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The Constitution and the Consequences of the Social History of Racism

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INTRODUCTION

The twenty years that Justice Thurgood Marshall has served on the Supreme Court have seen a significant change in the nature of constitutional questions that arise in the area of racial equality. The constitutional questions in this area for the most part no longer involve the traditional forms of governmental discrimination disadvantaging blacks and other racial minorities.[1] Rather, the crucial constitutional issue in the area of racial equality today is whether the Constitution requires or permits governmental entities to take account of the *consequences* of the long and tragic social history of racism in this nation that have created a condition of societal racial inequality.

The term "social history of racism" is a convenient way of summarizing the history of discrimination and victimiza-

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1. Following its seminal decision in Brown v. Board of Education, 347 U.S. 483 (1954), the Court rendered a large number of decisions in the 1960's invalidating state-imposed racial segregation and discrimination. *See, e.g.*, Hunter v. Erickson, 393 U.S. 385 (1969) (municipal charter provision subjecting fair housing laws to referendum procedure); Loving v. Virginia, 388 U.S. 1 (1967) (prohibition of interracial marriage); Reitman v. Mulkey, 387 U.S. 369 (1967) (state constitutional provision prohibiting the enactment of fair housing laws); Louisiana v. United States, 380 U.S. 145 (1965) (use of voter qualification tests to disenfranchise blacks); McLaughlin v. Florida, 379 U.S. 184 (1964) (prohibition of interracial cohabitation); Anderson v. Martin, 375 U.S. 399 (1964) (designation of race of candidate on election ballot); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (operation of segregated restaurant by private party in publicly-owned facility); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redrawing municipal boundaries so as to exclude all black residents).

Such cases continue to arise sporadically, but they are increasingly rare. *See* Batson v. Kentucky, — U.S. —, 106 S. Ct. 1712 (1986) (use of preemptory challenges by prosecutor to exclude black jurors on racial grounds); Palmore v. Sidoti, 466 U.S. 429 (1984) (denial of child custody to a white mother because her new husband was black).

tion of blacks in American society.[2] This history has become saddeningly familiar and was traced fully by Justice Marshall in his opinion in *Bakke*.[3] The social history of racism was originally the aftermath of slavery, and like slavery, it was predicated and justified on the supposed moral inferiority of the black race.[4] It is the history of an official status of inferiority established by law; of rampant discrimination in employment; of ghettoization; of segregated and tangibly inadequate schooling; and of the denial of access to societal power. Racial discrimination was often commanded by the government at all levels, and when it was not commanded, it was tolerated and encouraged. Private entities and individuals added their significant contributions to this pattern of racism. Indeed, only in the last three decades has any real progress been made in halting much of the overt discrimination practiced against blacks in the United States.

The consequences of this long and tragic history of racism remain and perpetuate themselves. It is not necessary to review at length the all too familiar and depressing manifestations of the condition of societal racial inequality that exists in the United States today. There is an enormous "economic gap" between blacks and whites, with blacks suffering dispro-

2. The focus of this writing is on the social history of racism as it has been directed against blacks, and the present-day consequences of that history. Racism has also produced adverse effects on other racial-ethnic groups, such as Hispanics and Native-Americans, who, like blacks, have been subject to discrimination and victimization because the dominant white majority has perceived them as being "non-white." *See, e.g.*, Keyes v. School Dist. No. 1, Denver, 413 U.S. 189, 197-98 (1973) (segregation of Hispanics in the public schools). The propositions for which the author is contending in the present writing are equally applicable to laws and governmental actions affecting these racial-ethnic groups. On the other hand, while Asian-Americans have also been subject to discrimination and victimization in the past, the consequences of this past discrimination have not been as great; Asian-Americans as a group do not suffer "inequality" in relation to whites in most important aspects of American life. For a discussion of this point, see Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87, 120 (1979).

3. Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 390-96 (1978) (Marshall, J., concurring).

4. As Professor Perry has observed: "The *material inequality* of the races is the objective, concrete manifestation of the widespread belief in the *moral inequality* of the races and of racially discriminatory practices reflecting that belief." Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1040 (1979).

portionate unemployment and underemployment, being concentrated in the low-paying and low-prestige occupations, and having a family income little more than half that of whites.[5]

5. The black unemployment rate has been consistently twice that of whites. As of December, 1984, the black unemployment rate stood at 14.4%, compared with a white unemployment rate of 6.0%. U.S. DEPT. LABOR, BUREAU OF LABOR STATISTICS, EMPLOYMENT AND EARNINGS, table A-6, Jan., 1985. In 1982, the black unemployment rate was 18.9%, compared to 8.6% for whites. U.S. DEPT. COMMERCE, BUREAU OF THE CENSUS, AMERICA'S BLACK POPULATION: 1970-1982, chart 5 (1983). Among black teenagers in 1982, the unemployment rate reached 48%, compared to 20.4% for white teenagers. *Id.*

A disproportionate number of blacks who are employed are found in the lower-paying, lower-prestige occupational categories; working blacks are underrepresented in the more elite and "white collar" jobs. Even within the "blue collar" category, where the distribution of blacks and whites is more even, blacks are disproportionately concentrated in the least desirable occupations. *See generally* U.S. COMM'N CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN (1978). *See also* EMPLOYMENT AND EARNINGS, *supra*, at table A-23; AMERICA'S BLACK POPULATION, *supra*, at table 3.

The end result is that black family income is little more than half of white family income, a figure that has remained constant for a long time. In 1983, median black family income was $12,429, compared to median white family income of $21,902. Black income was approximately 57% of white income. In 1967, median black family income was $4325, compared to median white family income of $7449. Black income was approximately 58% of white income. U.S. DEPT. COMMERCE, BUREU OF THE CENSUS, 1985 STATISTICAL ABSTRACT OF THE UNITED STATES, table 735. In 1981, 34% of black families lived below the federally-defined poverty level ($9287 for a family of four), compared to 11% of white families. AMERICA'S BLACK POPULATION, *supra*, at chart 4.

The racial difference in median family income is only due to some extent to the fact that a much higher proportion of black families than white families are headed by women. (As of 1982, 41% compared to 12%. AMERICA'S BLACK POPULATION, *supra*, at chart 7). Among families headed by females, black families had a median income of $7510, compared with $12,510 for white families; black income in this situation was 60% of white income. *Id.* at chart 2. Among families where the father was the only wage-earner, the median income for black families was $14,420, compared with $23,460 for white families, or 61% of white income. U.S. DEPT. LABOR, BUREAU OF LABOR STATISTICS, FAMILIES AT WORK: THE JOBS AND THE PAY, table 4, August, 1984. Twenty-four point four percent of such black families live below the poverty level, compared with 9% of such white families. The income gap is generally smaller among married couples with the median black family income as of 1981 at $19,620, compared with $25,470 for white families. Among this group, black income is 76% of white income. AMERICA'S BLACK POPULATION, *supra*, at chart 2. But even among these two person families, as of 1982, 15.6% of the black families lived below the poverty level, compared with 6.9% of white families. FAMILIES AT WORK, *supra*, at table 4. It is only in these families, where both spouses are employed, that the gap is narrowed considerably, since white working wives in such families do not earn very much more than black working wives. In 1982, the median income of working couple black families was $26,110, compared with $29,650 for working couple white families; black income was

There is likewise a racial "educational gap," with blacks continuing to lag significantly behind whites in terms of academic achievement and quality of educational experience.[6] Above all, there is the racial "power gap." Blacks are seriously un-

88% of white income. *Id.* What the data indicates then is that the racial difference in median family income would still be quite substantial if the proportion of black families headed by women was the same as the proportion of white families headed by women. The racial income gap is worsened, because proportionately more black families than white families are headed by females.

There appears to be little prospect that the condition of racial economic inequality will improve in the foreseeable future, and it may even be worsening. For example, as the black population of the nation's central cities increases, the availability of manufacturing jobs and other jobs requiring minimal levels of skill has declined in these areas. Employment opportunities in the central cities have been primarily in information processing and other white collar areas, which require higher levels of skill and education. *See New Jobs in Cities Little Aid to Poor*, N.Y. TIMES, Oct. 22, 1986, at 1. In the nation's 50 largest cities, the percentage of black families living in poverty has increased from 1970 to 1980, and in aggregate terms, the number of blacks living in poverty in those cities exceeds the number of whites. Between 1970 and 1980, the number of blacks living in poverty increased from 2.6 million to 3.1 million, while the number of whites declined from 3.2 million to 2.6 million. *See Poverty of Blacks Spreads in Cities*, N.Y. TIMES, Jan. 26, 1987, at 1.

6. Regarding the level of education attained, in 1983, 43.2% of blacks, compared with 27.9% of the general population, had not completed high school. Among persons 25-29 years old, the rate was 20.6% for blacks, compared with 14.0% for the general population. U.S. DEPT. COMMERCE, BUREAU OF THE CENSUS, 1985 STATISTICAL ABSTRACT OF THE UNITED STATES, table 213. As of that year, 19.5% of all whites had graduated from college, compared with 9.5% of all blacks. *Id.* at table 214. A 1977 study by the United States Office of Education found that only 58% of black seventeen-year-olds were functionally literate, compared with 87% of white seventeen-year-olds. U.S. CONG. BUDGET OFF., INEQUALITIES IN THE EDUCATIONAL EXPERIENCES OF BLACK AND WHITE AMERICANS 8-9 (1977). According to the United States Commission on Civil Rights in 1978, by the time black males reached high school, they were likely to be two or more grades behind in school. SOCIAL INDICATORS, *supra* note 5, at table 2.1.

A recent study by the Rand Corporation found that black students "are disproportionately more likely to be enrolled in special education programs, and are less likely to be enrolled in programs for the gifted and talented," and are "underrepresented in academic programs and overrepresented in vocational-educational programs." The study concludes that, "Overall, the evidence suggests that black students are exposed to less challenging educational program offerings, which are less likely to enhance the development of higher cognitive skills and abilities than white students." *Gains by Blacks in Education Found Eroding*, The Chron. of Higher Educ., Apr. 17, 1985, at 1, col. 4.

The disparity in educational quality carries over into higher education, where blacks are more likely than whites to attend poorly-rated schools. The Rand study found that black students were enrolling in increasing proportions at two-year institutions where drop-out rates, especially for blacks, are higher than at four-year colleges, and where fewer resources are available in the most important areas of educational programming. In colleges, as well as in secondary schools, the Report concluded that

derrepresented in positions of societal power, in the "elite" professions, and in the "economic mainstream."[7] Still another consequence of the social history of racism is residential racial segregation and concentration. The black population is concentrated within the central cities of the nation's largest metropolitan areas, where they generally live in racial isolation from both urban and suburban whites.[8] In short, in the

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black students on the average "receive educational programs and offerings that differ in kind and content from those of white students." *Id.*

7. For example, although blacks comprise 12% of the population of the United States, blacks represent only 2.6% of the lawyers and judges in the country, 5% of the physicians, 3.2% of the editors and reporters, and 4.7% of the college and university teachers. 1985 STATISTICAL ABSTRACT OF THE UNITED STATES, *supra* note 5, at table 22. The absence of blacks in the top management of America's corporations needs no documentation. Blacks are equally underrepresented in the highest levels of the governmental bureaucracy and educational institutions.

There are relatively few black-owned business enterprises, and such enterprises generate an insignificant amount of the total business volume. As of 1976, for example, only 3% of the 13 million business enterprises in the United States were owned by blacks and other minorities, and of the 2.54 trillion dollars in gross business receipts that year, only about 16.6 billion dollars, or 0.65% of the total, were realized by minority-owned businesses. 122 CONG. REC. 13866 (daily ed. May 13, 1976) (Statement of Senator Javits); 122 CONG. REC. 3574 (daily ed. Oct. 1, 1976) (Statement of Senator Glenn). In 1984, the largest black-owned business, Johnson Publishing, had sales of only 138.9 million dollars. As the president of one black-owned company observed: "Our figures are not that significant. When you put all of the top 100 black companies' sales together they might equal one of the companies on the bottom of the Fortune 500 list." *Black-Owned Companies Gain*, N.Y. TIMES, May 8, 1985, at D5, col. 2.

8. For a summary of the extent of residential racial segregation and concentration, based on 1980 census data, see Farley, *Assessing Black Progress: Voting & Citizenship Rights, Residency & Housing, Education*, 13 ECONOMIC OUTLOOK USA 16 (1986). The author concludes:

> In areas which have large black populations, there are many central city neighborhoods and a few in the suburbs which are either all-black or well along to becoming exclusively black enclaves. Most other neighborhoods have no more than token black populations. Studies of residential patterns in 1980 revealed that blacks are very different from other minority or ethnic groups in this respect. In particular, they are much more segregated from whites than are two more newly arrived groups: Asians and Hispanics.

Id. at 17.

The index of dissimilarity is used to measure the extent of residential racial segregation. If there were perfect residential racial integration, the index would be 0; if there was complete residential racial segregation, it would be 100. According to 1980 census data, the index of dissimilarity for the nation's metropolitan areas of 2.5 million or more was as follows: New York—81; Los Angeles-Long Beach—81; Chicago—88; Philadelphia—79; Detroit—88; San Francisco-Oakland—72; Washington, D.C.—70; Dallas-Fort Worth—79; Houston—75; Boston—77; Nassau-Suffolk (Long Island)—77. *Id.* at 18.

United States today, we still have "two societies, black and white, separate and unequal."[9]

Until Justice Marshall came on the Court, and for some period thereafter, the struggle for racial equality concentrated almost entirely on attacking the existing structural impediments that denied equality to blacks. This struggle has been largely successful in the sense that the Constitution has been interpreted to prohibit state-imposed segregation and other traditional forms of intentional governmental discrimination against blacks.[10] Federal laws now prohibit racial discrimination in voting, employment, public accommodations, and housing. Similar protection is afforded by the laws of many states. This means that there is now in place a *system of prevention*; the law prohibits present discrimination against blacks by the government[11] and many private entities, and provides remedies for such discrimination.

The system of prevention, however, does not purport to deal directly with the *present consequences* of the social history of racism; nor is it designed to do so. Because these consequences are so pervasive, self-perpetuating, and self-reinforcing,[12] the system of prevention, even if vigorously and

9. REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 1 (1968).

10. The Court's constitutional doctrine in regard to racial equality has developed with reference to the concept of invidious racial discrimination. All the traditional forms of intentional governmental discrimination against blacks have been found to be "invidious" and hence unconstitutional, because in no case could they be shown to be "[n]ecessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." Loving v. Virginia, 388 U.S. 1, 11 (1967).

11. Subject to the requirement of a showing of discriminatory intent, as will be discussed subsequently.

12. The self-perpetuating and self-reinforcing nature of those consequences is illustrated by considering the relationship between the "economic gap" and the "educational gap." Because of the "economic gap," black children are disproportionately lower-income in relation to white children, and, for this reason, are likely to have a substantially lower level of academic achievement. This is aggravated by the fact that the majority of black children will have received all or part of their education in predominantly black and thus predominantly lower-income schools. *See generally* Sedler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U.L.Q. 535, 548-50. Low educational attainment, caused in large part by economically disadvantaged status and attendance at schools in which economically disadvantaged children predominate, in turn has a severe detrimental impact when the children become adults on their eco-

fully enforced, will do relatively little to alter the societally disadvantaged and subordinate position of blacks.

This brings us to the relationship between racially neutral action and the consequences of the social history of racism. Racially neutral action means action that is based on criteria of selection that plausibly serve functions other than racial selection,[13] and that cannot be shown to have been undertaken with an intent to discriminate on the basis of race under the current constitutional standard.[14] Frequently, racially neutral action will interact with the consequences of the social history of racism to produce what may properly be called a *racially discriminatory effect*. The effect of the racially neutral action will be to disadvantage blacks or otherwise *perpetuate* the consequences of the social history of racism. In other words, the racially neutral action will have an *effect because of race*, and will result in the continuation of racial inequality and racial separation.

There are many examples of this phenomenon. The author will only cite a few at this juncture. Because of massive residential racial segregation and concentration, the use of geographic attendance zoning within a school district will produce a large number of racially identifiable schools,[15] and the establishment of school districts on urban-suburban lines will frequently produce a predominantly black urban district, surrounded by virtually all-white suburban districts.[16] Similarly, the refusal of a white suburb to permit the construction of low-income or public housing, which would be operated on a racially integrated basis, prevents racial integration in the suburb.[17] And, if the same suburb requires that applicants for

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nomic status, social mobility, and other indicia of social well-being. Thus, poorly educated black children grow into adults in low-status, low-paying jobs, and their depressed economic condition adversely affects the educational opportunities of their children. The cycle of poverty and inequality is then perpetuated from one generation to another.

13. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 554 (1977).

14. *See infra* notes 30-52 and accompanying text.

15. *See* Sedler, *The Constitution and School Desegregation: An Inquiry into the Nature of the Substantive Right*, 68 KY. L.J. 879, 919-22 (1979).

16. *Id.*

17. *See infra* notes 46-52 and accompanying text. *See also* United States v. City of Birmingham, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984) (virtually all-

public employment be residents of the suburb at the time the application is made, no blacks will be able to obtain public employment within that suburb.[18]

The extreme "educational gap" between blacks as a group and whites as a group means that whenever eligibility for any position or benefit, such as a job or admission to professional school, depends on comparative test scores or other objective indicators of academic achievement, blacks will be disproportionately excluded in comparison to whites.[19] Therefore, even though there may be no present intent to discriminate against blacks, and even though the particular test or academic qualification may be "valid" for the purposes for which it is being used,[20] the effect of its use will be to exclude blacks disproportionately in comparison to whites.

As these examples indicate, in today's society racially neutral action will frequently have an effect because of race. The effect of such action will be to disadvantage blacks or otherwise perpetuate the present consequences of the social history of racism. The constitutional issue regarding the significance of this racially discriminatory effect is two-fold. First, to what extent is the government *required* to take account of the racially discriminatory effect of otherwise racially neutral action, so that the failure to do so may render such action unconstitutional. Second, to what extent may the government, consistent with the Constitution, affirmatively employ race-conscious rather than race-neutral criteria in governmental programs and operations for the purpose of benefiting blacks and alleviating the racially discriminatory effect that would result from adherence to race-neutral criteria.

The primary focus of this article will be on how the Supreme Court has dealt with this crucial issue of racial equality. This analysis will reveal that under the Court's cur-

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white suburb was found to have blocked the construction of proposed low-income senior citizen and family housing project, because the project would be operated on a racially integrated basis).

18. *See infra* notes 95-96 and accompanying text.

19. *See* Sedler, *Racial Preference, Reality and the Constitution: Bakke v. Regents of the University of California*, 17 SANTA CLARA L. REV. 329, 345-55 (1977).

20. For a discussion of the "validation" of employment testing, see Ensley Branch of NAACP v. Seibels, 616 F.2d 812, 816-18 (5th Cir. 1980).

rent constitutional doctrine the government generally is *not* required to take account of the foreseeable racially discriminatory effect of racially neutral action. It is only when the racially discriminatory effect of governmental action can be traced to *identified past intentional discrimination* on the part of that governmental entity that such effect will be held to be unconstitutional. Absent a showing of this "line of causation," a governmental entity has no constitutional responsibility to take account of the *foreseeable* racially discriminatory effect of its actions. The analysis will also reveal that the affirmative use of race-conscious criteria benefiting blacks in governmental programs and operations is most likely to be sustained where it is directly related to overcoming the present consequences of identified past intentional discrimination on the part of the entity employing the race-conscious criteria.

In other words, under the Court's current constitutional doctrine, the present consequences of the social history of racism are of limited significance in determining the constitutional validity of governmental action affecting blacks and other racial minorities. Rather, in the area of racial equality, the Court's emphasis has been on *intentional governmental discrimination*, past or present, and absent a showing of such discrimination, the government is not required to, and at least in some circumstances may not be permitted to, take account of those consequences. Because those consequences are so pervasive and self-reinforcing, the Court's current constitutional doctrine in this area stands as an obstacle to achieving what Justice Marshall has called "genuine equality" between blacks and whites in American society.[21]

The first section of the article will discuss the Court's current approach to the matter of "discriminatory intent" and "discriminatory effect." This discussion will reveal that, as a general proposition, governmental action having a racially discriminatory effect or otherwise perpetuating the present consequences of the social history of racism is not unconstitutional. It is only when it can be demonstrated that the challenged action was undertaken with discriminatory intent on

21. *Bakke*, 438 U.S. at 398 (Marshall, J., concurring).

the part of the governmental decision-maker or directly perpetuates the present consequences of identified past intentional discrimination on the part of that governmental entity that it rises to the level of a constitutional violation. It is the author's position that in light of the values embodied in the fourteenth amendment and the Reconstruction amendments, taken as a whole, governmental action having a *foreseeable racially discriminatory effect* should be subject to a substantial burden of justification, and unless that burden can be sustained, the action should be held unconstitutional. Crucial to this position is a distinction between governmental action having what the Court has referred to as a "racially disproportionate impact"[22] and governmental action having what may be called a racially discriminatory effect, as the author will define that concept. The contention will be that the burden of justification applies to governmental action that has a racially discriminatory effect, which, under the author's definition of that concept, relates the effect of the governmental action to the present consequences of the social history of racism.

The second section of the article will discuss the limited circumstances in which the Court will find racial discrimination unconstitutional absent a showing of present discriminatory intent. The third section of the article will explicate further the author's view of the meaning of racially discriminatory effect and will apply that concept to a number of situations that the Court has dealt with under the discriminatory intent standard. In the fourth section of the article there will be a discussion of the constitutional permissibility of the use of race-conscious criteria benefiting blacks and other racial minorities[23] in governmental programs and operations. The analysis will reveal that under the Court's current doctrine, the use of race-conscious criteria is constitutionally permissible when undertaken for the purpose of remedying identified

22. *See infra* notes 42-52 and accompanying text.

23. Because the social history of racism has also had an adverse effect on other racial-ethnic groups, such as Hispanics and Native-Americans, see *supra* note 2, and since these groups have been subject to discrimination and victimization on the same basis as blacks, it should be constitutionally permissible for a legislative body to include them in any racial preference given to blacks. For a discussion on the matter of inclusion in the preference, see *Bakke*, 438 U.S. at 359 n.35 (Brennan, J., concurring).

past unlawful discrimination on the part of the governmental entity employing such criteria.[24] There will also be a discussion of the other purposes for which the use of race-conscious criteria may be permissible. Since the author's views as to the constitutional permissibility of the use of race-conscious criteria to overcome the present consequences of the social history of racism and to achieve what he has called the equal participation objective have been fully explicated elsewhere, they will only be summarized briefly here. In the concluding section of the article, the author will develop his thesis with respect to the constitutional significance of the present consequences of the social history of racism. The thesis will be developed with reference to the *black freedom* value, which the author will demonstrate is embodied in the fourteenth amendment and the Reconstruction amendments, taken as a whole. The thesis is two-fold. First, in light of the black freedom value, the appropriate constitutional standard to determine the validity of governmental action adversely affecting blacks should be racially discriminatory effect, as the author defines that concept, rather than racially discriminatory intent. Second, again in light of this constitutional value, the affirmative use of race-conscious criteria benefiting blacks in governmental programs and operations, designed to achieve what the author refers to as the equal participation objective, is fully constitutional. Under the author's thesis, therefore, the Constitution should be interpreted as both requiring and permitting governmental entities to take account of the consequences of the social history of racism that have created a condition of societal racial inequality.

DISCRIMINATORY INTENT AND DISCRIMINATORY EFFECT

Under the Supreme Court's current constitutional doctrine, racially neutral governmental action does not constitute impermissible racial discrimination, regardless of the foreseeable effect of such action on blacks or other racial minorities, unless that action can be shown to have been undertaken with

24. *See infra* notes 142-145 and accompanying text.

"discriminatory intent."[25] The discriminatory intent requirement first surfaced in cases involving school segregation in states where segregation was not required by state law at the time of *Brown v. Board of Education*.[26] The Court held that the existence of a large number of racially identifiable schools in school districts located in such states was unconstitutional only if it was *de jure*, that is, if it was brought about by intentional segregative actions on the part of school authorities.[27] As a result of the concept of *de jure* segregation, school children have no constitutional right to attend racially integrated schools, even if the integration of the schools in a school district would be fully feasible. As the author has discussed more fully elsewhere,[28] the nature of the substantive right is to attend school in a school system in which there presently exist no vestiges of state-imposed segregation.[29] This being so, where intentional segregative actions on the part of school au-

25. *See supra* note 10. The Court's constitutional doctrine in regard to racial equality has developed with reference to the concept of invidious racial discrimination. Invidious racial discrimination may be defined operationally as the *unjustifiable* use of race-conscious criteria in laws or governmental action that disadvantages people because of their race. Where the use of race-conscious criteria is contained in an express racial classification such use is subject to "strict scrutiny" and will be held unconstitutional unless (1) it is "justified by a compelling governmental interest," and (2) the particular use of race-conscious criteria is "narrowly tailored to the achievement of that goal." Wygant v. Jackson Bd. of Educ., — U.S. —, 106 S. Ct. 1842, 1846 (1986) (Opinion of Powell, J.). Likewise, where it can be shown that purportedly neutral laws have been administered in a racially-discriminatory manner, Yick Wo v. Hopkins, 118 U.S. 356 (1886), or that particular governmental action was undertaken with the intention to discriminate on the basis of race, Castenada v. Partida, 430 U.S. 482 (1977), there is invidious racial discrimination for constitutional purposes. In this circumstance, since the government purportedly was not using race-conscious criteria, it is unlikely that the government will be able to proffer any justification for the resulting racial discrimination. *See, e.g.*, Hunter v. Underwood, 471 U.S. 222 (1985). The discriminatory intent requirement is applicable to all constitutional challenges to discrimination on the basis of identifiable group membership, such as gender. *See* Personnel Admin'r v. Feeney, 442 U.S. 256 (1979).

26. 347 U.S. 483 (1954).

27. *See* Sedler, *supra* note 15, at 893-97. It is clear in retrospect that the Court was trying to develop a doctrine that would assimilate for constitutional purposes the situation existing in states where segregation was required by state law at the time of *Brown* and the situation where it was not. The unifying element in the assimilative process has been the concept of *de jure* segregation.

28. Sedler, *supra* note 15, at 916-26.

29. For a discussion of the affirmative duty on the part of the school authorities to eliminate all vestiges of state-imposed segregation and the constitutional consequences

thorities cannot be shown, the school district does not violate the Constitution by operating a large number of racially identifiable schools.

The leading case imposing the discriminatory intent requirement as a matter of general equal protection doctrine is *Washington v. Davis.*[30] In retrospect, it is difficult to imagine a less favorable factual situation in which to assert that the standard for an equal protection violation should be racially discriminatory effect rather than racially discriminatory intent. The plaintiffs in that case were trying to transfer wholesale the test for establishing a Title VII violation to the constitutional arena,[31] and the Court was not willing to make this "quantum leap." Writing for the Court, Justice White stated: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."[32] Moreover, the plaintiffs in that case were challenging as unconstitutional a qualifying test for police employment that well may not have been violative of Title VII,[33] and they were doing so in the context of a governmental body's voluntary affirmative action program that had substantially increased the number of black officers on the police force.[34] To say the least, the Court could not be expected to be sympathetic to the substance of the plaintiffs' claim. In the process of rejecting that claim, the Court imposed the discriminatory intent requirement as a matter of general equal protection

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resulting from the failure to satisfy that duty, see *infra* notes 65-81 and accompanying text.

30. 426 U.S. 229 (1976).

31. Under Title VII, purportedly neutral employment practices that have a racially disproportionate impact on racial minorities or other protected groups constitute "discrimination," and are invalid unless they can be justified by "business necessity." *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971); Washington v. Davis, 426 U.S. 229 (1976).

32. 426 U.S. at 239.

33. The Court indicated that the qualifying test would not be violative of Title VII, because it was directly related to the requirements of the police training program. In any event, by the time the case reached the Supreme Court, the training program had undergone substantial modifications. The Court refused to remand the case to the district court for further proceedings with respect to the Title VII claim. *Id.* at 248-52.

34. *Id.* at 235. In the nine months preceding the filing of the lawsuit, 44% of the new police force recruits had been black.

doctrine.[35]

In this regard, the Court stated:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.[36]

The Court went on to focus on the matter of racially disproportionate impact, in the sense of a law or governmental action affecting proportionately more blacks than whites.

> [W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.[37]

In other words, it appears that the Court in *Washington v. Davis* saw the constitutional choice as being between a standard of racially discriminatory intent or a standard of racially disproportionate impact, and came down on the side of racially discriminatory intent.

The reason the Court did so was explicitly stated by Justice White:

> A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes *that may be more burdensome to the poor and to the average black than to the more affluent white.*[38]

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35. *See also* Personnel Admin'r v. Feeney, 442 U.S. 256 (1979).

36. *Washington*, 426 U.S. at 239.

37. *Id.* at 242.

38. *Id.* at 248 (emphasis added). In commenting on this reason for the imposition of the discriminatory intent requirement, Professor Bennett has observed: "The Court's emphasis on motivation, subjectively understood, has not been affirmatively justified by reference to any theoretical understanding of equal protection. The Court's only real

One of the most enduring consequences of the social history of racism is the "economic gap" between blacks and whites. Since blacks as a group are disproportionately poor in comparison to whites as a group, it would follow that a constitutional standard requiring disproportionate impact analysis could have the far-reaching implications suggested by Justice White. That is, governmental action adversely affecting poor persons, such as a requirement that indigent litigants pay filing fees, which has generally been upheld against equal protection challenges,[39] would now be subject to a claim of unconstitutional racial discrimination and have to be evaluated under the more exacting compelling governmental interest standard of review. The Court has strongly resisted any effort to require more exacting scrutiny of governmental action adversely affecting poor persons,[40] and likewise has refused to equate discrimination on the basis of poverty with discrimination on the basis of race, so as to bring into play more exacting scrutiny "by the back door."[41] Thus, the Court's preoccupation with the implications of disproportionate impact analysis in *Washington v. Davis* is understandable, and it may be that in order to avoid having to deal with those implications, the Court held that the constitutional standard for claims of racial discrimination resulting from the application of facially neutral laws is that of discriminatory intent.

There is, however, a middle ground that the Court apparently did not consider in *Washington v. Davis*. It is possible to distinguish between governmental action having a racially dis-

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stab at justification has been to point to problems with the presumed alternative of an effects-based test." Bennett, *Reflections on the Role of Motivation Under the Equal Protection Clause*, 79 NW. U.L. REV. 1009, 1009-10 (1984-85).

39. United States v. Kras, 409 U.S. 434 (1973) (Bankruptcy Act's conditioning the right to discharge on payment of $50 fee does not violate "equal protection" component of fifth amendment's due process clause). It is only where the civil action involves "fundamental rights," such as divorce or paternity, that the Constitution requires the government to take account of the poverty of the indigent litigant. *See* Little v. Streeter, 452 U.S. 1 (1981); Boddie v. Connecticut, 401 U.S. 371 (1971).

40. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (system of school financing based on property wealth); James v. Valtierra, 402 U.S. 137 (1971) (referendum approval of public housing projects); Dandridge v. Williams, 397 U.S. 471 (1970) (classifications contained in welfare legislation).

41. *See, e.g., James*, 402 U.S. at 141.

proportionate impact and governmental action having a *racially discriminatory effect*. As illustrated by the nature of the plaintiffs' claim in *Washington v. Davis*, and by disproportionate impact analysis in Title VII cases,[42] racially disproportionate impact is essentially a matter of racial numbers. The inquiry focuses on whether proportionately more blacks than whites are adversely affected by the challenged action. Thus, if an employment qualification test or any other employment requirement disqualifies proportionately more blacks than it does whites, the use of that test or requirement to determine eligibility for employment is violative of Title VII, unless it can be shown to be justified by "business necessity."[43] Similarly, as pointed out above, laws or governmental action adversely affecting poor persons will affect proportionately more blacks than whites.

However, while disproportionate racial poverty is indeed a major consequence of the social history of racism, poverty is not a distinctly racial characteristic. Large numbers of whites are also poor, and in the aggregate, there are many more poor whites than there are poor blacks.[44] Racially discriminatory effect, as the author defines that concept, does not look to racial numbers. Rather, it looks to the consequences of the social history of racism and to the specific racial effects manifesting those consequences. The inquiry focuses on whether the racially neutral action will have an *effect because of race*, and will result in the continuation of the racial inequality and racial separation that are directly traceable to the

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42. Disproportionate impact analysis is required in Title VII cases because the purpose of Title VII was to bring about the "removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs*, 401 U.S. at 431.

43. In regard to the matter of "discriminatory intent" in a Title VII case, the Court in *Griggs* stated as follows:

> [b]ut good intent or the absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability. . . .
>
> [C]ongress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation. More than that, Congress has placed on the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question. *Id.* at 432.

44. *See* Sedler, *supra* note 19, at 343-44.

social history of racism. The author has previously given a number of examples of the phenomenon called *racially discriminatory effect*, and will develop this point more fully subsequently. For the present, it is sufficient to note that it is possible to draw a distinction between racially discriminatory effect and racially disproportionate impact.[45] If the constitutional touchstone were racially discriminatory effect, as opposed to racially disproportionate impact, the concern expressed by Justice White in *Washington v. Davis* with the far-reaching implications of equating race with poverty should be obviated to a considerable degree. Under this view of what constitutes racial discrimination, governmental action having a *foreseeable racially discriminatory effect* would be subject to a strong burden of justification under the equal protection clause, without the necessity of showing such action was undertaken with discriminatory intent.

The distinction between racially discriminatory effect, as the author has defined it, and racially disproportionate impact is clearly illustrated by *Village of Arlington Heights v. Metropolitan Housing Development Corporation*.[46] There a virtually

45. Other commentators who have been critical of the discriminatory intent requirement do not appear to have drawn a precise distinction between racially discriminatory effect and racially disproportionate impact. Professor Perry, for example, uses the term, "disproportionate racial impact," and says that a law "having the effect of burdening the poor . . . will have the further effect of disproportionately disadvantaging blacks." Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 557 (1977). Professor Binion refers to laws or governmental actions that "have disproportionately disadvantageous impacts." Binion, *Intent and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 447. Professor Eisenberg comes closest to drawing this distinction when he refers to a "causal connection" between uneven impact and race. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 42 N.Y.U.L. REV. 36, 40 (1977). In regard to the matter of racially disproportionate impact, Professor Bennett has observed that

> As long as racial minorities—or other groups—display significant demographic differences from the society as a whole, it is virtually inevitable that public action will affect them differentially. . . . If all effects that burden even selected minorities were forbidden, those minorities alone would have insurance against any harm from political action that can hardly be justified by any appeal to equality.

Bennett, *supra* note 38, at 1010. Professor Bennett, however, goes on to state: "It is not clear, however, that a simple disproportionate impact or disadvantagement test is the only alternative. Perhaps some effects should be forbidden, while others should not." *Id.* at 1011.

46. 429 U.S. 252 (1977).

all-white Chicago suburb refused to rezone land from single-family to multi-family occupancy to permit the construction of a racially integrated low and moderate income housing project. In holding that no constitutional violation had been established, the Court again emphasized that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact," and that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection clause."[47] Here, however, the challenged governmental action had a foreseeable racially discriminatory effect in that it perpetuated a distinctly racial consequence of the social history of racism, residential racial segregation and concentration. If the rezoning had been permitted at least some black families would have moved into the suburb, thereby achieving a modest degree of residential racial integration.[48]

The case was remanded to the Eighth Circuit for a determination of whether the refusal to rezone was violative of Title VIII of the Fair Housing Act of 1968.[49] The Eighth Circuit held that the test under Title VIII, in light of the congressional purpose, was one of racially discriminatory effect rather than racially discriminatory intent, and that at least in certain circumstances, governmental action having a foreseeable racially discriminatory effect could be violative of Title VIII.[50] In determining whether the refusal to rezone had an impermissible discriminatory effect, the court emphasized that a major purpose of Title VIII was to bring about racial integration in housing, and that the construction of the housing project for which rezoning had been denied "would be a significant step toward integrating the community."[51]

The Eighth Circuit's approach toward defining racially

47. *Id.* at 264-65.

48. While the particular project for which rezoning had been denied was a project for low and moderate income persons, the racially discriminatory effect would be the same if rezoning had been denied for the construction of expensive townhouses which would have a racially integrated population.

49. 42 U.S.C. §§ 3601-3631 (1982).

50. Metropolitan Housing Dev. Corp. v. Village of Arlington Heights, 558 F.2d 1283, 1288-90 (8th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

51. *Id.* at 1291.

discriminatory effect for purposes of Title VIII is similar to the approach that the author advocates for constitutional purposes. The author's approach focuses on the effect of the challenged governmental action in relation to the distinctly racial consequences of the social history of racism. Since a distinctly racial consequence of that history is residential racial segregation, and the refusal to rezone perpetuated that consequence within the particular community in this instance, there is, under the author's approach, a racially discriminatory effect for constitutional purposes, requiring a strong burden of justification.

The refusal of a suburb to permit rezoning of a parcel of land to accommodate a housing project that will bring about a degree of racial integration is difficult to justify in terms of a strong, countervailing governmental interest. The suburb is not being asked to do anything affirmatively, such as to expend its own funds for construction of the project. Furthermore, a desire to keep low and moderate income people out of the suburb hardly qualifies as an important governmental interest that would justify the perpetuation of racial segregation and the continued absence of blacks from the suburb.[52] Thus, if the constitutional standard in *Arlington Heights* had been one of racially discriminatory effect, rather than discriminatory intent, the refusal of the village to rezone the land would have been violative of equal protection.

However, the Supreme Court, perhaps because of its failure to distinguish between racially disproportionate impact and racially discriminatory effect, has held that the Constitution is not implicated by racially neutral governmental action unless it can be shown that this action was undertaken with racially discriminatory intent. The author will subsequently develop the concept of racially discriminatory effect more fully, and demonstrate that the use of this concept to determine racial discrimination for constitutional purposes is con-

52. The factors considered most significant by the Eighth Circuit in *Arlington Heights* were the extent of the discriminatory effect, the government's interest in taking the challenged action, and whether the government was being asked affirmatively to provide housing for blacks or merely to refrain from interfering with private entities who wanted to provide such housing. *Id.* at 1290-96.

sistent with and implements the values embodied in the fourteenth amendment and Reconstruction amendments, taken as a whole. Before doing so, however, the article will discuss how it may be possible under the Court's current doctrine to invalidate governmental action that has the effect of disadvantaging blacks or otherwise perpetuating the present consequences of the social history of racism without showing present discriminatory intent on the part of the governmental decision-maker.

UNCONSTITUTIONAL RACIAL DISCRIMINATION IN THE ABSENCE OF A SHOWING OF PRESENT DISCRIMINATORY INTENT

As indicated by the results in *Washington v. Davis* and *Arlington Heights*, it is frequently very difficult to prove that governmental actions were undertaken with present discriminatory intent. The governmental actors will be careful to invoke neutral rather than explicitly racial reasons for their actions, and it usually will be possible to offer a plausible racially neutral reason for the action in question. For example, a school board wanting to maintain a large number of racially identifiable schools can simply employ geographic attendance zoning as the method of school assignment, thereby achieving a condition of substantial racial segregation in the schools without any reference to race.[53] Or, university officials who wish to exclude or limit black enrollment can impose admission standards based primarily on comparative objective academic achievement indicators, and rely on the racial

53. As Eric Schnapper has observed:

> Any governmental official of the last several decades would certainly know that repeated, overtly discriminatory acts are subject to legal challenge and run a high risk of failure. A 'rational' segregationist school board would thus choose (for purportedly nonracial reasons) to build schools in the centers of black and white neighborhoods and thereafter to assign students to their 'neighborhoods schools,' rather than build schools on the borders of those neighborhoods and assign students each year on the basis of race. The probable effect on race relations is also likely to incline racist officials to favor the discriminatory actions with the enduring effects that would obviate the need for overtly discriminatory conduct.

Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 836 (1983).

"education gap" to do the rest.[54] In practice, therefore, the success of challenges to purportedly neutral governmental action adversely affecting blacks often depends on overcoming the requirement of showing present discriminatory intent.

Where the governmental action challenged as racially discriminatory was undertaken at some time in the past, when American society was more explicit about race and racial considerations were more frankly acknowledged, it is, of course, easier to establish discriminatory intent. The Court has made it clear that so long as the challenged governmental action can be traced to intentional racial discrimination, no matter how long ago it occurred, that action is unconstitutional. As the Court stated in *Keyes v. School District No. 1*, with respect to past intentional segregative acts on the part of school officials: "If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.' "[55] Thus, in *Hunter v. Underwood*,[56] a provision of the Alabama Constitution disenfranchising persons convicted of crimes involving moral turpitude, adopted at a constitutional convention in 1901, was found to have been enacted for the purpose of disenfranchising blacks and so was held unconstitutional.[57] In that case, the expert testimony of historians,

54. *See supra*, note 6; Sedler, *supra* note 19, at 345-55.

55. 413 U.S. 189, 210-11 (1973).

56. — U.S. —, 105 S. Ct. 1916 (1985).

57. The evidence established that at the present time blacks were at least 1.7 times as likely as whites to suffer disenfranchisement under this provision. *Id.* at 1920. This fact alone would not amount to racially discriminatory effect under the approach the author is proposing, since the disproportionate racial impact was probably due to the comparatively greater poverty among blacks than whites and could not be identified as a distinctly racial consequence of the social history of racism. However, any governmental action that is shown to have been undertaken with a racially discriminatory purpose is for that reason alone unconstitutional. As the Court noted in *Washington v. Davis*: "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." 426 U.S. at 607. By the same token, "racial discrimination is not just another competing consideration," *Arlington Heights*, 429 U.S. at 265, so when it can be shown that intent to discriminate was among the factors that influenced governmental action, such action is unconstitutional unless the government in turn can meet the heavy burden of demonstrating that the same action would have been taken "if the impermissible purpose had not been considered." *Id.* at 270-71 n.21. Any intentional racial discrimination is the equivalent

looking to the record of the convention and the statements of the delegates, was sufficient to establish the racially discriminatory purpose. As the Court concluded: "Without deciding whether [the provision] would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and that section continues to this day to have that effect. As such it violates equal protection. . . ."[58] Similarly, in *Keyes* and some other cases involving a claim of intentional segregative acts on the part of school authorities, there was no dispute that those acts, occurring some time in the past, had been undertaken with segregative intent.[59]

It is also possible to avoid the necessity of showing present discriminatory intent where it can be demonstrated that the otherwise racially neutral action of a governmental entity perpetuates the present consequences of identified past intentional discrimination on the part of that entity.[60] In this circumstance, it is the perpetuation of the present consequences of the identified past discrimination that forms the basis of the constitutional violation. This principle is illustrated by *Lane v. Wilson*,[61] where the Court invalidated an Oklahoma law that had the effect of perpetuating prior racial discrimination in voting by the state. Oklahoma had imposed a literacy test for voting, but had included a "grandfather clause" which effectively exempted whites from the requirement. This law was held to abridge the right to vote on account of race in violation of the fifteenth amendment.[62] Oklahoma responded by enacting a new law which provided that all persons who

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of an express racial classification, and in the absence of justification under the "strict scrutiny" standard of review, amounts to invidious racial discrimination and is unconstitutional.

58. *Hunter*, 105 S. Ct. at 1923.

59. *See also* Dayton Bd. of Educ. v. Brinkman, 443 U.S. 562 (1979); Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979).

60. This is what Eric Schnapper calls bifurcated discrimination. "Bifurcated discrimination occurs when a government official bases a present action directly or indirectly on a prior discriminatory governmental decision." Schnapper, *supra* note 50, at 840.

61. 307 U.S. 268 (1939).

62. Guinn v. United States, 238 U.S. 347 (1915).

had previously voted were qualified for life, but all others had to register within a twelve day period or be permanently disenfranchised. Since the new law had the effect of perpetuating the present consequences of the unconstitutional past discrimination in favor of whites and against blacks, it too was violative of the fifteenth amendment. Should such a case arise today, it would not be necessary to show that the new law was enacted with discriminatory intent; it would be sufficient to show that it perpetuates the present consequences of the past discrimination.

Similarly, in *Meredith v. Fair*,[63] the University of Mississippi required that all applicants for admission furnish recommendations from alumni. There were no black alumni because the state had previously maintained racial segregation in its public educational system, and blacks had been ineligible to attend the University of Mississippi. Imposing the alumni recommendation requirement on a black applicant would thus perpetuate the present consequences of the identified past discrimination by the state, and was therefore a denial of equal protection.[64]

Related to the principle that purportedly racially neutral action by a governmental entity is unconstitutional if it perpetuates the present consequences of identified past discrimination is the principle that a governmental body that has engaged in past unconstitutional discrimination has an affirmative duty to remedy the present consequences of that discrimination. Until that affirmative duty has been satisfied, any action that impedes the remedying of those consequences is unconstitutional without regard to whether it was undertaken with discriminatory intent. This principle has had its primary application in regard to the elimination of *de jure* segregation in the public schools. Its application has resulted in the imposition of system-wide desegregation remedies even though in-

63. 298 F.2d 696 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962).

64. As the Court stated:

> We hold that the University's requirement that each candidate for admission furnish alumni certificates is a denial of equal protection of the laws, in its application to Negro candidates. It is a heavy burden on qualified Negro students, because of their race. It is no burden on qualified white students.

298 F.2d at 701.

tentional segregative acts could only be shown in a small proportion of the school system.

The Court first applied this principle in two 1972 cases, *Wright v. City Council of Emporia*[65] and *United States v. Scotland Neck City Board of Education*.[66] Both cases involved the formation of new school districts in states where segregation had been required by state law pre-*Brown*. The *Wright* Court held that a new district could not be carved out of an existing district that had not yet converted to a unitary school system where the effect of creating the new district "would actually impede the process of dismantling the existing dual [school] system."[67] The Court thus made it clear that until the school system had become unitary, the school authorities had the affirmative duty not to take any action that had the effect of increasing or perpetuating segregation.[68] This mandate meant that until unitary status was achieved, school authorities could not construct any school that would open as a racially identifiable school or permit any other school to become racially identifiable as a result of shifting racial population patterns. If the affirmative duty rationale were applied to a school district located in a state where segregation was required by state law pre-*Brown*, it would require the desegregation of the entire school system to the maximum extent feasible. Until unitary status had been achieved, both the schools that had been constructed pre-*Brown* and the schools constructed afterwards would be deemed to be *de jure* segregated. In retrospect, this rationale explains the Court's holding in *Swann v. Charlotte-Mecklenburg Board of Education*[69]

65. 407 U.S. 451 (1972).

66. 407 U.S. 484 (1972).

67. 407 U.S. at 466. In *Wright*, the racial composition of the county school system, which was under a desegregation order, was 66% black and 34% white. If the city had been permitted to become a separate school district, it would have had a racial composition of 52% black and 48% white, while the racial composition of the county district would have been 72% black and 28% white. 407 U.S. at 464. In *Scotland Neck*, the existing district, which was also in the process of being desegregated, was 78% black and 22% white. If the separate district had been created, it would have been 43% black, while the remaining county district would have been 89% black. 407 U.S. at 489-90.

68. 407 U.S. at 462.

69. 402 U.S. 1 (1971).

that a school system located in a state where segregation was required by state law pre-*Brown* was under a constitutional duty to desegregate the entire school system to the maximum extent feasible.[70] With respect to the schools that opened or became racially identifiable schools post-*Brown*, the affirmative duty rationale did not require showing that the racially identifiable character of these schools was due to intentional segregative acts on the part of the school authorities.

The affirmative duty rationale has also provided the basis for system-wide desegregation orders in school districts located in states where segregation was not required by state law pre-*Brown*. In those states, the predicate for a finding of *de jure* segregation is a showing of intentional segregative acts on the part of the school authorities.[71] It was possible in practice to show that intentional segregative acts did occur in many school districts outside of the South. In fact, courts routinely sustained claims of *de jure* segregation in those districts.[72] However, because of extensive residential segregation, it was not necessary for the school authorities to engage in segregative acts with respect to most schools in the district. Adherence to "neutral" geographic attendance zoning, without more, would produce a large number of racially identifiable schools.[73]

The intentional segregative acts that supported claims of *de jure* segregation usually occurred in areas which were experiencing racial residential transition and in areas where blacks and whites lived in fairly close proximity. These acts involved relatively few schools in the system. For example, in *Dayton Board of Education v. Brinkman*,[74] the evidence revealed that as of 1954, when *Brown* was decided, the school system was maintaining four black schools that had become racially identifiable as a result of intentionally segregative action.[75] In *Columbus Board of Education v. Penick*,[76] the evi-

70. *See* Sedler, *supra*, note 15, at 887-91.
71. *Id.* at 893-97.
72. *See* Sedler, *supra*, note 12, at 545-47.
73. *See supra* note 15.
74. 443 U.S. 526 (1979).
75. *Id.* at 535.
76. 443 U.S. 449 (1979).

dence revealed that the school authorities intentionally had maintained "an enclave of separate, black schools on the near east side of Columbus."[77] The plaintiffs in these cases sought system-wide desegregation; the Court held that imposition of such a remedy was constitutionally required.

The continued existence of *de jure* segregation in even a small part of the school system makes the entire system a dual school system for constitutional purposes. At this point, the affirmative duty rationale takes over. Until the dual school system is dismantled—in these cases until the few black schools were desegregated[78]—the school board was under an affirmative duty to prevent any other school from becoming racially identifiable. It is thus unnecessary to demonstrate segregative intent with respect to all of the other racially identifiable schools in the system. As the Court stated in *Dayton*:

> But the measure of the post-*Brown I* conduct of a school board under an unsatisfied duty to liquidate a dual system is the effectiveness, not the purpose, of the actions in decreasing or increasing the segregation caused by the dual system.[79]

The school system then is required to desegregate the entire system, to the maximum extent feasible, based on an initial constitutional violation involving only a few schools. As Justice (now Chief Justice) Rehnquist caustically noted in dissent in *Columbus*: "Here violations with respect to 5 schools, only 3 of which exist today, occurring over 30 years ago are the key premise for a systemwide racial balance remedy involving 172

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77. *Id.* at 456.

78. For example, in a case litigated by the author, Newburg Area Council, Inc. v. Jefferson County Bd. of Educ., 489 F.2d 925 (6th Cir. 1973), *vacated and remanded*, 418 U.S. 918 (1974), *reinstated*, 510 F.2d 1358 (6th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975), the Jefferson County, Kentucky, school district, which covered suburban Louisville and had only 4% black students, had operated one pre-*Brown* black elementary school, which had not been desegregated. By the time of the litigation, another school had opened as a predominantly black school, and a third school had become predominantly black as a result of changing residential patterns. In the Louisville district, 56 of the 65 schools were pre-*Brown* schools, 35 of which had never changed their racial composition. Of the 9 schools constructed since 1965, 6 opened as racially identifiable schools, and 13 pre-*Brown* white schools, located in close proximity to the pre-*Brown* black schools, had become racially identifiable black schools as the black population expanded into those areas. *See* Sedler, *supra* note 15, at 887-89.

79. 443 U.S. at 538.

schools—most of which did not exist in 1950."[80] It must also be noted, however, that where no intentional segregative actions can be shown, the school district is under no obligation to operate any of the schools on a desegregated basis.[81]

The affirmative duty rationale can be relied on to invalidate any governmental action that has the effect of perpetuating the present effects of identified prior discrimination. The potential sweep of this principle—dependent, always, however, on a showing of identified past unconstitutional discrimination—is illustrated by the lower court case of *NAACP v. Detroit Police Officers Association*.[82] The City of Detroit had voluntarily adopted a race-conscious hiring and promotional program to remedy its admitted past discrimination against blacks with respect to police hiring and promotions. In a challenge to that program by white police officers, the courts found that the city had indeed engaged in such discrimination.[83] However, before the city had succeeded in reaching its hiring and promotional goals, it was required to make layoffs due to financial exigency. Pursuant to its collective bargaining agreement with the police union, it made the layoffs in accordance with seniority, which substantially reduced the percentage of black officers in all ranks. The district court held that the effect of this use of seniority-based layoffs was violative of the city's affirmative duty to remedy the present effects of its identified past discrimination, and so was unconstitutional. As the district court noted, because of the city's identified past discrimination it had a "constitutionally imposed continuing affirmative obligation not only to stop the discrimination but to remedy all of the effects of the discrimination."[84]

Thus, under the Court's current constitutional doctrine it is sometimes possible to prevail on a claim of unconstitutional

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80. *Id.* at 507.

81. The end result of the *de jure-de facto* distinction is that the constitutional right of children to attend, and the obligation of the state to provide, racially integrated schools at the present time depend in large measure on what happened in the school system at some time in the past. *See* Sedler, *supra* note 15, at 919-21.

82. 591 F. Supp. 1194 (E.D. Mich. 1984).

83. Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979); Bratton v. City of Detroit, 704 F.2d 878 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984).

84. 591 F. Supp. at 1199.

racial discrimination without a showing of present discriminatory intent on the part of the governmental actor. However, this can only be done when it is possible to trace the present action having a racially discriminatory effect to past intentional racial discrimination on the part of the government. Absent this showing of causation, the foreseeable racially discriminatory effect of governmental action does not give rise to a constitutional violation.

RACIALLY DISCRIMINATORY EFFECT: A FURTHER ANALYSIS

The proposition for which the author now contends is that governmental action having a foreseeable racially discriminatory effect should be subject to a burden of justification. The concept of a burden of justification is designed to avoid the problem of differing standards of review, such as "strict scrutiny," "important and substantial relationship," and the like.[85] What is being suggested is that the burden of justification should be a strong one. In determining whether the burden has been sustained in a particular case, the Court should consider a number of factors. These would include the extent of the discriminatory effect, the importance of the asserted governmental interest, the availability of alternative means by which that interest could be advanced, and the impact of alternative means on other persons. The objective of this approach would be to require a balancing of interests, and unless the balance weighed strongly in favor of the government or the interests of other persons, the governmental action should be invalidated. Under this approach the government must provide strong justification for any action that has a foreseeable racially discriminatory effect. Under the Court's current doctrine, no justification is required for governmental action having a foreseeable racially discrimina-

85. The problem of the appropriate standard of review has surfaced in the writings of some of the critics of the "discriminatory intent" requirement. Professor Perry, for example, argues that the standard of review should be "flexible" and should be "more rigorous than that required by the rational relationship test but less rigorous than that required by the strict scrutiny test." Perry, *supra* note 13, at 559-61.

tory effect, and any such action is constitutional, absent a showing of discriminatory intent.

Critics of the discriminatory intent requirement have set forth various grounds in support of their criticism. It has been argued that a "motive-centered doctrine of racial discrimination" is improper because it places a " 'very heavy burden' of persuasion on the wrong side of the dispute, to the severe detriment of the constitutional protection of racial equality."[86] It is likewise argued that a requirement of a showing of racially discriminatory intent "shifts constitutional law away from its focal attention on state responsibility for state actions," and "distorts the law by holding states constitutionally responsible for what they intended to do and not for what they have done."[87] Still another argument is that the intent requirement is inconsistent with the ideal of equality: "no person should suffer relative disadvantage at the hands of the government, . . . if such disadvantage is reasonably attributable to race."[88] In the same vein is Professor Perry's argument that the equal protection clause embodies the principle of the moral equality of the races, and that "a rule that *all* facially neutral decisions having a disproportionate racial impact are subject to a heavier burden of justification would better serve the principle of the moral equality of the races."[89]

The recurring theme in all of these criticisms of the discriminatory intent requirement is that the requirement, by focusing on the purpose of the governmental action,[90] ignores its

86. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978) (quoting Loving v. Virginia, 388 U.S. 1, 9 (1967)).

87. Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 443. The author also notes that the equal protection clause should be understood to protect individuals from dignitary harms, and that "[t]he commitment of the government to the equal value of each of its citizens is measured by what government does." *Id.* at 442.

88. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 62 (1977). The author develops the "causation principle" as a "mediating principle" to embody this concept of equality. The causation principle is "an attempt to reach the group of cases that *Washington* has placed beyond the reach of existing fourteenth amendment doctrine," and focuses on the connection between the challenged uneven impact of a racially neutral governmental action and a prior official or private race-dependent decision. *Id.* at 61-68.

89. Perry, *supra* note 4, at 1040.

90. There is still considerable disagreement on the Court as to the meaning of the

foreseeable discriminatory effect, thereby permitting the action to stand without requiring any justification. As the author has emphasized, a constitutional standard based on racially discriminatory effect would do no more than impose a burden on the government to provide *justification* for its actions that cause foreseeable and distinct racial consequences. The action could still be sustained against constitutional challenge if adequate justification were provided and if the government's interest in taking the particular action, on balance, outweighed the foreseeable racial harm.[91]

Crucial to the proposition for which the author contends—that the Constitution should require a burden of justification for governmental action having a foreseeable racially discriminatory effect—is the distinction that has been drawn between racially discriminatory effect and racially disproportionate impact. In determining whether a governmental action has a racially discriminatory effect, the focus is on the effect of the challenged governmental action in relation to the distinctly racial consequences of the social history of racism. The governmental action has a racially discriminatory effect for constitutional purposes where the effect of that action perpetuates those consequences and results in the continuation of racial inequality and racial separation.

In *Washington v. Davis*, the inquiry as to racially discrim-

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"discriminatory intent" requirement and as to what is sufficient to establish "discriminatory intent" in a particular case. *See* Gottleib, *Commentary, Reformulating the Motive/Effects Debate in Constitutional Adjudication*, 33 WAYNE L. REV. 97, 98-100 (1986); Schnapper, *Two Categories of Discriminatory Intent*, 17 HARV. C.R.-C.L.L. REV. 31, 32-36 (1982). Mr. Schnapper contends that part of the difficulty results from the Court's failure to distinguish between the existence of a racially discriminatory purpose for *undertaking* governmental action and the choice of racially discriminatory means for *carrying out* that action; that is, the distinction between "goals" discrimination and "means" discrimination. He maintains that, "Although means discrimination and goals discrimination are distinct phenomena, a variety of considerations support the conclusion that a racially-based decision regarding means is as repugnant to the Constitution as a racially-based choice of goals." Schnapper, *supra*, at 46. Professor Gottleib contends that "motive" and "effects" are merely "different expressions for the same reality" and that the attempted distinction "distracts inquiry from the underlying issues and the options actually available." Gottleib, *supra*, at 101.

91. Professor Binion suggests that in *Washington v. Davis* and the other "discriminatory intent" cases the Court "equated scrutiny of unequal consequences with a finding of their unconstitutionality." Binion, *supra* note 87, at 405.

inatory effect should not have looked to the qualifying examination in isolation, but to the black representation in the police force and the actions of the city with respect to such representation. The challengers conceded that the number of black officers in the police force was "substantial." The evidence showed that 44 percent of the new police recruits were black, and that the police department "had systematically and affirmatively sought to enroll black officers many of whom passed the test but failed to report for duty."[92] In this circumstance, the city's practices with respect to the hiring of police officers did not have a racially discriminatory effect for constitutional purposes, so the constitutional challenge could not be sustained. In *Arlington Heights*, by contrast,[93] the refusal of the suburb to rezone to permit the construction of the racially integrated housing project had the effect of perpetuating a distinctly racial consequence of the social history of racism, that of residential racial segregation and concentration. There was thus a racially discriminatory effect for constitutional purposes. Under the proposed standard, the suburb would have had to provide a strong justification for the refusal to rezone. A desire to keep moderate and low-income people out of the suburb would hardly qualify as an important governmental interest[94] justifying the perpetuation of racial segregation and the continued exclusion of blacks from the suburb. One can conclude that in this case the suburb failed to sustain the heavy burden of justification for the racially discriminatory effect of its refusal to rezone; therefore, the refusal to rezone was violative of the equal protection clause.

The situation prevailing in *Washington v. Davis* may also be contrasted with the situation where a suburb with little or no black population likewise has an all-white police force, and imposes a one-year durational residency requirement as a con-

92. 426 U.S. at 235.

93. *See supra* notes 43-49 and accompanying text.

94. Several state courts have held, for example, that under the state constitution a municipality may not zone in such a way as to exclude all housing for moderate and low-income people. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975); Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236 (1975); Township of Williston v. Chesterdale Farms, Inc., 462 Pa. 445, 341 A.2d 466 (1975).

dition for appointment as a police officer. This condition will have the foreseeable effect of excluding all blacks from consideration for appointment and of keeping the police force all-white. Like many purportedly race-neutral decisions, it interacts with the present consequences of the social history of racism, here again residential racial segregation and concentration, to produce a racially discriminatory effect against blacks. Any legitimate interest that the suburb has in requiring that its police officers be city residents can be satisfied by imposing a residency requirement after the officer is hired.[95] This being so, the one-year durational residency requirement, which has a foreseeable racially discriminatory effect and does not advance any important governmental interest that cannot be advanced by alternative means, should be held unconstitutional.[96]

Likewise, because of extensive residential racial segregation and concentration, any governmental action adversely impacting on black residential areas in comparison with white residential areas has a foreseeable racially discriminatory effect and would require justification under the proposed approach. For example, where the municipal facilities provided in predominantly black residential areas are distinctly inferior to those provided in predominantly white residential areas, there is a racially discriminatory effect for constitutional purposes. Absent a strong showing of justification for the racial difference, it should be held unconstitutional. In the pre-*Washington v. Davis* case of *Hawkins v. Town of Shaw*,[97] the

95. In McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976), the Court upheld against a "right to travel" challenge a requirement that a city employee be a city resident during the period of employment. In Musto v. Redford Township, 137 Mich. App. 30, 357 N.W.2d 791 (1984), an intermediate state appellate court held violative of the equal protection clause of the United States and Michigan Constitutions a one year durational residency requirement for employment in city police and firefighter positions.

96. Such a requirement is violative of Title VII where the city has virtually no black population, but there are a substantial number of blacks residing in the relevant labor market. *See* United States v. Town of Cicero, 786 F.2d 331 (7th Cir. 1986). On the other hand, a requirement that police officers reside in the city after appointment does not operate to exclude blacks, and thus does not have a racially discriminatory effect for either constitutional or Title VII purposes.

97. 437 F.2d 1286 (5th Cir. 1971), *modified en banc*, 461 F.2d 1171 (5th Cir. 1972).

Fifth Circuit held that significant disparities in the provision of street paving, street lighting, and sanitary sewers between black and white neighborhoods in a Mississippi town were violative of equal protection. The equal protection violation was premised on the significant disparities; there was no inquiry as to whether the disparities resulted from an "intent to discriminate" on the part of the municipal authorities. In light of *Washington v. Davis*, such a discriminatory intent must be shown, although in practice it will not be difficult to establish discriminatory intent where significant disparities exist.[98] The crucial point is that such disparities, relating to existing residential racial segregation and concentration, should require justification because of the obvious racially discriminatory effect, and in the absence thereof, should be held unconstitutional.

Another pronounced consequence of the social history of racism is the "educational gap" between blacks and whites. While the specific causes of this "educational gap" are multifaceted,[99] the "educational gap" is distinctly racial, and blacks as a group have lower levels of "academic achievement" than whites as a group. It follows that whenever eligibility for employment or for admission to a university are based on "comparative indicators of academic achievement," *e.g.*, performance on standardized examinations, blacks as a group will be disproportionately excluded in comparison with whites as a group. In practice, this problem has largely been obviated with respect to employment by the disproportionate impact analysis required under Title VII and related state laws,[100] and with respect to admission to public universities by the widespread adoption of "affirmative action" programs.[101] Nonetheless, the use of racially neutral "educational criteria"

98. *See, e.g.*, Ammons v. Dade City, Florida, 783 F.2d 982 (11th Cir. 1986); Dowdell v. City of Apopka, 698 F.2d 1181 (11th Cir. 1983). In a number of these cases, the disparities will be so great as to give rise to an inference of discriminatory intent, because they are "explicable only on racial grounds." *Ammons*, 783 F.2d at 988; *Dowdell*, 698 F.2d at 1186.

99. *See supra* note 6; Sedler, *supra* note 19, at 349-55.

100. *See supra* note 31.

101. *See* Sedler, *Racial Preference and the Constitution: The Societal Interest in the Equal Participation Objective*, 26 WAYNE L. REV. 1227, 1250-53 (1980).

to determine eligibility for employment or admission to a university is another example of what is meant by a racially discriminatory effect for constitutional purposes.

This example also serves to illustrate the balancing called for under the proposed approach. Suppose that a city with a substantial black population has relatively few black police officers and bases eligibility for employment on comparative performance on standardized examinations. Suppose also that the standardized examinations are found to be job-related,[102] but the effect of using the examination to determine eligibility for employment is to exclude practically all blacks. Or a state university law school decides that it wants only the "best-qualified" students, and admits students solely on the basis of comparative LSAT scores, with the result that very few black students are admitted. In these examples, the governmental body has furnished a valid justification for its actions that have produced a racially discriminatory effect. The approach advocated by this article would require the courts to engage in a careful balancing of the strength of the asserted governmental interest against the racial consequences resulting from the advancement of that interest. It is not necessary to indicate how the balance should be struck here, particularly since both situations are largely hypothetical. However, what these examples illustrate is that adoption of the suggested approach would not necessarily result in the invalidation of all governmental action having a foreseeable racially discriminatory effect. It would require that the government sustain a strong burden of justification, insuring that only actions that could be supported under this burden of justification would be upheld as constitutional. The end result would be that the government would need a very good reason for undertaking any action that has a racially discriminatory effect.

Such an approach would also require justification for governmental decisions that are based on what has been referred to as "a greater willingness to see a given burden borne by blacks than by whites."[103] The example posited here is that involving the location of a needed urban freeway, where the

102. Recall the qualifying test in *Washington v. Davis*. *See supra* note 33.

103. Schnapper, *supra* note 90, at 40.

suggestion has been made that the decision-maker may weigh the "burdens/benefits" equation differently depending on whether the burden falls on blacks rather than whites. The decision-maker may decide that the freeway should be built, even though it will run through and destroy part of a black community, but reject the project if the only route is through a white community.[104] It has been cogently argued that a racially-based decision regarding means is as equally unconstitutional as a racially-based decision regarding goals,[105] and it may be assumed that this is what the Court would hold if squarely presented with the question.

Under the author's approach, however, it would not be necessary to establish that the decision to build the freeway through the black community was racially-based in the sense that the decision-maker intentionally weighed the "burdens/benefits" equation differently depending on whether the burden falls on blacks rather than whites. Because of extensive racial segregation and concentration, the decision as to whether to locate the freeway necessarily has racial implications. The decision-maker necessarily will be aware of the racial composition of the community through which the freeway will run, and in this example would know that it would destroy part of the black community. Because the decision as to the location of the freeway necessarily has this foreseeable racial effect, it would be subject to a strong burden of justification. If it could be shown, for example, that there are alternative sites that would serve the purpose as well, *e.g.*, a site located in a sparsely populated area, the burden of justification could not be sustained, and the proposed construction of the freeway through the black community would be constitutionally invalid. It may be that the site in the black community is the only feasible site, and since, in our example, the freeway admittedly is needed, the government would have sustained its burden of justification. On the other hand, if the freeway is only of marginal utility, the fact that it may destroy a part of the black community affects the constitutional balancing, and may lead to the conclusion that the construction

104. *Id.* at 39.
105. *Id.* at 46-51.

of the freeway, because of its foreseeable racial effect, is constitutionally impermissible.

The balancing that is advocated under this approach would also take into account the extent of the discriminatory effect of the challenged governmental action. The less the extent of the impact of the action on blacks, the less that would be required in terms of justification. In *City of Memphis v. Greene*,[106] the Supreme Court dealt with a challenge to the closing of a city street traversing a white residential area that was adjacent to a black residential area. The challenge was based primarily on the "equal enjoyment of property" provision of the Civil Rights Act of 1866.[107] In finding that the Act was not violated by the challenged action, the majority, looking to the evidence presented in the district court, concluded that: (1) the extent of inconvenience to the adjacent black residents as a result of the diversion of traffic was not great; (2) the diversion of traffic would not have the effect of limiting the social or commercial contact between residents of the adjacent areas; (3) the street closure would not cause depreciation of property values in the black residential area; and (4) while the particular closure conferred a benefit on certain white property owners, there was no reason to believe that the city would refuse to confer a comparable benefit on black property owners.[108] The asserted governmental interest justifying the closure was that of "protecting the safety and tranquility of a residential neighborhood."[109] While the dissent saw the racial harm resulting from the challenged action as being more significant than the majority did,[110] both the majority and the dissent balanced the strength of the asserted governmental interest against what they perceived to be the extent of the racial harm resulting from the challenged action. It is this type of balancing, done here for purposes of determining whether there was a violation of 42 U.S.C. § 1982, that the author advocates to determine the constitutional per-

106. 451 U.S. 100 (1981).
107. 42 U.S.C. § 1982 (1982).
108. 451 U.S. at 110-19.
109. *Id.* at 119.
110. *Id.* at 137-47 (Marshall, J., dissenting).

missibility of governmental action having a foreseeable racially discriminatory effect.

The proposed approach could lead to a different result in *Palmer v. Thompson*.[111] That case, until its "clarification" by the Court in *Washington v. Davis*, seemed to "[lend] support for the proposition that the operative effect of the law rather than its purpose is the paramount factor."[112] In upholding as constitutional a city's decision to close its public swimming pools rather than operate them on a racially integrated basis, the Court emphasized that the city was "extending identical treatment to both whites and Negroes."[113] The stated reason for the closure in that case was that closure was necessary "to preserve peace and order" and that integrated pools could not be economically operated. According to the Court in *Washington v. Davis*, the holding of *Palmer v. Thompson*, as it bore on a showing of discriminatory intent, was that "the legitimate purposes of the ordinance—to preserve peace and avoid deficits—were not open to impeachment by evidence that the councilmen were actually motivated by racial considerations."[114]

However, the effect of the pool closure was to prevent racial integration in public facilities, and in this context, to perpetuate a specific consequence of the social history of racism in southern states, the separation of blacks and whites in public facilities. The effect then was racially discriminatory for constitutional purposes, because it maintained racial separation in public facilities: the city chose to close the swimming pools rather than operate them on a racially integrated basis, and thus to prevent blacks and whites from interacting in public facilities. The justification that the city could advance for the closing was weak. The pools had operated at a deficit even when segregated,[115] so the concern with avoiding deficits seems misplaced. Moreover, there was no more rea-

111. 403 U.S. 217 (1971).

112. *Washington v. Davis*, 426 U.S. at 243.

113. *Id.*

114. *Id.*

115. The fees were deliberately kept low, and the city was absorbing an annual loss of approximately $11,700 on three pools. *Id.* at 252 (White, J., dissenting).

sonable basis for concluding that there would be racial conflict when the pools were operated on a racially integrated basis than there would be for concluding that there would be racial conflict when the public schools were desegregated. Indeed, such a position is completely inconsistent with the premises of *Brown* and its progeny, which hold that the government cannot require racial segregation in public facilities.[116] Because the closure of the pools had a racially discriminatory effect for constitutional purposes, and because the reasons given for the closure are not supportable, under the approach advocated by the author, the closure of the pools should be held to be unconstitutional.

Likewise, in the "state action" case of *Moose Lodge No. 107 v. Irvis*,[117] it is possible to find a racially discriminatory effect for constitutional purposes because of the relationship between governmental action and private discrimination. In that case, the state issued liquor licenses to private clubs, which allowed these clubs to serve liquor after the normal closing hours for public establishments serving alcoholic beverages. These licenses were issued according to a complex formula, and no more licenses could be issued in the city where the Moose Lodge club was located. Moose Lodge followed a policy of racial discrimination in membership and refused to permit the use of its facilities by black guests of its members. The Court held that the practice of racial discrimination by Moose Lodge with respect to the service of after-hours liquor was not subject to constitutional challenge, because Moose Lodge was a private entity and because there was

116. It may be recalled that in Plessy v. Ferguson, 163 U.S. 537, 550 (1896), state-imposed racial segregation in public facilities was justified on the ground that the state could act "with reference to the established usages, customs, and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order." As Justice White pointedly observed in *Palmer v. Thompson:*

> The fact is that closing the pools is an expression of official policy that Negroes are unfit to associate with whites. Closing pools to prevent interracial swimming is little different from laws or customs forbidding Negroes and whites from eating together or from cohabiting or intermarrying. The Equal Protection Clause is a hollow promise if it does not forbid such official denigration of the race the Fourteenth Amendment was designed to protect.

403 U.S. 217, 240-41 (1971) (White, J., dissenting) (citations omitted).

117. 407 U.S. 163 (1972).

no "state involvement" in its racially discriminatory practices. The mere grant of a liquor license did not constitute "state action," and the Court made it clear that the state was not required to prohibit racial discrimination on the part of holders of state-issued liquor licenses.[118]

In his dissent, Justice Douglas, joined by Justice Marshall, emphasized that the effect of the issuance of the liquor license to Moose Lodge, when no additional licenses were available in the city, was to restrict the ability of blacks to obtain liquor, since liquor was commercially available only at private clubs for a significant portion of the week, and since a group wishing to form a non-discriminatory club, which would serve liquor after-hours to blacks, would be highly unlikely to be able to obtain a license.[119] As one commentator has observed, in that case, "a sufficient causal connection between race and harm can be established."[120] The issuance of a liquor license to a private club that overtly practiced racial discrimination, in circumstances where such licenses were difficult to obtain, had the foreseeable racially discriminatory effect of restricting the ability of blacks to obtain after-hours liquor service. Under the approach the author advocates, the state would be required to show a strong justification for issuing a liquor license to this kind of private club. Since the private club would not be impaired in its ability to carry out its organizational purposes if it did not discriminate on racial grounds,[121] it is difficult to see how the state can justify issuing

118. *Id.* at 178-79.

119. *Id.* at 181-83 (Douglas, J., dissenting).

120. Eisenberg, *supra* note 88, at 77. The author goes on to observe:

> Although the evidence did not suggest that the state approved or encouraged the private club's discriminatory practices, the effect of the state's action was to allocate a limited resource, liquor licenses, in a way that reduced the number of establishments at which blacks could purchase liquor. Under a causation approach, two central issues would have been easily resolved: race was a cause in fact of the uneven impact on blacks and the connection between the two was clearly proximate.

Id. at 77-78.

121. In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Court, in upholding against first amendment challenge the application of the state's anti-discrimination law to reach gender-based discrimination by a private membership organization, emphasized that the admission of women as members would not interfere with the organization's ability to carry on its organizational activities. Moose Lodge was a social club,

a scarce liquor license to such a club.

One final example of racially discriminatory effect is that of at-large electoral districts. The existence of at-large electoral districts, as opposed to geographic electoral districts, frequently has the effect of diluting black political power, not only by reducing the probability that black candidates will be elected, but also by reducing the impetus for any candidate to be responsive to what may be called the "racial concerns" of black voters. In this connection, it is necessary to recognize the reality of race in American society, and the fact that not infrequently the race of the candidate and racial concerns influence the outcomes of elections.[122] Where a substantial number of blacks reside in a governmental unit, given extensive racial segregation and concentration, blacks, although in the minority overall, will be able to elect one or more candidates if geographic electoral districts are employed. Experience indicates that often the candidate elected from a "black district" will be black, but sometimes that candidate will be a white person, who because of the racial composition of his/her constituency, will be responsive to their racial concerns. If all candidates are elected at-large, however, it is much less likely that a black will be elected, and as far as the "racial interests" of black and white voters may appear to be in conflict,[123] all the candidates are likely to come down on the side of "white interests." As the Supreme Court has observed: "Voting along racial lines allows those elected to ignore black interests without fear of political consequences, and without

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not an organization like the Ku Klux Klan, which has as its avowed purpose the promotion of racial hatred and white supremacy.

122. In United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), the Court upheld against constitutional challenge the use of race-conscious criteria in legislative districting so as to achieve effective black majorities in the percentage of legislative districts corresponding to the percentage of black population in the county. According to the plurality opinion of Justice White, this use of race-conscious criteria was justified in order to "achieve a fair allocation of political power between white and nonwhite voters." *Id.* at 167. However, the state cannot affirmatively induce racial prejudice in voting, such as by requiring that the race of candidates be designated on the ballot. Anderson v. Martin, 375 U.S. 399 (1964).

123. For example, there may be a controversy over whether the governmental unit should adopt an "affirmative action" program with respect to police hiring, so as to increase the number of black police officers.

bloc voting the minority candidates would not lose elections solely because of their race."[124]

Under the Court's current constitutional doctrine, the use of at-large or multi-member electoral districts violates equal protection only if this method of election was established or was maintained with racially discriminatory intent.[125] As stated above, with the continued existence of racial prejudice in American society today,[126] it cannot be denied that most of the time, the effect of the use of this method of electing officials will be to dilute black political power. Here, adoption of the proposed racially discriminatory effect approach would confront the Court with a hard "value choice." Should it interpret the equal protection clause to foreclose the use of at-large or multi-member electoral districts because of the adverse effect that the use of this method has on black political power? Or should it, as Justice Stevens has argued, refuse to "constitutionalize" racial consciousness and racial bloc voting in the political process by requiring a method of voting that "motivate[s] disadvantaged racial and ethnic groups to vote as identifiable units"?[127] It is not suggested here how the Court should resolve this hard value choice.

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124. Rogers v. Lodge, 458 U.S. 613, 623 (1982). In that case, blacks made up 38% of the registered voters in a county where the county commissioners were elected at large, and although there had been black candidates, no black had ever been elected as a county commissioner. The district court found that there was "overwhelming evidence of bloc voting along racial lines." *Id.* at 623.

125. 458 U.S. 613; Mobile v. Bolden, 446 U.S. 55 (1980).

126. In two recent cases, the Court had the occasion to take cognizance of the continued existence of racial prejudice in American society. In Palmore v. Sidoti, where the Court held violative of equal protection a state court's denial of child custody to a white mother because her new husband was black, the Court observed:

> It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. . . . The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly give them effect.

466 U.S. 429, 433 (1984). Similarly in Batson v. Kentucky, the Court held that the intentional use of peremptory challenges by a prosecutor to strike blacks from juries trying a black defendant was violative of equal protection, noting that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." — U.S. —, 106 S. Ct. 1712, 1719 (1986).

127. Rogers v. Lodge, 458 U.S. at 651-52 (Stevens, J., dissenting).

But, one of the consequences of the suggested approach is that the Court would sometimes have to make such choices, and the value result, so to speak, would not depend on whether in a particular case it could be shown that the action diluting the political power of black voters was undertaken with discriminatory intent.

The same kind of hard value choice would be required with respect to the matter of racial integration in the public schools. As the author has discussed more fully elsewhere, under the Court's current *de jure* segregation doctrine, the entitlement of children, black and white, to attend racially integrated schools depends on a showing that at some time in the past the school district in which the child is enrolled has practiced *de jure* segregation.[128] Numerous commentators, the author included, have maintained that, in light of fourteenth amendment values, there should be a constitutional obligation on the part of school districts, without regard to identified past *de jure* segregation, to operate racially integrated schools, to the maximum extent feasible.[129] The countervailing argument is that geographic attendance zoning advances certain governmental interests related to the operation of "neighborhood schools," and that since the school districts are not responsible for residential racial segregation and concentration, they should not be precluded from operating "neighborhood schools," despite the fact that many of these schools will be racially identifiable.[130] While the author's own view is that the constitutional balance strongly weighs in favor of integration,[131] the Supreme Court may or may not strike the balance the same way. The point to be emphasized is that it is the function of the Supreme Court to make these kinds of difficult value choices, and the right of school children to attend a racially integrated school should depend on how the Court resolves this value choice and not on the requirements of state law or the actions of school authorities at some time past.

In this section of the writing, the author has tried to ex-

128. Sedler, *supra* note 15, at 916-26.
129. *See id.* at 944-53.
130. *Id.* at 953-54.
131. *Id.* at 954-56.

plicate fully the meaning of racially discriminatory effect for constitutional purposes. The author has attempted to distinguish racially discriminatory effect from racially disproportionate impact and demonstrate that this distinction is a tenable one. The author's submission is that whenever governmental action has a foreseeable racially discriminatory effect, the Constitution should require a strong burden of justification. A number of examples of racially discriminatory effect have been discussed, along with the burden of justification with respect to those examples. Sometimes, the burden of justification, once it is required, clearly cannot be sustained. At other times, the question is a closer one, and, in some circumstances, the Court will be put to hard value choices in striking the constitutional balance.

What has not yet been done is to set forth a *constitutional argument* in support of the proposition for which the author contends. What is the basis for concluding that the constitutional standard should be discriminatory effect, and that governmental action having a foreseeable racially discriminatory effect should be unconstitutional unless supported by strong justification has not yet been explained? The author submits that the racially discriminatory effect standard is the *constitutionally appropriate standard* because it serves to implement the *constitutional values* embodied in the fourteenth amendment and Reconstruction amendments as a whole. The discriminatory intent standard, in contrast, results in upholding as constitutional governmental action that is inconsistent with and serves to impede the advancement of those values in contemporary American society.

The implementation of constitutional values argument is also the argument that the author advances to support the constitutionality of *racial preference* designed to overcome the present consequences of the social history of racism which have placed blacks in a societally subordinate position and prevented the realization of "genuine equality" between blacks and whites in American society.[132] Just as the Court has required a showing of racially discriminatory intent in or-

132. The term "genuine equality" is taken from Justice Marshall's opinion in *Bakke*.

der to invalidate governmental action having a discriminatory effect on blacks, it has held that the use of race-conscious criteria resulting in racial preference for blacks is constitutionally permissible when it is undertaken for the purpose of remedying identified past unlawful racial discrimination on the part of the governmental entity employing such criteria. While the Court has upheld the use of race-conscious criteria benefiting blacks in other limited circumstances, for the most part, it has focused on remedying identified past unlawful racial discrimination. The Court has specifically rejected the contention that the government may use race-conscious criteria *generally* for the purpose of overcoming the present consequences of the social history of racism that have placed blacks in a societally subordinate position.

The next section of the article, therefore, will discuss the Court's current constitutional doctrine with respect to the permissibility of employing race-conscious criteria benefiting blacks—racial preference—in governmental programs and operations. This discussion will demonstrate the relationship between the discriminatory intent requirement and the remedying of identified past unlawful racial discrimination in regard to the Constitution and the consequences of the social history of racism. This section will also discuss briefly the author's view of the equal participation objective, which has been developed more fully elsewhere.

The concluding section of the article will set forth the author's implementation of constitutional values argument, which is relied on both to support the discriminatory effect standard and the equal participation objective. The conclusion will be that, in light of constitutional values, the Constitution should be interpreted both as requiring and permitting the government to take account of the consequences of the social history of racism, which have produced a condition of racial inequality in the United States today.

RACIAL PREFERENCE AND THE CONSEQUENCES OF THE SOCIAL HISTORY OF RACISM

The question with which the discussion is now concerned is the constitutional permissibility of racial preference for

blacks in governmental programs and operations. Racial preference in this regard means that the racial status of a person is affirmatively taken into account by governmental entities in such matters as determining admission to a publicly-supported university,[133] hiring and promotion in public employment,[134] or entitlement to governmental contracts.[135] The use of racial preference benefiting blacks is, of course, a race-based classification, and is thus subject to "strict scrutiny."[136]

The Constitution does not prohibit all use of race-conscious criteria in governmental decision-making. Analytically, constitutional doctrine in regard to racial equality has developed with reference to the concept of invidious racial discrimination.[137] The Constitution proscribes invidious racial discrimination,[138] which may be defined as the use of race-conscious criteria that is not "justified by a compelling governmental interest," or is not "narrowly tailored to the achievement of that goal."[139] Conversely, where this demand-

133. *See, e.g., Bakke*, 438 U.S. 265.

134. *See, e.g.*, Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979).

135. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980).

136. As the Court has stated, "The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination." Wygant v. Jackson Bd. of Educ., — U.S. —, 106 S. Ct. 1842, 1846 (1986) (Opinion of Powell, J.).

137. *See* Sedler, *supra* note 19, at 368-72. It has been contended that the Constitution should be interpreted to prohibit the "differential treatment of other human beings by race," Van Alstyne, *Rites of Passage: Race, The Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979), and that "the proper constitutional principle is not no 'invidious' racial or ethnic discrimination, but no use of racial or ethnic criteria in the distribution of governmental benefits or burdens." Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 25. The Court, however, has not interpreted the Constitution to prohibit "differential treatment on the basis of race" where such "differential treatment" does not amount to invidious racial discrimination. As Dean Sandalow has noted: "A constitutional principle that government may not distribute burdens or benefits on racial or ethnic grounds is required neither by the 'intentions of the framers' nor by a more general principle of constitutional law." Sandalow, *Racial Preference in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 675 (1975).

138. As the Court stated in *Loving v. Virginia*, "[t]he clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the states," and that if a racial classification is ever to be upheld, it "must be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate." 388 U.S. 1, 9, 11 (1967).

139. *Wygant*, 106 S. Ct. at 1846 (Opinion of Powell, J.). While all members of the

ing test is satisfied, the use of race-conscious criteria in the particular circumstance does not amount to invidious racial discrimination, and thus is not unconstitutional despite the detriment that it causes to adversely affected persons because of their race.[140]

Whenever the government uses race-conscious criteria benefiting blacks in its programs and operations, the constitutional inquiry is two-fold. First, the Court must determine whether the asserted governmental interest advanced by the use of race-conscious criteria is "compelling." Second, once the asserted interest is found to be "compelling," the Court must then determine whether the particular means used are "narrowly tailored to the achievement of that goal." For example, in *Bakke*, five Justices were of the view that the medical school's interest in achieving a racially diverse student body was "compelling," so as to justify the use of race-conscious criteria in determining admission,[141] but Justice Powell, who was the "swing" Justice in that case, took the position that the use of a strict racial quota was not "precisely tailored to the achievement of that goal."[142]

Court agree that the use of race-conscious criteria resulting in disadvantage to persons because of their race must be subject to "strict scrutiny," there has been some difference on the Court as to the proper formulation of the standard when applied to the use of race-conscious criteria for "remedial purposes." In that circumstance, Justices Marshall, Brennan, and Blackmun have said that the use of race-conscious criteria is permissible if it is "substantially related to the achievement of important governmental objectives." *Wygant*, 106 S. Ct. at 1861 (Marshall, J., dissenting). Justice O'Connor, who accepts Justice Powell's formulation, contends that "the disparities between the two tests do not preclude a fair measure of consensus," and that the distinction between a "compelling" and an "important" governmental purpose "may be a negligible one." *Id.* at 1853 (O'Connor, J., concurring). In the author's own view, the precise formulation of the standard of review is not significant. In every case the Court must decide whether the governmental interest assertedly advanced by the use of racial preference is of sufficient validity and importance to justify the racial detriment to the adversely affected whites. It must also decide whether the particular use of race-conscious criteria is an appropriate means of implementing that interest. *See* Sedler, *Beyond* Bakke: *The Constitution and Redressing the Social History of Racism*, 14 HARV. C.R.-C.L.L. REV. 133, 141-44 (1979).

140. *See* Sedler, *supra* note 139, at 157-62; Sedler, *supra* note 101, at 1228-31.

141. The five Justices were Justice Powell in a separate opinion, *Bakke*, 438 U.S. at 311-15, and Justices Brennan, White, Marshall, and Blackmun, who agreed with Justice Powell on this point in order to establish a majority holding. *Id.* at 326 n.1.

142. *Id.* at 320. He maintained that the university could give "competitive consideration to race and ethnic origin" as one of the factors determining admission. *Cf.*

The question then is what interests are "compelling" so as to justify the use of race-conscious criteria benefiting blacks. When the Court concludes that a particular interest is "compelling" for this purpose, it has made the value judgment that this interest is of sufficient importance and legitimacy to justify the resulting racial detriment to the adversely affected whites. The one interest that the Court clearly has recognized as "compelling" is the interest in alleviating the present consequences of identified past discrimination on the part of the governmental entity using racial preference. As Justice Powell stated in *Bakke*: "The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[143] Similarly, as Justice O'Connor stated in *Wygant*: "The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty interest to warrant the remedial use of a carefully constructed affirmative action program."[144] The remedying of identified past discrimination was the basis of the Court's decision in *Fullilove v. Klutznick*,[145] upholding the constitutionality of a 10 percent minority business enterprise "set aside" required by Congress in federally-assisted construction projects.[146]

Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986), (use of a racial quota in determining admission to a public university's pre-professional programs was upheld as a proper means of overcoming the present consequences of identified past racial discrimination in public higher education).

143. *Bakke*, 438 U.S. at 307 (Opinion of Powell, J.).

144. *Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring).

145. *See supra*, note 134.

146. *See* Sedler, *supra* note 101, at 1257-8 n.139. *See also* Sedler, *supra* note 139, at 146-51. The past discrimination has violated the rights of blacks as a group, and the racial preference is designed to remedy the injury to group interests. As Justice Brennan observed in *Bakke*, "Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." 438 U.S. at 363. The Reagan Administration has argued that all racial preference in governmental operations is unconstitutional unless the beneficiaries are the individual victims of identified prior discrimination. This position, however, finds no support in the Court's current constitutional doctrine. *See Wygant*, 106 S. Ct. at 1853. ("It is agreed that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored,' or 'substantially related,' to the correction of prior discrimination by the state actor."). In

When a governmental entity has engaged in identified past discrimination, such discrimination, except for that proscribed by statute,[147] must be found to be in violation of the Constitution, and as previously noted, the Constitution only prohibits intentional racial discrimination. In other words, the unconstitutional discrimination that the government may remedy by the use of racial preference is only racial discrimination undertaken with discriminatory intent. Moreover, as discussed previously, where the government has engaged in past unconstitutional discrimination, it has the affirmative duty to take action to overcome the continuing effects of such discrimination.[148] This being so, for the Court to say that the Constitution *permits* the use of racial preference by the government in order to remedy the present consequences of the government's own identified past discrimination adds little to what the Constitution already *requires*. If a city, for example, has engaged in past unconstitutional racial discrimination by intentionally refusing to hire blacks as police officers, it has the affirmative duty to adopt a race-conscious hiring program in order to remedy the present consequences of its identified past discrimination.[149] Thus, the end result of the Court's per-

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United States v. Paradise, — U.S. —, 107 S. Ct. 1053 (1987), the Court upheld the judicial imposition of a racial promotion quota in order to remedy the State of Alabama's persistent refusal to adopt promotion procedures that would overcome the present effects of its past racial discrimination with respect to the hiring and promotion of black officers in the state police force. Under that order, the state police force was required to promote one qualified black officer for every white officer promoted until 25% of the officers in each rank were black, or until the force had developed and implemented a promotional plan without adverse impact on blacks for the relevant rank. In a similar vein, the Reagan Administration has argued that the federal courts lack the power under § 706(g) of the Civil Rights Act of 1964 to order an affirmative hiring remedy for identified past employment discrimination that goes beyond redress for the specific victims, a position that the Court squarely rejected in Local 28 of Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Comm'n, — U.S. —, 106 S. Ct. 3019 (1986). *See also* Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986) (court rejected the Reagan Administration's argument that the equal protection clause precluded approval of a consent decree requiring the admission of a specified number of minority students to the pre-professional program of a public university located in a state that had not yet succeeded in desegregating its system of public higher education).

147. The statutory violation by the governmental entity may be based on a showing of disproportionate racial impact. *See supra* note 31.

148. *See supra* notes 62-81 and accompanying text.

149. *See* NAACP v. Detroit Police Officers Ass'n, 591 F. Supp. 1194, 1199 (E.D. Mich. 1984) (court referred to "a constitutionally imposed continuing affirmative obli-

mitting the use of racial preference to overcome the present consequences of identified past discrimination is that the governmental body may voluntarily choose to remedy its past discrimination, without waiting to be sued by the class of adversely affected black persons. Even then, the issue of past racial discrimination may have to be litigated if the racial preference program is challenged by adversely affected whites.[150]

When it comes to eliminating the present consequences of the social history of racism, focusing on the remedying of identified past discrimination by the governmental entity that is using racial preference in an effort to overcome those consequences comes close to bringing one full circle. The government is not constitutionally required to take account of the consequences of the social history of racism in the sense that racially neutral governmental action having a racially discriminatory effect is not unconstitutional in the absence of a showing of discriminatory intent. Likewise, as a general proposition, the government may not be constitutionally permitted to make use of racial preference in its programs and operations solely for the purpose of overcoming the present consequences of the social history of racism. Thus, a showing of racially discriminatory intent becomes the constitutional predicate for determining the validity of governmental action that on the one hand aggravates, or on the other hand, attempts to alleviate, the present consequences of the social history of racism.

The Court has held that some interests other than overcoming the present consequences of identified past discrimination may be sufficiently "compelling," so as to justify the use of race-conscious criteria. These interests include a public university's interest in achieving a racially diverse student

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gation not only to stop the discrimination but to remedy all of the effects of the discrimination").

150. *See* Detroit Police Officers Ass'n v. Young, 608 F.2d 671 (6th Cir. 1979). In such a case, however, the government need not prove that it was guilty of past discrimination, as the class of black victims would have to do if it were challenging the government's failure to hire blacks. It is a sufficient defense to a suit by adversely affected whites that "the public actor has a firm basis for believing that remedial action is required." *Wygant*, 106 S. Ct. at 1853 (O'Connor, J., concurring).

body,[151] the government's interest in maintaining racial integration in its programs and operations,[152] and the interest of racial minorities in obtaining a fair allocation of political power.[153] And it may be true, as Justice O'Connor noted in *Wygant*, that "[c]ertainly nothing the Court has said today

151. It was on this point that Justice Powell and the "Brennan four" agreed in *Bakke*. *See supra* notes 140-42 and accompanying text. In *Wygant*, the school board and the teacher's collective bargaining representative agreed to a provision providing for out-of-line seniority layoffs in order to maintain the existing ratio of black to white teachers. One of the justifications for this provision was that black teachers were necessary in order to provide "role models" for black students. Justice Powell, joined on this point by Chief Justice Burger and Justices Rehnquist and O'Connor, took the position that the "role model" claim was an insufficient justification for the use of racial preference. *Wygant*, 106 S. Ct. at 1847-48. However, the main thrust of the school board's "role model" claim went to the interest in achieving a racially integrated faculty, and Justice Marshall, joined by Justices Brennan and Blackmun, and Justice Stevens in a separate opinion, took the position that faculty integration was a sufficiently important governmental interest to justify the use of racial preference in the circumstances presented. *Id.* at 1862-63 (Marshall, J., dissenting); *Id.* at 1867-68 (Stevens, J., dissenting). As Justice Stevens put it:

> In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all white, or nearly all white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have been brought together in our famous 'melting pot' do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin deep'; it is far more convincing to experience that truth on a day to day basis during the routine, ongoing learning process.

Id. at 1868. Justice O'Connor took the position that "the goal of providing 'role-models' discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty," and that since faculty integration was not properly asserted as a justification for the use of racial preference here, it was not "necessary to discuss the magnitude of that interest or its applicability in this case." *Id.* at 1854 n.*. It may be that, in an appropriate case, there will be five votes on the Court for upholding faculty integration as a sufficiently important governmental interest to justify the use of racial preference.

152. *See* Sedler, *supra* note 139, at 158-59. School boards, for example, can voluntarily assign students on a racial basis even to the point of requiring that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971). For this reason, a state law prohibiting school boards from transporting students for the purpose of racial integration, but permitting transportation for other purposes, constitutes an impermissible "racial singling out" and is violative of equal protection. Washington v. Seattle School Dist., 458 U.S. 457 (1982).

153. *See* United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977); Sedler, *supra* note 139, at 159-60.

necessarily forecloses the possibility that the Court will find other governmental interests . . . to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies."[154] Nonetheless, overcoming the present consequences of identified past discrimination on the part of the particular governmental entity is the "most secure" basis for upholding the use of racial preference against constitutional challenge, and it may be expected that whenever possible, the governmental entity will try to defend the challenge on this basis.[155]

What the Court has been unwilling to hold is that overcoming the present consequences of the social history of racism *itself* is a "compelling" governmental interest, justifying the use of race-conscious criteria benefiting blacks. This interest was asserted in *Bakke*, where the medical school argued that its race-conscious admissions program was designed to overcome a discrete consequence of that history, the shortage of black and other minority physicians.[156] Justice Powell posed the question in terms of whether the medical school was justified in using race-conscious criteria for the purpose of "helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination,' " and he concluded that it was not. He stated:

> [this purpose] does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility whatsoever for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for the violation of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.[157]

And in distinguishing remedying "societal discrimination"

154. *Wygant*, 106 S. Ct. at 1853 (O'Connor, J. concurring).

155. As Justice O'Connor stated in *Wygant*: "The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Id.*

156. The school also asserted that its program was designed to overcome the inability of minorities, as a group, to compete equally with whites for scarce places in the medical school. *See* Sedler, *supra* note 19, at 345-55.

157. *Bakke*, 438 U.S. at 310 (Opinion of Powell, J.).

from remedying identified past discrimination, Justice Powell observed that the latter goal "[is] far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may be ageless in its reach into the past."[158] In *Wygant*, Justice Powell also emphasized that: "This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[159]

In *Bakke*, Justice Brennan, joined by Justices White, Marshall, and Blackmun, related the shortage of black and other minority physicians to the social history of racism and concluded that:

> Davis' articulated purpose of remedying the effects of societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.[160]

However, there were only four votes for this position in *Bakke*,[161] and it has never commanded a majority of the Court. As things now stand, overcoming the present consequences of the social history of racism itself is not a "compelling" governmental interest justifying the use of race-conscious criteria benefiting blacks.

The author has elsewhere developed at length the thesis that the Constitution should permit the use of race-conscious criteria designed to advance what he refers to as the *equal participation objective*.[162] The equal participation objective relates directly to overcoming the present consequences of the social history of racism. It refers to the equal participation of blacks as a group with whites as a group in all important aspects of

158. *Id.* at 307.

159. *Wygant*, 106 S. Ct. at 1847 (Opinion of Powell, J.).

160. *Bakke*, 438 U.S. at 362 (Brennan, J. concurring in part, dissenting in part).

161. The four Justices who subscribed to the Stevens opinion and decided the case on Title VI grounds did not reach this question.

162. *See generally* Sedler, *supra* note 139; Sedler, *supra* note 101.

American life. The goals are that blacks, as well as whites, will be significantly involved in governing society and share positions of power and prestige, be meaningfully represented in the American economic system, and not be disproportionately lower-income in relation to whites. When these goals are achieved, the consequences of the social history of racism will no longer be so strikingly visible in American society.

The equal participation objective differs from "redressing societal discrimination" in the sense that it is more focused and looks both to the interest of blacks in achieving equal participation in all important aspects of American life[163] and to the societal interest that is advanced by having such participation.[164] The equal participation objective has been discussed in regard to specific aspects of American life, such as participation in the function of governance,[165] in the "power professions," such as law and medicine,[166] and in the American economic system.[167] The author places great emphasis on the societal interest in the equal participation objective, and maintains that racial preference designed to advance that objective should be upheld as constitutional.

The *constitutional argument* advanced in support of allowing racial preference to achieve the equal participation objective is based on the implementation of constitutional values. The equal participation objective is fully consistent with and serves to implement the values embodied in the fourteenth amendment and the Reconstruction amendments as a whole. The broad, organic purpose of these amendments was to bring about a condition of *black freedom* in the United States. Indeed, these amendments embody the value of black freedom. The black freedom value contains the promise of a *racially equal society*, a society in which blacks would be full and equal participants with whites, a racially equal society which has not been realized in the United States because of the social history of racism. The consequences of that history remain

163. This is the interest that is developed in Sedler, *supra* note 139.
164. This is the interest that is developed in Sedler, *supra* note 101.
165. Sedler, *supra* note 101, at 1248-50.
166. *Id.* at 1250-53.
167. *Id.* at 1253-57.

and have created a condition of societal racial inequality in which the black freedom value embodied in the fourteenth amendment has not yet been realized. Since racial preference designed to achieve the equal participation objective serves to implement the constitutional value of black freedom, it is contended that such preference in governmental programs and operations should be held to be constitutional.[168]

The implementation of the constitutional value of black freedom is also the constitutional argument that should be put forth in support of the proposition that the constitutionally appropriate standard to determine the validity of governmental action adversely affecting blacks should be racially discriminatory effect rather than racially discriminatory intent. In the concluding section of the article, the following demonstrations will be made. First, the fourteenth amendment and the other Reconstruction amendments embody the black freedom value. Second, the discriminatory intent standard, as now applied by the Court, is not the appropriate constitutional standard, because it upholds as constitutionally permissible governmental action that perpetuates the present consequences of the social history of racism and thus impairs implementation of the black freedom value. Third, implementation of the black freedom value supports racially discriminatory effect as the appropriate constitutional standard to

168. It cannot be disputed that racial preference for blacks designed to achieve the equal participation objective causes racial detriment to affected whites. To this extent racial preference is *unfair*. But because is it designed to achieve this very important objective, it is not *unjustifiable*. It is a well-settled principle of constitutional law that individuals may be required to make sacrifices in the public interest, and the public interest may require that particular individual interests be preferred over other interests and that particular individuals receive benefits at the expense of others. This principle is no less applicable where the societal interest advanced by the giving of the preference is a racial interest and the preference is a racial one. *See generally id.* at 1240-44. As Chief Justice Burger stated in *Fullilove*: "It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such 'a sharing of the burden' by innocent parties is not impermissible." 448 U.S. 448, 484 (1980). However, because any racial preference to blacks causes racial detriment to adversely affected whites, strict scrutiny applies, and it must be shown both that the racial preference is "justified by a compelling governmental interest," and that the particular means of preference are "narrowly tailored to the achievement of that goal." *Wygant*, 106 S. Ct. at 1846 (Opinion of Powell, J.).

determine the validity of governmental action adversely affecting blacks, and likewise supports the constitutional permissibility of the affirmative use of racial preference by the government in its programs and operations to advance the equal participation objective.

CONSTITUTIONAL VALUES, RACIALLY DISCRIMINATORY EFFECT, AND THE EQUAL PARTICIPATION OBJECTIVE

While the protections of the fourteenth amendment are universal and go beyond racial equality,[169] it cannot be doubted that the primary concern of the framers of the fourteenth amendment was with racial equality and the protection of the newly emancipated blacks.[170] Looking to the historic context in which the fourteenth amendment and the other Reconstruction amendments were promulgated,[171] and relating the racial equality concern to the previous condition of slavery and its consequences that the Reconstruction amendments were designed to remedy, it may properly be said that the broad, organic purpose of these amendments was to bring about a condition of *black freedom* in the United States. In light of this broad, organic purpose, it is likewise proper to conclude that the fourteenth amendment and the Reconstruction amendments, as a whole, embody the value of black freedom.

A contemporaneous explication of the broad, organic

169. *See* Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, 44 OHIO ST. L.J. 93, 129-30 (1983).

170. *See* Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, *50* COLUM. L. REV. 131, 132-42 (1950). As my colleague, Professor Joseph Grano, has put it, the framers constitutionalized the value of racial equality into the fourteenth amendment. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 70-73 (1981).

171. The term "historic context" refers to the "principles and ideas which most importantly influenced the development of [the] constitutional text." Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 780 (1983). Professor Saphire uses the term "historic context" in an effort to avoid the problems associated with ascertaining the "framers' intent," and notes that the reference to the "historic context" of a constitutional provision is a reference to "foundational principles and ideas [that] transcend the views expressed by particular persons." These principles and ideas are "epochal," and "must be extrapolated, however imperfectly, from the events of an entire political era." *Id.*

purpose of the Reconstruction amendments is found in the *Slaughterhouse Cases*.[172] Although the main issue in that case involved the meaning of the fourteenth amendment's privileges and immunities clause, the Court emphasized that the fourteenth amendment could not be read in isolation from the other Reconstruction amendments. The Court reviewed the circumstances leading to the adoption of each of these amendments, and explained how, taken as a whole, they were designed to deal with the consequences of slavery and the position of the newly-emancipated blacks in American society.[173]

The Court stated the broad, organic purpose of the Reconstruction amendments in terms of a constitutional value of black freedom:

> We repeat then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over

172. 83 U.S. (16 Wall.) 36 (1873).

173. The Court began by observing that slavery was the "overshadowing and efficient cause of the Civil War," and that at the end of the war in 1865, the thirteenth amendment was put into the Constitution as "one of its most fundamental articles" to implement "this main and most valuable result" of the war. *Id.* at 68. The Court referred to the thirteenth amendment as "this grand yet simple declaration of the personal freedom of the human race within the jurisdiction of the government." *Id.* at 69. However, although slavery had been abolished, there was still massive discrimination against the newly-emancipated blacks in the former slave states, so that "something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much." *Id.* at 70. It was to this end that the fourteenth amendment was adopted in 1868. But even the adoption of the fourteenth amendment was "inadequate for the protection of life, liberty and property, without which freedom to the slave was no boon," because blacks were still being denied the suffrage. Thus, the trilogy of constitutional protection for the newly-emancipated blacks was completed by the adoption of the fifteenth amendment in 1870. As the Court concluded: "It is true that only the fifteenth amendment, in terms, mentions the [N]egro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race and designed to remedy them as the fifteenth." *Id.* at 71-72.

him.[174]

Professor Arthur Kinoy has related the black freedom value to the constitutional overturning of the premise of racial inferiority and subordination. As Kinoy states:

> [T]he main thrust of the Thirteenth, Fourteenth and Fifteenth Amendments was the construction of a penumbra of legal commands which were designed to raise the race of freedmen from the status of inferior beings—a status imposed by the system of chattel slavery—to that of free men and women, equal participants in the hitherto white political community consisting of the 'people of the United States.' The constitutional right of the black race to this status of freedom was the simple and central objective of the Reconstruction Amendments.[175]

The significance of what Kinoy has called the constitutional right of black freedom was recognized by the Supreme Court in *Jones v. Alfred H. Mayer Co.*[176] There, the Court held that Congress has the power, under the implementing clause of the thirteenth amendment, to prohibit all racial discrimination by private persons in the sale and rental of property.[177]

The Reconstruction amendments then embody the value of black freedom. The broad, organic purpose of those amendments was to establish a condition of black freedom in the United States, to overturn forever the premise that blacks were an inferior and subordinate group, and to make them equal participants in the hitherto white-dominated American society. The promise of the Reconstruction amendments was

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174. *Id.* at 71.

175. Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387, 388 (1967).

176. 392 U.S. 409 (1968).

177. As the Court stated:

> And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.
>
> . . . . At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment [has] made a promise the Nation cannot keep. *Id.* at 442-43.

lost in the social history of racism, and has yet to be realized in this Nation.

The author submits that the discriminatory intent requirement, as now applied by the Court to determine whether purportedly racially neutral governmental action amounts to impermissible racial discrimination, is not the appropriate constitutional standard. This is because the discriminatory intent requirement permits the government to take action that has the foreseeable effect of perpetuating the present consequences of the social history of racism, and thus impairs implementation of the black freedom value that is at the core of the Reconstruction amendments. In *Washington v. Davis*, Justice White stated, "the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race."[178] Justice White explains that governmental action should not be held unconstitutional solely on the ground that it has a racially disproportionate impact, in the sense that it affects proportionately more blacks than whites.[179] Justice White never explains, however, why an essential element of "official conduct discriminating on the basis of race," from a constitutional standpoint, must be the existence of discriminatory intent on the part of the governmental actor. Where the foreseeable consequences of governmental action is to create a racially discriminatory effect, as the author has defined the concept,[180] it would seem that there has been "official conduct discriminating on the basis of race," regardless of whether this effect was specifically "intended" by the governmental actor.

The Court's imposition of a "discriminatory intent" requirement as an essential element of an equal protection violation is not consistent with the approach that the Court has taken with respect to the violation of other constitutional guarantees. Professor Binion maintains:

> No other guarantee of the Constitution is subjected to the necessity of proof that the violations alleged were by governmental design. To the contrary, the violation of any

178. 426 U.S. at 239.

179. *See supra* notes 34-38 and accompanying text.

180. *See supra* notes 39-49 and accompanying text.

> other constitutionally protected right is demonstrated by evidence that the law or practice challenged infringes upon the right in question. It is always sufficient to challenge what the law does, its substance, and its consequences for constitutionally protected rights.[181]

In the establishment clause area, for example, even though a governmental action advances a valid secular purpose and is not "intended" to benefit religion, the establishment clause is violated when the action has such a "beneficial effect." The Court here specifically refers to the "effects test,"[182] and as it observed in *School District of the City of Grand Rapids v. Ball*: "[B]ut our cases have consistently recognized that even such a praiseworthy, secular purpose [remedial and enrichment education of children attending parochial schools] cannot validate government aid to parochial schools when the aid has the effect of promoting a single religion or religion generally or when the aid unduly entangles the government in matters religious."[183]

The "discriminatory intent" requirement necessary to establish an equal protection violation also contrasts sharply with the Court's view of what constitutes "discrimination" for negative commerce clause purposes. The Court has long held that the focus here is entirely on discriminatory effect. In practice, the Court has always invalidated state regulations having the essential effect of discriminating against or disadvantaging interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests.[184] As the Court observed in *Philadelphia v. New Jersey*: "Whatever New Jersey's ultimate purpose, it may

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181. Binion, *supra* note 87, at 416. Professor Binion illustrates this point by a consideration of the first amendment and of the provisions of the fourth through eighth amendments protecting the rights of persons accused of crime. *Id.* at 430.

182. The standard for determining an establishment clause violation has been stated with reference to a three-part test: (1) The governmental action must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an "excessive governmental entanglement with religion." If any one of these elements is not satisfied, the establishment clause has been violated. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

183. — U.S. —, 105 S. Ct. 3216, 3222 (1985).

184. *See* Sedler, *The Negative Commerce Clause as a Restriction on State Regula-*

not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently."[185] The complete irrelevancy of "intent" to the existence of a constitutional violation in this area was long ago stated by the Court in *Minnesota v. Barber*,[186] where it invalidated a Minnesota law requiring fresh meat to have been inspected by a Minnesota inspector within 24 hours of slaughter, because the practical effect of the law was to prevent the sale in Minnesota of meat slaughtered in other states:

> The presumption that this statute was enacted, in good faith, for the purpose expressed in the title, namely to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States. There may be no purpose on the part of a Legislature to violate the provisions of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution. In such cases, the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.[187]

Neither in *Washington v. Davis* nor in any other case has the Court explained precisely why a showing of "discriminatory intent" is an essential element of an equal protection violation when it does not appear to be so with respect to any other constitutional guarantee.

More significantly, the "discriminatory intent" requirement, as applied to claims of racial discrimination so as to uphold the constitutionality of governmental action having a foreseeable racially discriminatory effect, impairs the implementation of the black freedom value embodied in the fourteenth amendment and the other Reconstruction amendments. Any governmental action having such an effect perpetuates the consequences of the social history of racism and

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tion and Taxation: An Analysis in Terms of Constitutional Structure, 31 WAYNE L. REV. 885, 898-906 (1985).

185. 437 U.S. 617, 626-27 (1978).

186. 136 U.S. 313 (1890).

187. *Id.* at 319.

aggravates the condition of societal racial inequality and racial separation that is inconsistent with realization of the black freedom value. Under the approach advocated, such an action would be subject to a strong burden of justification before it could be sustained as constitutional. This approach to determining the constitutionality of governmental action having a foreseeable racially discriminatory effect is fully consistent with and serves to implement the constitutional value of black freedom. The Court's present approach, focusing on the existence of "discriminatory intent" on the part of the governmental actor, is inconsistent with and impairs the implementation of that value, and for this reason is not the *appropriate* approach for the Court to follow.

Likewise, the equal participation objective, which the author has set forth as the justification for the constitutionally permissible use of racial preference benefiting blacks in governmental programs and operations, is fully consistent with and serves to implement the black freedom value. The equal participation objective is related to achieving a *racially equal* society, a society in which blacks would be full and equal participants in all important aspects of American life, a society in which black freedom would truly become a reality. In *Bakke*, Justice Marshall emphasized the equal participation objective and related it to overcoming the present consequences of the social history of racism. As he stated:

> In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. . . .
>
> It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into

> America's past and still find that a remedy for the effects of that past is impermissible.[188]

It is the author's submission, therefore, that the use of racial preference benefiting blacks in governmental programs and operations, designed to advance the equal participation objective, is fully consistent with and serves to implement the constitutional value of black freedom and so should be upheld as constitutional.[189]

CONCLUSION

In this writing, the author has set forth his views as to how the Constitution should be interpreted to deal with the present consequences of the social history of racism in this Nation that have created a condition of societal racial inequality. This constitutional position is based on the implementation of the black freedom value that is embodied in the fourteenth amendment and the Reconstruction amendments as a whole. It is submitted that, in light of the black freedom value, the Constitution both requires and permits the government to take account of these consequences. The author has defined the concept of racially discriminatory effect, as distinct from racially disproportionate impact, and has maintained that whenever governmental action has a foreseeable racially discriminatory effect, such action should be held unconstitutional unless supported by strong justification. Likewise, it is the author's position that the use of racial preference benefiting blacks in governmental programs and operations should be held to be constitutional whenever it is related to bringing about the full and equal participation of blacks in all important aspects of American life. These propositions have not yet been recognized by the Court, and to this extent the Court's current constitutional doctrine stands as an obstacle

188. 438 U.S. at 396, 401-02 (Marshall, J., concurring).

189. Under the Court's current doctrine the use of racial preference for this purpose should be held to advance a "compelling" governmental interest. It is a separate question, of course, whether the particular means used are "precisely tailored to the advancement of that goal." *See supra* note 168.

to achieving what Justice Marshall has called "genuine equality" between blacks and whites in American society.[190]

190. *Bakke*, 438 U.S. at 398 (Marshall, J. concurring).