not engage in group-conscious decision making (the antidiscrimination principle).

Before turning to an analysis of these values, a few words about the nature of this inquiry are appropriate. As mentioned, the equality principle uses a relativistic measure of the propriety of governmental conduct. When two individuals are deemed alike or similarly situated, government cannot draw explicit lines distinguishing them. When two individuals are deemed unlike or differently situated, government can draw explicit lines distinguishing them. Indeed, government *should* draw appropriate lines distinguishing unlikes. The following chart serves as a simple measure of the propriety of government line drawing.

	neutral law	explicit line drawing
similarly situated	appropriate	inappropriate
dissimilarly situated	inappropriate	appropriate

This chart illustrates the basic point made above. An equality-based challenge to governmental action requires explicit line drawing of likes or the failure to draw lines for unlikes.

The distinction between positive and negative rights, however, obviates the need to consider government's failure to treat unlikes differently.[38] If the Constitution is understood to be a charter of negative liberties, as Justice John M. Harlan argued, then the equality guarantee does not impose " 'an affirmative duty to lift the handicap flowing from differences'. . . . To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society."[39] Consequently, while poor and wealthy women are differently situated with respect to their ability to pay for an abortion, "it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to financial resources to avail herself of the full range of

38. *See generally* Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

39. Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) (footnote omitted).

protected choices."[40] Moreover, while antidiscrimination laws that ensure access to public accommodations for handicapped individuals further equality,[41] the Constitution does not mandate the enactment of this type of legislation. Finally, in explaining why the state has no duty to rescue a child victimized by an abusive parent,[42] the Court noted that the due process clause "is phrased as a limitation on the State's power to act, not as a guarantee of a certain minimum level of safety and security. . . . [Like other constitutional rights, it] was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression[.]' "[43]

The positive-negative rights dichotomy thus immunizes government for its failure to recognize unlikeness affirmatively. Government only runs afoul of the equality principle when it treats likes differently. Consequently, when courts defer to government line drawing as distinctions among unlikes, the raw power of government is enhanced. In turn, when the judiciary considers individuals similarly situated, less discretion is available to elected government.

The separation of functions and antidiscrimination principles reveal who is similarly and who is differently situated. These values, therefore, represent the cornerstone of equality analysis.

A. Separation of Functions Principle

The separation of functions principle recognizes that popularly elected government is the true source of lawmaking. As Judge Richard Posner notes: "The real 'justification' for most legislation is simply that it is the product of the constitutionally created political process of our society."[44] The judiciary's role is to put into effect the legislative will. The judiciary, however, also ensures that majoritarian government operates within constitutional norms, and hence, may invalidate unconstitutional government action.

The constitutional positioning of the judiciary as simultaneously subordinate to and master over the legislative process creates the classic

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40. Harris v. McRae, 448 U.S. 297, 316 (1980).

41. The recently enacted Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990), is such a measure. Under the Act, state and private employers of 15 or more must make "reasonable accommodations" to otherwise qualified handicapped individuals. *Id.* § 101, 104 Stat. 330-31.

42. *See* DeShaney v. Winnebago County, 109 S. Ct. 998 (1989).

43. *Id.* at 1003 (quoting Davidson v. Cannon, 474 U.S. 344, 348 (1985)). For a critique of *Deshaney*, see Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53; Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990).

44. Posner, *The Defunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 29.

countermajoritarian difficulty. In his classic work, *The Least Dangerous Branch*, Alexander Bickel spoke of judicial review as antidemocratic.[45] That judicial review is "undemocratic" does not make it inappropriate. Indeed, Bickel even speaks of the judiciary's need to check legislative expediency and states that the courts are the branch of government best suited to "appeal to men's better natures, to call forth their aspirations."[46] The question remains how the judicial branch shapes legislative characterizations of who is similarly and differently situated, given the countermajoritarian role of the judiciary in government. Remember: the courts' depiction of individuals as differently situated protects government line drawing; the courts' labeling of individuals as similarly situated cabins government regulation.

The answer devised by the Court is a two-tiered classification approach.[47] Government, for the most part, is presumed trustworthy and may deem people unlike without intrusive judicial scrutiny. The important exception to this rule is classifying persons according to their race, gender, and other "suspect" traits.[48] These factors are deemed to reflect prejudice and antipathy, not legitimate state interests.[49] Consequently, "[w]hen there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."[50] In such cases, government line drawing is viewed as the unlike treatment of likes.

The principal emphasis of separation of functions, however, is the primacy of elected government and the correspondingly narrow role of judicial review. This is best revealed in the rational basis review of so-

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45. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-17 (1962). Bickel states:

> [W]hen the Supreme Court declares unconstitutional a legislative act[,] . . . it thwarts the will of the representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens . . . and it is the reason the charge can be made that judicial review is undemocratic.

Id.

46. *Id.* at 26.

47. The two-tiered approach is much maligned. First, some commentators consider it an inappropriate way to decide equality cases. *See* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 HARV. L. REV. 1 (1972) (stating that the two-tiered approach is too rigid because it does not allow "modest interventionism"); Karst & Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. L. REV. 7 (1979) (stating that the two-tiered approach pays too much attention to standard of review and too little attention to matters of substance). Second, some commentators have demonstrated that interest balancing, not a principled application of two-tier review, best explains equality decision making. *See* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

48. Palmore v. Sidotti, 466 U.S. 429, 432 (1984).

49. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

50. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265-66 (1977).

cial and economic legislation.[51] Rational basis review reveals the Court's willingness to ascribe legitimating rationales to seemingly arbitrary classifications.[52] Additionally, it emphasizes that incorrect legislative fact-finding and suspect legislative purposes do not render a statute unconstitutional, as long as the legislature's stated rationale is theoretically legitimate.[53] Finally, rational basis review enables government attorneys to subvert actual legislative purpose by offering plausible post hoc justifications for government actions.[54]

The inevitability of legislative classification and the impropriety of judicial lawmaking afford underlying rationales for rational basis review.[55] A classic statement of the judiciary's trust in majoritarian government is *Vance v. Bradley*:[56] "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted."[57] Moreover, the Court is an inappropriate forum for the determination of complex factual questions involved in constitutional adjudication because of the nature of the judicial process.[58]

Even though rational basis review enables government to envision a world of unlikes in its line drawing, this does not mean that governmen-

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51. *See* Devins, *Appropriations Redux*, 1988 DUKE L.J. 400-06.

52. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483 (1955) (validating law requiring optometrist's prescriptions for opticians to fit old glasses into new frames while exempting sellers of ready-to-wear glasses).

53. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) (upholding "environmental" law prohibiting sale of milk in plastic nonreturnable containers despite evidence both of intent to harm out-of-state producers and of harmful environmental effects of legislation).

54. *See* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166 (1980) (upholding pension disability classification despite evidence that law subverted intended purpose).

55. As the Supreme Court stated in New York City Transit Authority v. Beazer:

> When a legal distinction is determined . . . between night and day, childhood and maturity, or any other extremes, *a point has to be fixed or a line has to be drawn*. . . . Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. *But when it is seen that a line or point there must be*, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

440 U.S. 568, 593 n.41 (1979) (quoting Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting)) (emphasis added).

56. 440 U.S. 93 (1979).

57. *Id.* at 97 (footnote omitted).

58. Oregon v. Mitchell, 400 U.S. 112, 247-48 (1970) (Brennan, J., concurring in part and dissenting in part). This concept received positive expression in *Arlington Heights*: "[B]ecause legislators and administrators are properly concerned with balancing numerous competing considerations[,] . . . courts refrain from reviewing the merits of their decisions. . . ." 429 U.S. at 265.

tal line drawing is immune from constitutional attack.[59] It does suggest, however, that concerns about separation of functions limit the breadth of suspect governmental line drawing. The Court's reluctance to find a classification suspect, as well as the Court's cramped view of what constitutes a discriminatory classification, confirms this latter proposition.

City of Cleburne v. Cleburne Living Center, Inc.[60] illustrates the Court's reluctance to expand heightened review beyond classifications based on race, gender, alienage, and illegitimacy. In reviewing the constitutionality of a zoning exemption of homes for "the insane or feebleminded,"[61] the Court in *Cleburne* rejected arguments that laws discriminating against the mentally retarded are suspect. The Court accorded little weight to both the immutability of mental retardation and the introduction of overwhelming evidence demonstrating pernicious discrimination against the retarded.[62] Instead, the Court noted that *some* classifications according to mental retardation are rational,[63] and that antidiscrimination legislation protecting the mentally retarded reveals that the mentally retarded are not *without* political power.[64]

This reasoning is extremely restrictive. Immutability concerns are negated by the fact that the classification can be related to a legitimate governmental purpose.[65] Indeed, under the Court's standard in *Cleburne*, gender, illegitimacy, and alienage might not constitute suspect classifications. In prior cases, the Court has found that all three classifications serve important governmental interests.[66] Also, with respect to all three classifications, the government has enacted antidiscrimination legislation.[67] Following the *Cleburne* standard, political-

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59. *See supra* notes 48-50 and accompanying text.

60. 473 U.S. 432 (1985).

61. *Id.* at 436 n.6.

62. *Id.* at 461-65 (Marshall, J., concurring in part and dissenting in part) (chronicling discrimination against the mentally impaired).

63. *Id.* at 442-43.

64. *Id.* at 443-45.

65. When immutability is "often relevant to legitimate purposes," legislative line drawing with respect to immutability does not necessarily render such government action suspect. J. ELY, DEMOCRACY AND DISTRUST 150 (1980). The question remains, however, whether government overwhelmingly furthers legitimate purposes through such line drawing. If not, the plausibility of legitimate line drawing is rebutted by the actuality of pernicious purpose. In other words, the prospect of legitimate line drawing should not cloak the reality of irrational discrimination. *Cleburne*, beyond pointing to the prospect of rational discrimination, does not pursue this line of inquiry.

66. *See* Roestker v. Goldberg, 453 U.S. 57 (1981) (upholding male-only draft); Ambach v. Norwick, 441 U.S. 68 (1979) (upholding citizenship requirement for public school teachers); Lalli v. Lalli, 439 U.S. 259 (1978) (upholding precondition of a court order of filiation on intestate inheritance of nonmarital children).

67. *See* Immigration and Nationality Act, 8 U.S.C. § 1324b (1988) (alienage); Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e (1988)) (gender); TENN. CODE ANN. § 36-2-208 (1984) (illegitimacy).

disfranchisement concerns in these cases evaporate with the passage of antidiscrimination legislation.

Cleburne's narrowness is rooted in the Court's increasing sensitivity to separation of functions concerns. In addition to finding rational discrimination and the prospect of political representation present in *Cleburne*, the Court also gave weight to the "general rule . . . that legislation is presumed to be valid,"[68] and to the related pragmatic concern that if the mentally retarded were deemed suspect, then the Court would be hard pressed "to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities . . . and who can claim some degree of prejudice from at least part of the public at large."[69] The Court, then, is quite hesitant to let the genie of legislative distrust out of the bottle of presumptive validity.

The Court's explication of what constitutes a discriminatory classification sends a similar message. With few exceptions,[70] Court holdings suggest that unless government uses a forbidden word—race, gender, and so on—the statute or regulation is not deemed facially improvident. Consequently, although a fair housing ordinance that requires voter approval of certain group-conscious regulations governing real estate transactions is an impermissible racial classification,[71] the Court found perfectly acceptable a state constitutional provision prohibiting state construction of low-rent housing unless first approved in a community election.[72] Even more striking was the Court's holding that a law excluding pregnancy-related disability from a state disability insurance program was not considered a gender classification because the "program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list

68. *Cleburne*, 473 U.S. at 440.

69. *Id.* at 445-46. The Court also added that "[o]ne need mention in this respect only the aging, the disabled, the mentally ill, and the infirm. *We are reluctant to set out on that course, and we decline to do so.*" *Id.* at 446 (emphasis added).

70. The most recent exception is Washington v. Seattle School Dist., 458 U.S. 457 (1982), in which the Court invalidated a state initiative prohibiting school boards from requiring students to attend schools not nearest to or next nearest to their homes. While the law speaks of neighborhood schools and not race-related busing, the Court—pointing to numerous nonracial exceptions to the neighborhood schools policy—concluded that the Washington law was race specific. *Id.* at 470-84. In contrast, the Court—on the day *Seattle* was issued—labeled race neutral an amendment to the California Constitution prohibiting state courts from ordering mandatory pupil assignments unless necessary to remedy the federal equal protection clause. Crawford v. Board of Educ., 458 U.S. 527 (1982). For an examination of these cases, see Sunstein, *Public Values, Private Interest, and the Equal Protection Clause*, 1982 SUP. CT. REV. 127. Another neighborhood school case is Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976) (mem.), in which the Court upheld a neighborhood school policy whose foreseeable and inevitable effect was racial isolation.

71. *See* Hunter v. Erickson, 393 U.S. 385 (1969).

72. James v. Valitera, 402 U.S. 137 (1971).

of compensable disabilities."[73] In plain terms, while the pregnancy exclusion only affects women, some women never become pregnant. The class of unaffected, thus, includes men and women; for the Court, the program was not defined along gender lines. This failure to deem pregnancy a surrogate for gender seems, to say the least, a stretch.[74] It also suggests that the Court envisions itself as a limited countermajoritarian check.

The separation of functions principle helps to explain the Court's use of a two-tiered classification approach, its hesitancy to label a classification suspect, and its disinclination to find legislation group specific. Since individuals are considered similarly situated only when a classification is found suspect, separation of functions limits the invocation of suspect class criteria, and as a result, heightened review. Therefore, separation of functions empowers government by authorizing the identification of individuals as unlikes. At the same time, separation of functions treats people as likes with respect to suspect criteria and disfavors government line drawing on the basis of race, gender, alienage, and illegitimacy.

B. Antidiscrimination Principle

The antidiscrimination principle disfavors *all* race-dependent decision making.[75] While the antidiscrimination principle does not prohibit race-dependent action,[76] it demands that such government action pass strict scrutiny's compelling interest and least restrictive means requirements.[77] For the most part, this rigorous test is satisfied only by racial classifications that remedy discrimination.[78]

By disfavoring race-dependent line drawing, the antidiscrimination principle holds that individuals cannot be deemed unlikes on racial grounds. In the words of Justice John Paul Stevens: "Persons of differ-

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73. Geduldig v. Aiello, 417 U.S. 484, 496 n.20 (1974).

74. For a criticism of *Geduldig*, see Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 125 (1982).

75. *See generally* Blumstein, *supra* note 28, at 638-43; Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 1-12 (1976); Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 116-30 (explanation and critique). Race-dependent decisions are those "that would have been different but for the race of those benefited or disadvantaged by them." Brest, *supra*, at 6.

76. Professor Paul Brest, however, argues that race-dependent decisions which "disadvantage" racial minorities are prohibited by the antidiscrimination principle. Brest, *supra* note 75, at 2.

77. The Supreme Court does not uniformly adhere to this value. *See infra* notes 136-43 and accompanying text.

78. One exception to this rule are the Japanese internment and curfew cases, Korematsu v. United States, 323 U.S. 214 (1944), and Hirabayashi v. United States, 320 U.S. 81 (1943). Another exception is federal affirmative action policy. *See infra* notes 124-35 and accompanying text.

ent races, like persons of different religious faiths and different political heliefs, are equal in the eyes of the law."[79] As such, the antidiscrimination principle is a limitation on the exercise of governmental power. It would be incorrect, however, to argue that the antidiscrimination principle is in tension with the governmentally empowering nature of the separation of functions principle. Separation of functions, as the prior discussion reveals, accords no deference to racial classifications. Unlike generalizations about age, drug use, or professional status, generalizations about race are presumed to be a smoke screen for illegitimate discrimination.[80] At this level, the antidiscrimination principle is responsive to defects in the political process.[81]

This process-defects justification is one of two fundamental rationales for the antidiscrimination principle. The second rationale is that the antidiscrimination principle promotes individual self-worth, a cornerstone of liberal democracy. This justification, as Professor James Blumstein notes, sees racial discrimination as a " 'particularized wrong' independent of the adverse consequences that flow from it because race-based decision making violates the societal goal of a fair, individualized, and meritocratic procedural framework for decision making."[82] In other words, assumptions of differences in moral worth[83] are anathema to a society premised on free will and individual accomplishment.[84] Such assumptions, as Professor Michael Perry argues, encourage racialism because they deal with persons of other races not as individuals, but as "blacks," "whites," and so forth.[85] Racialism both perpetuates discrimination and encourages a racial spoils system whereby our "nation of minorities" fights over the distribution of government largesse along racial lines.[86]

The antidiscrimination principle is accepted generally, yet can be extremely controversial. When it comes to race-dependent decision making that is deemed harmful to minorities, like the antimiscegenation law struck down in *Loving v. Virginia*,[87] and racial segregation in

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79. Rogers v. Lodge, 458 U.S. 613, 650 (1982) (Stevens, J., dissenting).

80. *See supra* notes 48-50 and accompanying text.

81. *See* Brest, *supra* note 75, at 6-8.

82. Blumstein, *supra* note 28, at 638-39 (quoting Fiss, *Fair Employment Laws*, 38 U. CHI. L. REV. 235, 243 (1971)).

83. Brest, *supra* note 75, at 10.

84. My colleague Rod Smolla offers an alternative characterization of this rationale, namely, free market social Darwinism. Social Darwinism, rather than emphasizing individual accomplishment, points out "that all persons are not in fact equal in their talent, creativity, beauty, strength, intellectual ability, enterprise, or ambition." Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980's*, 58 S. CAL. L. REV. 947, 960 (1985).

85. Perry, *supra* note 28, at 550.

86. *See* Smolla, *supra* note 84, at 962-63.

87. 388 U.S. 1 (1967).

public schools, no one disagrees that the antidiscrimination principle serves as a bar to such government action. When it comes to so-called preferential discrimination, however, the consensus breaks down. Instead, fundamental questions arise as to both the universal application of the antidiscrimination principle and the determination of what constitutes discrimination.

The universality of antidiscrimination as a bar to stigmatizing race-conscious decision making is evidenced by the ease with which the Court decided *Palmore v. Sidotti*.[88] *Palmore* considered the propriety of private prejudice as a factor in the determination of the child's best interests in a custody battle. Specifically, a state judge concluded that a custodial parent could lose custody solely because of her remarriage to an individual of another race. The trial court concluded that private biases inevitably would make the child suffer from social stigmatization.[89] In its unanimous reversal of the state ruling, the Court held that government cannot give effect to private biases. The trial court's factual determination of best interest, though possibly correct, was simply irrelevant.[90] The Court concluded that the Constitution neither can control such prejudices nor can it tolerate them.[91]

Before turning to the question of affirmative action, it is important to examine the connection between antidiscrimination cases like *Palmore*, *Loving*, and *Brown v. Board of Education*[92] and Supreme Court jurisprudence on the question of what constitutes discrimination. Does requiring proof of discriminatory intent accord with the antidiscrimination principle's embrace of individual self-worth? *Washington v. Davis*,[93] the 1976 ruling that rejected the disparate impact theory of equal

88. 466 U.S. 429 (1984).

89. *Id.* at 431.

90. The Court concluded that "the reality of private biases and the possible injury they might inflict are [im]permissible considerations for the removal of an infant child from the custody of its natural mother." *Id.* at 433.

91. *Id.* In a fascinating reading of *Palmore*, Professor David Strauss argues that it is the Supreme Court, not the state court, that mandates race-dependent decision making. In making this point, Strauss offers the following hypothetical: A judge is presented with two custody cases in which she—through a crystal ball—knows that the child is best off with his father but nothing else. In one case, race explains why the child's best interests are with the father. In the other case, race is irrelevant. Under *Palmore*, despite the judge's ignorance of explanatory variables, one of her best interest determinations will be overturned. The reason is that the judge—looking only at outcomes—did not take race into account. Strauss, *supra* note 75, at 104-05. This argument, while provocative, is not viable. Judges look at facts, not crystal balls, in determining custody. *Palmore* eliminates race from the list of permissible facts. In this sense, race is different from other factors. As a result, outcomes may change. Contrary to Strauss, the reason why the judge's outcome-focused opinion is affirmed in one case and reversed in the other is that race is not being considered by those who otherwise would make (consciously or unconsciously) race-dependent decisions.

92. 347 U.S. 483 (1954).

93. 426 U.S. 229 (1976).

protection in favor of an intent standard, is emblematic of the Court's approach to this question. *Davis* concerned a challenge by black applicants who were not accepted into the Washington, D.C. police force. The crux of this challenge was the department's utilization of a verbal skills test, which a disproportionate number of blacks failed. In rejecting the challenge, the Court emphasized the impossibility of distinguishing between unsuccessful black and unsuccessful white applicants. Neither black nor white applicants who failed successfully could claim that the test denied them equal protection.[94] In other words, had *Davis* concluded that only blacks could challenge the use of the exam, blacks and whites would not be viewed as similarly situated individuals; instead, they would be viewed as members of a group.

At this most basic level, there is a fundamental congruity between the antidiscrimination principle of *Palmore*, *Loving*, and *Brown*, and the discriminatory intent requirement. Both constructs are rooted in the belief that blacks and whites are individuals similarly situated. Both constructs reject the notion of membership in dissimilarly situated groups. *Palmore*, *Loving*, and *Brown* find race-dependent decision making impermissible precisely because such action tends to transform individual self-worth into group status. *Davis* refuses to consider group-based impact proof of discrimination for identical reasons.[95]

The commonality between the intent and nondiscrimination requirements should not be construed as a complete adoption of the Court's discriminatory intent jurisprudence.[96] First, *Davis* seems more concerned about the consequences of impact-based proofs of discrimination than the antidiscrimination roots of intent. For example, the Court in *Davis* expresses concern over the "far-reaching" consequences of impact-based proofs extending to tax, welfare, public service, regulatory, and licensing statutes that burden the poor and the average black more than the more affluent white.[97] This emphasis on interest balancing obfuscates the Court's antidiscrimination holding. Second, the elaboration of the intent requirement in *Village of Arlington Heights v. Metropolitan Development Board*[98] seems overly constraining. Under *Arlington Heights*, once a plaintiff shows that pernicious discrimination was a motivating purpose of government action, the governmental unit

94. *Id.* at 246.

95. *Id.*

96. For criticisms of *Davis*, see Eisenberg, *supra* note 28; Lawrence, *supra* note 3; Perry, *supra* note 28; and Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935 (1989); *see also* Brest, *supra* note 75, at 29 (rejecting disparate impact proofs, but arguing that impact may be used "selectively" to create a "rebuttable" presumption of discriminatory intent).

97. *Davis*, 426 U.S. at 248 (footnote omitted).

98. 429 U.S. 252 (1977).

still can avoid liability by showing, by a preponderance of the evidence, that it would have undertaken the same action for nondiscriminatory reasons.[99] This standard is too lax. It is next to impossible to tell whether discriminatory motives entered into the weighing of nondiscriminatory purposes. For example, a discriminatory zoning board may place greater weight on aesthetic concerns of overcrowding in rejecting a multi-unit, low-income housing project than a nondiscriminatory board. The preponderance of evidence standard, then, runs the risk of letting ostensibly neutral purposes cloak discriminatory motives, thereby frustrating the antidiscrimination principle.[100] A more rigorous "clear and compelling" evidentiary standard would better advance antidiscrimination objectives.[101]

Imperfections in discriminatory intent doctrine do not negate the fundamental similarity between the antidiscrimination principle and discriminatory intent case law. There is, however, a perceived tension between these two principles. Why? The answer undoubtedly is that *Palmore*, *Brown*, and *Loving* invalidate governmental conduct, whereas *Davis* and *Arlington Heights* validate governmental action. Opposite results, however, do not necessitate conflicting reasoning. *Palmore*, *Brown*, and *Loving* address government attempts to treat likes dissimilarly, thus violating the equality principle. In contrast, the intent cases involve neutral statutes that treat likes similarly,[102] thus making the rulings consistent with the equality principle.[103]

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99. *Id.* at 270 n.21.

100. The Bush Administration and the Congress concurred on this matter, for both versions of the Civil Rights Act of 1990 have provisions ensuring employer liability whenever "invidious discrimination was a [not *the*] motivating factor." Bush Veto Message to the Senate at 1, Oct. 22, 1990.

101. This standard is to be distinguished from the so-called *Keyes* presumption used in school desegregation cases. Under the rationale of Keyes v. School Dist. No. 1, 413 U.S. 189 (1973), once discriminatory purpose is demonstrated in a significant part of the system, all disparities are presumed the result of discrimination. *Id.* at 208. The presumption can be rebutted only by showing that "segregative intent was not among the factors that motivated their actions." *Id.* at 210. In the *Arlington Heights* context, *Keyes* apparently suggests that, once there is some evidence of discriminatory purpose, the governmental actor can avoid liability only by demonstrating that race could not have entered into the decision-making process. This suggestion is incorrect. Proof of discriminatory purpose—presumably under *Arlington Heights*—is prerequisite to the triggering of the *Keyes* presumption. *Arlington Heights*, then, deals with the threshold issue of whether any discrimination exists; *Keyes*'s concern is how to measure the sweep of proven discrimination.

102. Charles Lawrence, however, argues that these purportedly neutral statutes are in fact rooted in unconscious racism. *See infra* notes 146-50.

103. There is an element of irony here. It was suggested earlier that government power is limited by viewing minorities and nonminorities as similarly situated. *See supra* text accompanying notes 38-43. It is now contended, however, that government does not violate equality through neutral statutes. In other words, since government typically enacts neutral laws, does not the characterization of minorities and nonminorities as likes empower government? There are two answers here. First, even if minorities and nonminorities are unlikes, government is under no obligation to

The intent standard seems consistent with the antidiscriminatory demand that to treat any person less well than another, or to favor one any more than another, because they are black or white or brown or red is wrong.[104] The same cannot be said of race-dependent decision making that serves the public good by promoting diversity or some other forward-looking policy objective. If minorities and whites are similarly situated with respect to race, distinctions between the benign and pernicious use of race are senseless. Alexander Bickel, in an oft-quoted passage by the Reagan Justice Department,[105] argues:

> The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.[106]

Race-dependent decision making, however, cannot be rejected out of hand as inconsistent with the antidiscrimination principle. Compensatory justice demands that an individual wronged by pernicious discrimination be entitled to compensation adequate to remedy the wrong suffered.[107] Otherwise, perpetrators of discrimination will suffer no penalty for their racist conduct. Moreover, if effective remedies cannot serve as a disincentive to outrageous conduct, racists will not curb their conduct and the antidiscrimination principle will be subverted. Given the antidiscrimination principle's emphasis on discouraging racist conduct, wrongdoers should not be relieved of remedial obligations simply because it is impossible to locate an "actual victim" of discrimination. Thus, remedial discrimination that either compensates for past wrongs suffered or deters future racial conduct is consistent with the antidiscrimination principle.

The question remains where to draw the line separating permissible remedial discrimination and impermissible race-dependent decision making. Granted, as the school desegregation cases demonstrate, class-based wrongs warrant class-based remedies.[108] At the same time, unless

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treat unlikes differently. *See id.* Second, while government may typically enact neutral laws, raw government power is at its apex when it may treat people as unlikes. Witness the antimiscegenation law at issue in *Loving* and the segregation of education and public accommodations. Indeed, the fact that government now enacts neutral laws is a testament to the constraining of governmental power through the characterization of minorities and nonminorities as similarly situated.

104. Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. CHI. L. REV. 775, 810 (1979).

105. *See* Reynolds, *supra* note 16, at 1001; *Wygant* Brief, *supra* note 14, at 11.

106. A. BICKEL, THE MORALITY OF CONSENT 133 (1975).

107. As expressed in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803): "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163.

108. *See* Devins, *School Desegregation Law in the 1980's: The Courts' Abandonment of*

discrimination explains all disparities, the values of antidiscrimination would be undermined by the utilization of disparate impact measures.[109] For this reason, imbalance caused by societal discrimination is an inadequate basis for remedial discrimination. "Remedies" for societal discrimination neither compensate victims nor punish wrongdoers.[110]

For the most part, Supreme Court affirmative action decision making follows the above analysis. Societal discrimination and noncompensatory justifications for race-dependent decision making generally have been rejected as "too amorphous,"[111] as having "no logical stepping point,"[112] and as being inconsistent with the *Brown* antidiscrimination mandate.[113] Moreover, like the pernicious discrimination struck down in *Brown*, *Loving*, and *Palmore*, benign discrimination generally must satisfy strict scrutiny's demand of compelling interest and least restrictive means.[114]

The impossibility of reconciling disparate impact or societal discrimination with the antidiscrimination principle cabins the use of race to cases in which one can identify either the victim or the perpetrator.[115] This is hardly troublesome since the antidiscrimination principle—by viewing minorities and nonminorities as similarly situated with respect to race—disfavors race-dependent decision making.

IV. Separation of Functions and Antidiscrimination Reconsidered: Toward a Middle Ground

Separation of functions and antidiscrimination analyses infuse into the equality principle the value that minorities and whites are alike.

Brown v. Board of Education, 26 Wm. & Mary L. Rev. 7 (1984).

109. *See supra* notes 25-27, 93-95 and accompanying text.

110. As Paul Brest stated:

> [A]n individual's moral claim to compensation loses force as the nature, extent, and consequences of the wrongs inflicted become harder to identify and as the wrongs recede into the past. Not only does the image blur as the focus shifts from a specific claim based on an identifiable act to encompass amorphous wrongs, but new kinds of claims [e.g., economic exploitation and other social injustices] enter the field of vision.

Brest, *supra* note 75, at 42.

111. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986); *cf.* Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997 (1990) (stating that diversity may be an adequate justification for congressionally mandated affirmative action).

112. *Wygant*, 476 U.S. at 275.

113. *Id.* at 276.

114. *See* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 721 (1989) (advocating propriety of strict scrutiny review in evaluating state affirmative action efforts).

115. Nonvictims—consistent with the Constitution—may receive relief in cases in which no less race-specific measure is available to punish the wrongdoer. United States v. Paradise, 480 U.S. 149, 183-84 (1987). Title VII also permits nonvictim relief in the analogous case of persistent egregious discrimination. *See* Devins, *Affirmative Action After Reagan*, 68 Tex. L. Rev. 353, 360-65 (1989).

Separation of functions reinforces this alikeness by recognizing that racial classifications rebut the presumption of governmental trustworthiness.[116] Antidiscrimination travels a different road, emphasizing individual self-worth.[117]

When classifications harm minorities, the separation of functions and antidiscrimination principles both speak to the rejection of this governmental action as improperly treating likes unlike. Separation of functions and antidiscrimination also disfavor the use of impact tests as a measuring stick of pernicious discrimination. Separation of functions emphasizes that impact standards improperly presume illicit government purpose without forming an adequate evidentiary basis.[118] Antidiscrimination views impact tests as improperly treating individuals as members of racial groups.[119] While unconscious racism may reveal the inadequacy of intent, impact tests prove too much by assuming racism to be the likely cause of racial imbalance. Consequently, if unconscious discrimination is but one of several causes of racial isolation, an impact standard demands nonremedial race-dependent decision making (in contravention of antidiscrimination values) premised on a distrust of government (in contravention of separation of functions values).

Separation of functions and antidiscrimination values diverge on the remedial discrimination issue. Antidiscrimination limits remedial discrimination to instances in which there is a proven wrongdoer.[120] Separation of functions is not troubled by remedial discrimination. In the words of Professor John Hart Ely:

> When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review, are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice. . . .[121]

Court affirmative action jurisprudence is a hodgepodge of antidiscrimination and separation of functions values. When it comes to the federal government's use of race, separation of functions prevails.[122] In stark contrast, however, state and local efforts are measured principally against an antidiscrimination standard.[123]

The leading case on federal affirmative action is *Metro Broadcast-*

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116. *See supra* notes 48-50, 78-81 and accompanying text.

117. *See supra* notes 94-95 and accompanying text.

118. *See supra* notes 70-74 and accompanying text.

119. *See supra* notes 93-95 and accompanying text.

120. *See supra* text accompanying note 107.

121. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974). For the Reagan Administration's critique, see *Wygant* Brief, *supra* note 14, at 16-18.

122. *See infra* notes 124-35 and accompanying text.

123. *See infra* notes 136-44 and accompanying text.

ing, Inc. v. F.C.C.,[124] in which a five-member majority upheld Federal Communications Commission (FCC) efforts to increase minority representation in broadcast management through race preferences in the granting of licenses.[125] These preferences were justified both as a remedy for inequities created by racial and ethnic discrimination[126] and as a mechanism for promoting program diversity through increased minority ownership.[127] While recognizing that prior cases amply supported the federal government's use of race to remedy societal discrimination,[128] *Metro Broadcasting* upheld the FCC preference on nonremedial diversity grounds. Moreover, rather than make use of the strict scrutiny test typically associated with racial line drawing, the Court ruled that congressionally mandated "benign"[129] preferences need only be "substantially related" to "important governmental objectives within the power of Congress."[130]

The diversity rationale endorsed in *Metro Broadcasting*, although consistent with separation of functions concerns,[131] clearly subverts antidiscrimination values. Diversity prizes a cross-representation of viewpoints and assumes that status—at least "in the aggregate"[132]— is a proxy for the representation of certain views. With respect to the FCC preference, the diversity rationale presumes that racial status will influence the programming decisions of black and white license holders.[133] In focusing on groups, diversity directly contradicts the ethos of individualism that underlies antidiscrimination.

Metro Broadcasting, however, does not signal the death knell of antidiscrimination in federal race preference cases. First, the availability of a remedial justification may have been an important, though unstated, consideration in the Justices' reasoning.[134] Second, *Metro*

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124. 110 S. Ct. 2997 (1990).

125. *Id.* For an analysis, see Devins, Metro Broadcasting, Inc. v. F.C.C.: *Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990).

126. *Metro Broadcasting*, 110 S. Ct. at 3009-10 (quoting H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 43).

127. *Id.* at 3010.

128. *See* Fullilove v. Klutznick, 448 U.S. 448, 476-78 (1980) (upholding a remedial set-aside enacted by Congress); *see also* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 717-20 (1989) (discussing and distinguishing *Fullilove* from set-asides enacted by state and local governments).

129. *Metro Broadcasting*, 110 S. Ct. at 3008.

130. *Id.* at 3009.

131. For further analysis, see Devins, *supra* note 125, at 143-44.

132. *Metro Broadcasting*, 110 S. Ct. at 3016.

133. As Justice Sandra Day O'Connor commented in her *Metro Broadcasting* dissent, the FCC preference "embod[ies] stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion harred to the government by history and the Constitution." *Id.* at 3029 (O'Connor, J., dissenting).

134. *See* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983) (stating that members of the Court join an opinion for

Broadcasting is an exception to the rule of federal race preferences grounded in remedial theory.[135] Third, given the replacement of Justice William Brennan with Justice David Souter, *Metro Broadcasting*'s slim majority seems vulnerable. As it stands, however, separation of functions concerns reign supreme in federal affirmative actions efforts.

Court review of state and local affirmative action efforts, although a hybrid of antidiscrimination and separation of functions values, is principally aligned toward antidiscrimination values. On one hand, affirmative action cannot be grounded in societal discrimination or nonremedial theories.[136] Moreover, strict scrutiny review is the applicable standard of review.[137] On the other hand, the Court rejected the Reagan Justice Department's strident advocacy of strict compensatory justice. Specifically, in the Court's view, a plan need not be limited to remedying specific instances of identified discrimination for it to be "narrowly tailored," or "substantially related," to the correction of prior discrimination.[138]

Wygant v. Jackson Board of Education[139] is the Court's principal statement on this question.[140] At issue in *Wygant* was an affirmative action plan that used the black-white student population ratio as a target for the hiring and layoffs of minority and nonminority teachers. The Court found reliance on black-white population ratios to be an inappropriate basis for race-conscious action. Instead, remedial action must be warranted; that is, there must be sufficient evidence to justify the conclusion that there has been prior discrimination, and that the employer is the wrongdoer.[141] Failure to meet these requirements, the Court contended, would undermine "a core purpose of the Fourteenth Amendment" to alleviate all governmentally imposed race distinctions.[142] In explaining the type of employer proof required to show that remedial action was necessary, the Court suggested proof of a discrepancy in the relevant labor market between qualified minority hires and qualified

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numerous reasons and hence the Court may not subscribe to a case's stated rationale in future decisions).

135. *See, e.g., Fullilove*, 448 U.S. at 476-78.

136. *See supra* notes 111-19 and accompanying text. In the Supreme Court's lead opinion in Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) (plurality decision), Justice Lewis Powell suggested that first amendment academic diversity warrants the consideration of race as a factor in a university's admission decision. *Id.* at 311-16 (opinion of Powell, J.). Since no other member of the Court joined it, the Powell opinion does not speak for the Court on this issue.

137. *See supra* notes 111-19 and accompanying text.

138. Wygant v. Bd. of Educ., 476 U.S. 267, 287 (O'Connor, J., concurring).

139. 476 U.S. 267 (1986).

140. The Court's recent decision in City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), derives almost entirely from *Wygant*. *See* Devins, *supra* note 115, at 372-78.

141. *Wygant*, 476 U.S. at 277.

142. *Id.* (quoting Palmore v. Sidotti, 466 U.S. 429, 432 (1984)).

nonminority hires.[143] In other words, *Wygant* rejected a contemporaneous findings requirement in favor of limited numerical proof. Wrongdoing, then, can be inferred through disparities, not direct proof.

Wygant's utilization of the relevant labor market is a merger of antidiscrimination and separation of functions values. The separation of functions is advanced because government is empowered voluntarily to remedy its own race discrimination. This advancement of separation of functions also speaks to a principled relaxation of the antidiscrimination principle's hostility to impact. While antidiscrimination disfavors numerical proofs of discrimination, it also favors the remedial use of race-dependent decision making when there is a proven wrongdoer. Unlike black-white population disparities whose presumption of wrongdoer and victim status are little more than a call for racial justice, the line drawn by the relevant labor market approach is plausibly related to wrongdoer status.[144] Given the proof problems associated with unconscious racism, the relevant labor market can be viewed as a device that takes unconscious racism into account without transforming equal protection into a pure group construct. The relevant labor market approach does not subvert the antidiscrimination principle, for it is a fundamentally remedial measuring stick. *Wygant*, therefore, is consistent with both separation of functions and antidiscrimination concerns.

The relevant labor market approach, however, is not an equal protection panacea. First, because unconscious racism prevents minorities from entering the relevant labor market, this solution is only a partial cure to the problem of unconscious racism. Second, since it is undoubtedly true that some employers will have a disproportionately larger, and others a disproportionately smaller, share of minority employees, the relevant labor market's call for a minimum level of minority representation places an unfair burden on government employers. Under this view, moreover, the relevant labor market approach may be deemed a demand for race-dependent decision making; hence, it would be considered fundamentally at odds with the antidiscrimination principle.

Separation of functions provides a justification for and limitation on the relevant labor market, which is responsive to this second concern. In cases in which the government chooses to utilize the relevant labor market as a measure for remedial discrimination, this equity argument evaporates. Indeed, separation of functions supports such line

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143. *Id.* For a more thorough discussion, see *id.* at 284-94 (O'Connor, J., concurring).

144. In Title VII litigation, disparities between the percentage of minority hires and the percentage of minorities in the relevant labor market do establish a prima facie pattern or practice claim. *See id.* at 292 (O'Connor, J., concurring). For this reason, Justice O'Connor argues that the relevant labor market provides "a firm basis for determining that affirmative action is warranted." *Id.* (O'Connor, J., concurring).

drawing. This is the essence of *Wygant*.[145] In contrast, the utilization of the relevant labor market cannot be imposed upon unwilling employers. The equity argument as well as separation of functions concerns both speak against such uses of the relevant labor market.

Separation of functions also provides an answer of sorts to the first objection—that the relevant labor market is an inadequate guard against unconscious racism. The source of this objection is the failure of discriminatory intent adequately to explain racism. Take *Washington v. Davis* as an example. Professor Charles Lawrence argues that the disparate impact of the entrance examination is presumptively discriminatory because its "historical and cultural context" makes us think of this disparity in racial terms.[146] Lawrence advances two arguments here. First, both the differing roles of police in predominantly white and predominantly black neighborhoods[147] and the components of a police officer's job—"authority, control, protection, and sanctioned violence"—have racial meaning.[148] Second, the government's use of a verbal and written skills test that blacks disproportionately fail also has racial meaning because our culture has taught us to believe that blacks fail because they are black.[149] This adverse cultural meaning, for Lawrence, demonstrates the need to assess the propriety of the communication skills test. If alternative hiring techniques with less disparate impact exist, unconscious racism is at the root of the disparity. Noting that the communication skills test undervalues the ability of black officers to establish rapport in black communities and that white officers will "need sensitivity training and community relations workshops," Lawrence deems the communication skills test discriminatory.[150]

The separation of functions and antidiscrimination principles are not necessarily in conflict with Lawrence's model. Both disfavor race-dependent decision making, whether conscious or unconscious. Separation of functions disfavors race-dependent decision making because presumptive trust is not accorded to these decisions; the antidiscrimination principle disfavors race-dependent decision making because these decisions undermine individual self-worth. The drawing of lines separating discrimination from disparate impact is quite another matter. If impact—or impact with stigmatizing cultural meaning—is a surrogate for intent, then an impact test is consistent with both antidiscrimination

145. *See id.* at 289-90 (O'Connor, J., concurring).
146. Lawrence, *supra* note 3, at 370.
147. *Id.* at 370-71.
148. *Id.* at 370.
149. *Id.* at 373.
150. *Id.* at 375.

and separation of functions principles.[151] If discrimination does not explain all disparities, antidiscrimination and separation of functions would be undermined by an impact test.[152]

In assessing whether discrimination lies at the root of racial disparities, separation of functions and antidiscrimination values provide some guidance. Impact analysis pays attention to groups, and thus, it is not favored by the antidiscrimination principle. Impact analysis is also distrustful of government, and thus, is not favored by separation of functions principle. To say that impact analysis is disfavored is not to say that it is inappropriate. The point, instead, is that absent compelling evidence that impact is a surrogate for intent, judicial imposition of an impact test is inconsistent with separation of functions and antidiscrimination values.

Is the door, then, closed on impact analysis? Absolutely not. Separation of functions concerns speak against *judicial* imposition of impact-based measures of discrimination. Determinations by legislative bodies that discrimination can he measured only by disparate impact advances separation of functions values. Furthermore, even though antidiscrimination disfavors impact analysis, the principal goal of antidiscrimination is preventing race-dependent decision making. Consequently, if the identification of race-dependent decision making could be accomplished only through the utilization of numerical measures of discrimination, the antidiscrimination principle also would be furthered by the consideration of disproportionate impact.[153]

That elected government, rather than the judiciary, should play a leadership role in this effort comes as no surprise. Remember, rational basis review is rooted in legislative fact-finding competence. The Supreme Court, for example, has recognized that the judicial process is ill-suited to determine complex factual questions.[154]

This fact-finding defense typically is associated with rational basis review. In heightened review cases, however, the fact-finding defense is subject to question.[155] Indeed, the very purpose of heightened review is

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151. *See supra* notes 48-50, 93-95 and accompanying text.

152. *See supra* notes 25-27 and accompanying text.

153. *See supra* note 143 and accompanying text.

154. *See supra* note 58 and accompanying text. In the words of former Solicitor General Archibald Cox:

> Whether a state law denies equal protection depends to a large extent upon finding and appraisal of the practical importance of relevant facts . . . . There is often room for differences of opinion in interpreting the available data. A fortiori men may differ upon the values of competing desiderata. The accepted principle . . . is that the Court should assume that there are facts which furnish a constitutional foundation . . . .

Cox, *Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 106 (1966). This is the separation of functions principle discussed earlier in this Article.

155. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91

to force the government to prove the accuracy of its fact-finding.[156] Moreover, some heightened review cases suggest judicial hostility to governmental fact-finding. *Craig v. Boren*,[157] for example, refused to give weight to differential drunken driving arrest statistics introduced by the state to support a gender-specific classification relating to the sale of alcohol. Proving broad sociological propositions by statistics is a dubious business for the Court, and inevitably is counter to the "*normative philosophy* that underlies the Equal Protection Clause."[158] Consequently, the argument continues, rather than limit the judicial role and defer to legislative fact-finding, the courts should play an activist countermajoritarian role. This argument does not hold. The determination of whether unconscious racism warrants use of an impact test is an appropriate matter for state- and federal-elected branch determination.

With respect to Congress, the fact-finding defense extends to race-dependent decision making. The source of this power is section five of the fourteenth amendment, which explicitly authorizes congressional enforcement of the equality guarantee.[159] Congress, then, could determine that the inability to read or write in English is an inappropriate voting precondition because literacy requirements have a *disparate impact* on Puerto Ricans.[160] Congress also may decide that a *race-specific* set aside in a federal public works statute is necessary to remedy discrimination.[161] In support of these decisions, the Court emphasizes Congress's special fact-finding capability.[162]

Authority to enforce the fourteenth amendment also speaks to Congress's power to supplant the courts.[163] For example, the 1982

HARV. L. REV. 1212, 1234 (1978); *see also* Estreicher, *Congressional Power and Constitutional Rights: Reflections on Proposed "Human Life" Legislation*, 68 VA. L. REV. 333, 356-57 (1982).

156. Heightened review, rather than presuming the veracity of means and ends, demands that government demonstrate that its ends are important or compelling and the means selected are substantially related or least restrictive. *See* Craig v. Boren, 429 U.S. 190 (1976).

157. 429 U.S. 190 (1976).

158. *Id.* at 204 (emphasis added); *see also id.* at 208 n.22.

159. *See* U.S. CONST. amend. XIV, § 5 (stating that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article"); *see also* Metro Broadcasting, Inc. v. F.C.C., 110 S. Ct. 2997, 3008-09 (1990) (stating that Congress's "mandated" FCC preference is of "overriding significance").

160. *See* Katzenbach v. Morgan, 384 U.S. 641, 653 (1966).

161. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980).

162. In the voting case, for example:

> It was for Congress . . . to assess and weigh the various conflicting considerations—the risk of pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, [and] the adequacy or availability of alternative remedies . . . .

Morgan, 384 U.S. at 653.

163. *See generally* Gordon, *The Nature and Uses of Congressional Power Under Section 5 of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 NW. U.L. REV. 656 (1977).

amendment to the Voting Rights Acts,[164] which bars the use of any procedure that *results* in the denial or abridgement on account of race of the right to vote,[165] was enacted in response to court decisions mandating that constitutional race-discrimination case law govern vote dilution claims.[166] Perceiving the need for effects analysis to play a larger role in vote cases, Congress expressed its dissatisfaction with the constitutional measure of discrimination through legislation.

Another example is Congress's effort to shift, from employee to employer, the burden of proof in statutory employment discrimination lawsuits. In 1989 the Supreme Court, in *Wards Cove v. Atonio*,[167] because of " 'the myriad of innocent causes that may lead to statistical imbalances,' "[168] imposed a specific causation requirement in employment discrimination lawsuits.[169] Congress, perceiving that employers are better situated to prove their innocence than employees are able to demonstrate their guilt, passed legislation requiring employers to demonstrate a "business necessity"[170] whenever their personnel practices resulted in a disparate impact on the basis of race, religion, sex, or national origin.[171]

This legislation was vetoed by President Bush,[172] and Congress failed to override this veto.[173] Although *Wards Cove* remains the present standard, Congress's efforts here again reveal that popular government can (and quite possibly will) put into effect a modified version of Lawrence's proof for unconscious racism.[174]

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164. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (1988)). *See generally* Blumstein, *supra* note 28.

165. Pub. L. No. 97-205, 96 Stat. 131 (codified as amended at 42 U.S.C. § 1973 (1988)).

166. The source of these court decisions was Mobile v. Bolden, 446 U.S. 55 (1980), a Supreme Court decision rejecting a constitutional challenge to at-large elections due to the failure of minorities to win elections. For the Court, since a municipality may prefer at-large over single-district representation "on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive." *Id.* at 70.

167. 109 S. Ct. 2115 (1989).

168. *Id.* at 2125 (quoting Watson v. Fort Worth Bank & Trust, 108 S. Ct. 2777, 2787 (1988)).

169. *Id.* Specifically, before the burden of persuasion shifts to the employer, employee plaintiffs must "demonstrate" that "each challenged [employment] practice has a significantly disparate impact on employment opportunities for whites and minorities." *Id.*

170. The Civil Rights Act of 1990, S. 2104, 101st Cong., 2d Sess. (1990). "Business necessity" is the demand that an employment practice "bear a significant relationship to successful performance of the job." *Id.* § 3.

171. *Id.* § 4.

172. *See* Devroy, *Bush Vetoes Civil Rights Bill*, Wash. Post, Oct. 23, 1990, at A1, col. 3.

173. *See* Dewar, *Senate Upholds Civil Rights Bill Veto, Dooming Measure for 1990*, Wash. Post, Oct. 25, 1990, at A15, col. 1.

174. Under Lawrence's test, disparities with cultural meaning demand strict scrutiny review. Lawrence, *supra* note 3, at 355-81. The legislation approved by Congress as well as the Bush bill are less exacting. *See supra* notes 170-72 and sources cited therein.

This congressional authority argument, however, does not extend to state action. Indeed, the Supreme Court has recognized that the fourteenth amendment "stemmed from a distrust of state legislative enactments based on race."[175] Nonetheless, there is reason to defer to state fact-finding on the issue of intent versus impact. In equality cases,[176] the trigger to distrusting legislative fact-finding is the existence of a suspect classification. The intent-versus-impact debate concerns the determination of whether the triggering event has occurred.[177] Hence, there is reason to think the fact-finding defense still exists. For those who advocate the rhetoric of guilt, this distinction is problematic: if unconscious racism exists, the fact-finding defense fails to detect racist conduct and, therefore, is inappropriate; yet the fact-finding defense makes it impossible to determine whether unconscious racism exists. To presume unconscious racism exists, however, creates a dilemma in the opposite direction. If unconscious racism does not exist, the fact-finding defense is appropriate; yet presumed unconscious racism makes it impossible to determine whether the fact-finding defense is appropriate. Consequently, since the dilemma cuts both ways, the fact-finding defense holds.

This conclusion is not a preference for a greater evil over a lesser evil. When faced with a choice rooted in factual uncertainty, separation of functions values demand that the judiciary accept the fact-finding defense. Two other considerations support the efficacy of the fact-finding defense. First, the antidiscrimination principle disfavors race-dependent decision making. Consequently, unless the case for impact rooted in unconscious racism is clear, the fact-finding defense seems consistent with antidiscrimination values. Second, the fact-finding defense does not foreclose a legislative body from taking steps to prevent possible unconscious racism. For example, a legislative body sensitive to

175. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 720 (1989). Consequently, while the federal government may remedy societal discrimination by enacting a set-aside restricting federal contracting dollars to specified minority groups, state or local set-asides must be a narrowly tailored remedy to actual discrimination by the state or local actor. *See* Devins, *supra* note 115, at 372-78.

176. In religion, negative commerce, and speech cases, however, disparate effects may lead to the invalidation of government action. *See* Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (holding that disparate impact on out-of-state commerce may trigger strict scrutiny review of state action); Lemon v. Kurtzman, 403 U.S. 602 (1971) (holding that the establishment clause prohibits government action whose principal effect is either the advancement or inhibition of religion); Collin v. Smith, 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953 (1978) (holding that issuance of parade permit cannot be made contingent on procurement of liability and property damage insurance).

177. In other words, while the police entrance exam in *Davis* is deemed a neutral law under an intent standard, the entrance exam would fail as pernicious, racist line drawing under an impact standard.

possible unconscious racism can be responsive to the problems identified by Professor Lawrence in his critique[178] of *Washington v. Davis*.[179] In contrast, if the courts utilize numerical proofs of discrimination, government is without authority to conclude that nondiscriminatory factors contribute to racial imbalance.

The separation of functions and antidiscrimination values discourage judicial cognizance of unconscious racism and empower Congress and other legislative bodies to take unconscious racism into account. This seeming incongruity is explained by the impossibility of drawing perfect lines distinguishing discrimination from impact. It suggests that the presumption of trust retains validity, and therefore, fact-finding on this question should be undertaken by the legislature. This indeterminacy also suggests that a legislative body finding that unconscious racism mandates consideration of impact does not run afoul of the antidiscrimination principle disfavoring race-dependent decision making. If impact is deemed the only device able to detect discrimination, impact can be used to remedy discrimination. By the same token, a legislative body that finds unconscious racism too sweeping does not violate the antidiscrimination principle. Under this construct, impact tests—by paying attention to group status—are the evil, not the cure.

V. CONCLUSION

This Article has argued that the rhetorics of guilt and innocence are not the only ways to understand equality decision making. The equality principle, infused with the values of antidiscrimination and separation of functions, provides an alternative view to equality decision making. Indeed, contrary to Professor Ross's argument, equality decision making seems shaped more by antidiscrimination and separation of functions values than by the rhetoric of innocence.

This alternative formulation of equality decision making does not undermine the attack on the rhetoric of innocence by Professors Ross and Lawrence. In the hands of the Reagan Justice Department, the rhetoric of innocence was fitted into a vision of compensatory justice insensitive to unconscious racism and at odds with both antidiscrimination and separation of functions values.[180]

The rhetoric of guilt equally goes too far. Disparities in employment, education, and housing may well be caused by factors other than conscious and unconscious racism. The rhetoric of guilt, then, may run roughshod over fundamental antidiscrimination and separation of func-

178. *See supra* notes 146-50 and accompanying text.
179. 426 U.S. 229 (1976); *see supra* notes 93-95 and accompanying text.
180. *See, e.g., supra* notes 107-08 and accompanying text.

tions values. At the same time, Congress and, to a lesser extent,[181] the states are empowered to respond to unconscious racism through legislation. Consequently, while not embracing unconscious racism, much more than a Pyrrhic victory is scored for guilt advocates by the repudiation of the rhetoric of innocence through antidiscrimination and separation of functions values.

Admittedly, antidiscrimination and separation of functions values do not respond directly to the concerns of unconscious racism raised by Professors Lawrence and Ross. Considering the indeterminacy of defining where discrimination ends and disparate impact begins, however, the avoidance of absolutist approaches may be the best available solution to reconcile the guilt and innocence models. The structural approach described herein offers a principled, flexible solution to the problem of racial disparities. Remarkably, it seems to be the solution advanced by the Court in the bulk of its equality jurisprudence.

181. *See supra* note 175.