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The Limits of Guilt and Shame and the Future of Affirmative Action

By Donald L. Beschle*

Introduction

Five decades after the concept of “affirmative action” was first employed by the government,¹ and nearly four decades since the Supreme Court made its first attempt to define the constitutional status of affirmative action programs,² the political and legal debate surrounding this policy continues. The Court’s most recent pronouncements³ do little more than reject the argument that race may never be taken into account in government programs, without providing firm guidance with respect to the limitation or the use of race as a factor.⁴

The continuing uncertainty over the proper scope of affirmative action is relevant, not only to legislators and government administrators, but also to private businesses seeking workplace diversity. While the precise relationship between the constitutional limitations on government affirmative action programs and the statutory limitations on similar programs established by private entities has never been articulated,⁵ court

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⁴ An acceptable university admissions program must avoid rigid quotas and be “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.” Grutter, 539 U.S. at 309 (quoting Bakke, 438 U.S. at 317).

decisions suggest a great deal of overlap in the standards applied in each situation. 6

The articulated standard for constitutional analysis of affirmative action is strict scrutiny, 7 but ever since the first articulation of that standard, its application has been more challenging than in cases where racial classifications are used to the detriment of minority groups. In these latter cases, strict scrutiny has resulted in something quite like a rule of per se invalidity. 8 In other constitutional contexts, however, strict scrutiny has become something less than an absolute barrier to governmental action. 9 In these contexts, the requirement that government narrowly tailor its responses to pursue a compelling government interest has been enforced in a way that sometimes permits government to satisfy its burden. Affirmative action is one of these contexts.

The question of whether a particular government action is sufficiently narrowly tailored is often hard to answer, especially since its fact-specific nature may make prior cases questionable precedents. The question of narrow tailoring, however, will only come into play where a sufficiently powerful government interest exists. In recent years, perhaps the most significant issue in the jurisprudence surrounding affirmative action has been whether the only interest sufficient to justify racial classifications designed to benefit minority groups is the need to remedy specific past acts of discrimination by the entity proposing the remedial program. 10

Both as a political and legal strategy, a focus on past guilt by affirmative action advocates may seem attractive, in light of the unanimous support for the proposition that such guilt can serve as a sufficient interest to justify affirmative action; yet, as the era of overt and

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6 Thus, it is not unusual to see the Court make reference to Title VII cases in cases turning on the Equal Protection Clause. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989). And in Coal. for Econ. Equity v. Wilson, the Court held that the constitutional standard enunciated in Croson governed judicial remedies proposed under Title VII. 110 F.3d 1431, 1445-46 (9th Cir. 1997).

7 Bakke, 438 U.S. at 290-91; Gratz, 539 U.S. at 270.

8 The only case in which the Supreme Court has found that a racial categorization that disadvantaged a racial minority satisfied strict scrutiny was, ironically, the first case to enunciate a strict scrutiny test for cases involving race discrimination. See Korematsu v. United States, 323 U.S. 214 (1944) (upholding the World War II military order excluding persons of Japanese ancestry from portions of the Pacific Coast).

9 See, e.g., Planned Parenthood of S. Pa. v. Casey, 505 U.S. 833 (1992) (introducing the “undue burden” test into analysis of abortion regulation); see also id. at 876 (limiting the use of strict scrutiny in such cases); Emp’r Div. v. Smith, 494 U.S. 872 (1990) (rejecting strict scrutiny in free exercise cases challenging laws of general applications).

10 See infra text accompanying notes 29-60.
government-condoned racial discrimination recedes into the past, convincing showings of guilt become harder to establish. In light of this, two responses are possible.

One response is to broaden the definition of past discrimination and of guilt. In doing so, however, the concept of guilt itself is significantly transformed into what social psychologists more commonly denote as shame. Whereas guilt properly defined focuses on remorse for specific acts, shame is a more global feeling of embarrassment with respect to what one is, rather than specifically what one has done. Where a sense of guilt is absent, how effective is shame in inducing socially positive action?

If neither guilt nor shame is available as effective motivating agents for those making decisions regarding diversity programs, what alternatives remain? Recent court decisions do leave open some room for justifying affirmative action on the basis of forward-looking grounds, that is, grounds that look to the future benefits of diversity, rather than past guilt for acts of discrimination. The extent to which forward-looking justifications will be accepted by courts remain unclear, however.

As the Supreme Court prepares to consider the affirmative action program at the University of Texas,\(^\text{11}\) the possibility that affirmative action might be strictly limited to remediation of past guilt is quite alive. Will this lead, in effect, to the end of affirmative action?

Whatever the extent of permissible grounds for affirmative action may be, legislators and other policymakers must be persuaded of the desirability of such programs. This leads to the core question explored in this article: how effective is guilt in motivating pro-social actions? Where a sense of guilt is absent, is shame an equally effective or more effective substitute? And if guilt and shame are likely to fail, what is left? To what extent are guilt and shame required by current constitutional doctrine as justifications to affirmative action?

This article begins with a brief history of affirmative action, focusing on the way in which the Supreme Court has come to see it primarily, if not exclusively, as a remedial device upon a showing of guilt for past discriminatory acts. Part II will explore the use of guilt and shame, two often overlapping but distinct emotions, in serving as factors motivating pro-social actions. Finally, after discussing the limits of guilt and shame, this article will suggest some ways to approach affirmative action in the future that might be both politically effective and constitutionally permissible.

\(^{11}\) Fisher v. Univ. of Tex., 631 F.3d 213 (5th Cir. 2011), \textit{cert. granted}, 132 S. Ct. 1536 (Feb. 21, 2012) (No. 11-345).
I. Affirmative Action: A History

The modern history of the concept and the terminology of affirmative action are regarded as beginning with the executive orders issued by the Johnson and Nixon administrations in the years following the enactment of the landmark civil rights legislation of the 1960s. These orders required federal agencies and government contractors to go beyond mere nondiscrimination and take affirmative steps to increase minority representation in job categories where racial minorities were severely underrepresented. Legislators and administrators at the federal, state, and local levels, as well as a number of private entities, began experimenting with various types of affirmative action programs either to remedy the effects of past discrimination (and avoid potential liability) or to achieve perceived benefits resulting from more diverse education or work-related environments.

Despite this history, our understanding of the affirmative action debate will benefit from a preliminary look at what might be called the pre-history of affirmative action. In the years immediately following the Civil War, Congress took steps to secure something more than mere formal legal equality for the former slaves. As significant as the Thirteenth, Fourteenth, and Fifteenth Amendments were, they hardly erased the social and economic consequences of the slavery era. Although Congress rejected calls to redistribute plantation land owned by former rebels in order to provide newly freed slaves with “forty acres and a mule”, it did establish the Freedman’s Bureau, a federal agency charged with providing education and other forms of assistance.

During its short life and with limited resources, the Bureau had some degree of success, particularly in providing educational opportunities.

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12 See supra note 1.
13 Id.
16 See Oubre, supra note 15.
17 Freedmen’s Bureau Act of 1865, ch. 90, 13 Stat. 507 (enacted March 3, 1865) (giving the Bureau “control of all subjects relating to refugees and freed men”). On its face, the Bureau was authorized to assist all those displaced by the War, black or white. In practice, services were overwhelmingly provided to blacks. Schnapper, supra note 15, at 760-61.
18 “In each of the years immediately prior and subsequent to the adoption of the
From its inception, though, it was controversial. Even in the immediate aftermath of slavery, opponents characterized the Bureau as providing the former slaves not with equal opportunity but with unwarranted advantages. While much of this opposition no doubt had its origins in racism, it is perhaps not entirely surprising since it was at a time where federal involvement in education and the provision of social welfare benefits were nearly nonexistent.

The Reconstruction-era Congress also enacted the Civil Rights Act of 1875, which prohibited racial discrimination by private parties engaged in providing public accommodations. In 1883, however, the Supreme Court invalidated that Act, holding that the Fourteenth Amendment did not empower Congress to legislate against private acts of discrimination but only the acts of the states themselves. Beyond the obvious significance of this entrenchment of what would become known as the “state action” doctrine, the Court further echoed the voices of the opponents of the Freedman’s Bureau and their concern with “special favor” for racial minorities:

> When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws ...

This comment, largely unnecessary for the resolution of the federalism issues on which the case was decided, shows that even at a time when the Civil War and slavery were “almost too recent to be called history”, questions that would, a century later, dominate the debate over...
affirmative action were already sharply defined. What is the difference between protecting equality and providing unwarranted special favoritism? If special treatment is sometimes justified, under what conditions? Is special treatment a temporary aberration, available only for a limited time to those who have been personally deprived of equal opportunity in the past, or might it extend beyond a single generation of victims of discrimination?

In the decades following the demise of the Freedman’s Bureau and the Civil Rights Act of 1875, the question of the constitutional legitimacy of targeted government aid to racial minorities was hardly an active issue. In the post-Reconstruction world of government-sponsored segregation, endorsed by the Supreme Court’s 1896 decision in *Plessy v. Ferguson,* civil rights advocates had their hands full advocating enforcement of formal legal equality. After the civil rights revolution marked by *Brown v. Board of Education* and the landmark federal legislation of the 1960s, however, the question of “special treatment” was bound to reappear. Decades of public and private acts of racial discrimination had taken their toll. Was it a sufficient response to merely demand that these acts cease?

The first context in which the Supreme Court considered race-based decisions by the government intended to benefit racial minorities arose, not in the context of what we would label “affirmative action,” but rather in cases involving court-ordered school bus plans. After a decade or more of minimal, reluctant compliance by many school boards with the Court’s command that public schools be desegregated “with all deliberate speed,” courts began to require busing students out of their neighborhoods as a remedy following a finding of illegal segregation. Opponents of busing as a remedy argued that *Brown* and subsequent developments required that government acts be entirely colorblind, and

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27 163 U.S. 537 (1896).
racially sensitive school assignments were, therefore, directly contrary to that principle.\textsuperscript{32}

In the 1971 case of \textit{Swann v. Charlotte-Mecklenburg Board of Education}, the Supreme Court upheld the use of race-conscious remedies to enforce school desegregation.\textsuperscript{33} The Court emphasized that these race-conscious steps were responses to a history of unconstitutional state-sponsored segregation.\textsuperscript{34} Once that history was established, local government had “the affirmative duty to take whatever steps might be necessary” to end segregation.\textsuperscript{35} And in such a case, “the scope of a district court’s equitable powers to remedy past wrongs is broad.”\textsuperscript{36} While \textit{Brown} established a standard of strict scrutiny for government-imposed racial classifications, it did not make all such classifications per se illegal. Since federal courts have a compelling interest in remedying the effects of a constitutional violation, a race-conscious remedy might well be seen as sufficiently tailored to achieving that interest to satisfy a strict scrutiny analysis.\textsuperscript{37}

\textit{Swann}, then, emphasized the link between race-conscious acts intended to favor minority groups and the past-guilt of those who bore the brunt of those acts. In the 1974 case of \textit{Milliken v. Bradley},\textsuperscript{38} the Court indicated that this link was not merely sufficient but also necessary to justify court-ordered race-conscious relief. In a decision widely seen as dealing a nearly fatal blow to the practical possibility of genuine racial integration in many urban school systems, the Court invalidated a district court plan that would have required busing students across district lines in Detroit and the surrounding suburbs.\textsuperscript{39} Although those suburban districts were home to a significant number of former Detroit residents who had left the city during a period of “white flight,” the Court held that since the suburban districts had never engaged in de jure segregation, they could not be required to participate in a busing plan designed to remedy the sins of Detroit.\textsuperscript{40}

\textsuperscript{32} For a summary of desegregation decisions nationwide during the 1960s and early 1970s, see \textsc{Gary Orfield}, \textit{Must We Bus?: Segregated Schools and National Policy} 11-39 (1978).

\textsuperscript{33} 402 U.S. 1, 22-31 (1971).

\textsuperscript{34} \textit{Id.} at 6-11.

\textsuperscript{35} \textit{Id.} at 15 (quoting \textit{Green v. Cnty. Sch. Bd.}, 391 U.S. 430, 437-38 (1968)).

\textsuperscript{36} \textit{Id.}

\textsuperscript{37} \textit{Id.}

\textsuperscript{38} 418 U.S. 717 (1974).

\textsuperscript{39} \textit{Id.} at 745-47.

\textsuperscript{40} \textit{Id.}
Thus, before the Supreme Court had considered what are generally regarded as “affirmative action” cases, it had established, in the busing cases, a link between race-conscious action taken to benefit racial minorities and a prior finding of guilt for past discrimination on the part of those taking the action. In this context, race-conscious action taken to benefit racial minorities was held justified as a remedy necessary to restore a presumed pre-guilt state of racial equality.

The necessity of a connection between judicial imposition of a remedy and a finding of some degree of guilt in the school desegregation lawsuits hardly seems surprising or unusual. It merely reflects the normal role of courts and the normal limitations on their rule. Courts operate within a context that require a finding of guilt or fault in order to justify a remedy, the purpose of which is merely to set things right. The role of courts is not generally understood to include wading into a social problem and presenting a way of making things better, apart from a finding that someone has acted wrongfully.

Legislatures, on the other hand, do not work under such restraints. Legislators may identify a social problem without the need to attribute its existence to guilt or fault on the part of any specific person or entity, and prescribe methods of alleviating the problem that go beyond merely restoring some perceived status quo ante. The future of affirmative action would largely turn on whether courts saw the government acts, or acts by private employers in cases involving Title VII violations, as legitimate acts to alleviate a social problem limited to minority underrepresentation or an illegitimate effect to impose a remedy where there was no initial finding of guilt or fault.

In Regents of the University of California v. Bakke, the Supreme Court for the first time assessed the legitimacy of a race-conscious government plan aimed at benefitting racial minorities, which was neither imposed by a district court nor adopted to remedy specific past acts of discrimination. The medical school at the University of California at Davis, which had only been established in 1968, and thus had no history of racial discrimination, established an affirmative action admissions program in 1970. Under the plan, 16 of the 100 seats in the school’s entering class were reserved for “economically and/or educationally disadvantaged” applicants. While these formal eligibility requirements for the reserved seats did not exclude white applicants, in practice only

42 Id. at 272 (explaining that the school, established in 1968, clearly had no history of racial discrimination on which to base an affirmative action program).
43 Id.
44 Id. at 274.
African-Americans, Asian-Americans, and Mexican-Americans were actually chosen.\textsuperscript{45}

The Supreme Court invalidated the program, but in a fractious way that left many questions unanswered. Four justices, finding that the program violated federal statutes prohibiting racial discrimination in higher education saw no need to address the question of whether benign racial classifications not prohibited by statute would nevertheless violate the Constitution.\textsuperscript{46} Four justices, in contrast, would have upheld the program.\textsuperscript{47} In their opinion, the statute prohibited only racial classifications that would violate the Constitution.\textsuperscript{48} Further, these justices felt that the Constitution did not prohibit “benign” racial classifications if they “serve[d] important government objectives and . . . [were] substantially related to . . . [these] objectives,”\textsuperscript{49} a test somewhat more permissive than the classic formulation of “strict scrutiny.”\textsuperscript{50} Eliminating “serious and persistent underrepresentation of minorities in medicine”, these four justices contended, could serve as such an objective, regardless of whether the medical school itself had any responsibility for creating that underrepresentation.\textsuperscript{51}

Justice Powell cast the deciding vote. While holding against the school’s program, he rejected the position that either the federal statute or the Constitution categorically prohibited race-consciousness in higher education admissions.\textsuperscript{52} At the same time, he rejected the dissenter’s view that a form of intermediate scrutiny was sufficient in analyzing benign racial classifications.\textsuperscript{53} Justice Powell would apply strict scrutiny, but insist that such a test was not necessarily fatal. He accepted the university’s position that providing the educational benefits of a diverse student body could qualify as a compelling state interest.\textsuperscript{54} That interest, however, must be satisfied by sufficiently narrow means, and Justice Powell concluded that setting aside a fixed number of admission slots for minority candidates went too far.\textsuperscript{55} With Justice Powell’s opinion

\textsuperscript{45} Id. at 275-76. (“Indeed, in 1974, at least, the special [admissions] committee explicitly considered only ‘disadvantaged’ special applicants who were members of one of the designated minority groups.”). Id. at 276.

\textsuperscript{46} Id. at 408-21 (Stevens, J., concurring in part and dissenting in part).

\textsuperscript{47} Id. at 324-79 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{48} Id. at 325 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{49} Id. at 359 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{50} See id. at 311-14 (Powell, J., applying strict scrutiny).

\textsuperscript{51} Id. at 370-71 (Brennan, J., concurring in part and dissenting in part).

\textsuperscript{52} Id. at 311-14.

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\textsuperscript{54} Id. at 312.

\textsuperscript{55} Id. at 314-19.
providing the decisive fifth vote, *Bakke* would be read as endorsing the position that while affirmative action programs, at least where they were not justified by the need to remedy specific prior acts of discrimination, could not employ fixed quotas or separate tracks for consideration of minority candidates, in certain circumstances race could be one of a number of factors taken into account in admission or employment decisions.

*Bakke* seemed to suggest that affirmative action might be an acceptable response to a perceived social problem arising from minority underrepresentation in some circumstances without the need to attribute that underrepresentation to any specific guilty party. While never explicitly repudiating this idea, subsequent Supreme Court cases, primarily focusing on employment matters rather than the admission policies of universities, were skeptical of affirmative action rationales not based on past guilt.

A prominent example, and one that might suggest that *Bakke* was *sui generis*, is the 1986 case *Wygant v. Jackson Board of Education*. The Court invalidated a school district’s layoff policy that took race into account as well as seniority. The board’s contention that maintaining a racially diverse public school faculty would enhance the educational environment was rejected as a sufficient justification for the policy, and the Court went on to find insufficient evidence of any past discrimination in the board’s hiring policies. Three of the four dissenters based their disagreement on their conclusion that the record did in fact support a finding of past discrimination. Only Justice Stevens preferred shifting the focus away from the question of past guilt to the question of whether the policy could be justified as promoting an educationally superior school environment:

> In my opinion, it is not necessary to find that the Board of Education has been guilty of racial discrimination in the past to support the conclusion that it has a legitimate interest in employing more black teachers in the future. Rather than analyzing a case of this kind by asking whether the minority teachers have some sort of special entitlement to jobs as a remedy for sins that were committed in the past, I believe that we should first ask whether the Board’s

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57 *Id.* at 270-71.
58 *Id.* at 274-76 (explaining the benefits of providing “role models” for minority students was found to be too amorphous).
59 *Id.* at 278.
60 *Id.* at 297-99 (Marshall, J., dissenting).
action advances the public interest in educating children for the future.\textsuperscript{61}

Justice Stevens’ advocacy of analyzing affirmative action for its potential to create future social benefits in addition to its potential to serve as a remedy for the guilt of past discrimination found little support in subsequent cases. Whether looking at the actions of government entities subject to constitutional provisions, or private employers subject to Title VII, the pattern was relatively clear. In cases where past discrimination could be proven, the Court approved affirmative action, even programs going beyond the confines of Bakke to employ numerical goals.\textsuperscript{62} In the absence of past discrimination, however, outcomes were quite different.

In City of Richmond v. J.A. Croson Co.,\textsuperscript{63} the Court held that all state or local government affirmative action programs must be subjected to strict scrutiny.\textsuperscript{64} This was the first time that an unambiguous majority of the Court had explicitly endorsed that position.\textsuperscript{65} While the Court fell short of explicitly ruling out any non-remedial use of affirmative action,\textsuperscript{66} apart from Justice Stevens,\textsuperscript{67} the majority strongly suggested that “rectify[ing] the effects of identified discrimination” might well be the only acceptable justification for race-conscious action.\textsuperscript{68} The Court’s language suggested that even as a remedy, affirmative action would be rarely appropriate: “in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”\textsuperscript{69}

Once again, in Croson, even the dissenters focused primarily on the past rather than the future. Unlike the majority, the dissenters would allow past discrimination within a particular field of employment, or even in society at large, to serve as the requisite past discrimination justifying government action to remedy its effects.\textsuperscript{70} This approach obviously

\begin{itemize}
  \item \textsuperscript{61} Id. at 313 (Stevens, J., dissenting).
  \item \textsuperscript{63} 488 U.S. 469 (1989).
  \item \textsuperscript{64} Id. at 493-98.
  \item \textsuperscript{65} Id. at 551 (Marshall, J., dissenting).
  \item \textsuperscript{66} Id. at 509 (“In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”).
  \item \textsuperscript{67} Id. at 511 (“I . . . do not agree with the premise that seems to underlie today’s decision . . . that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong.”) (Stevens, J., concurring in part).
  \item \textsuperscript{68} Id. at 509.
  \item \textsuperscript{69} Id.
  \item \textsuperscript{70} Id. at 530-35, 544-46 (Dissenters contending that Richmond had made a sufficient
expands the list of entities permitted to engage in affirmative action well beyond those that were demonstrably guilty of past discrimination. Even in this view, though, the justification for affirmative action is grounded in some type of guilt for past acts.

In *Adarand Constructors, Inc. v. Pena*, the Court held that federal as well as state and local affirmative action programs must be subjected to strict scrutiny analysis. In so doing, the Court overruled its earlier decision in *Metro Broadcasting, Inc. v. FCC*. *Metro Broadcasting* held that greater judicial deference was due when an affirmative action program was authorized by Congress than when it originated at the state or local level. This conclusion was based on the Fourteenth Amendment’s section five, authorizing Congress to implement the Amendment’s substantive provisions, including the assurance of equal protection, by appropriate legislation. *Metro Broadcasting* was a rare decision that relied not on particular past discrimination by the FCC in its past licensing, but rather on the forward-looking justification for the agency’s affirmative action program, specifically the goal of promoting diverse program content, to serve as the requisite government interest.

The extent to which *Adarand* rejected the use of any justification for affirmative action other than specific acts of past discrimination is not entirely clear. On one hand, the Court cited *Wygant* for the proposition that evidence of “societal discrimination” is insufficient as a basis for affirmative action. In addition, the Court’s citation of *Metro Broadcasting* stressed that “the FCC policies at issue did not serve as a remedy for past discrimination.” On the other hand, the Court cited with approval Justice Powell’s *Bakke* opinion, which maintained that the forward-looking interest of a school in having a diverse student body could support a limited form of affirmative action. Although it has not

showing of past discrimination in the local contracting industry. Also, dissenters citing the general pervasive history of racial discrimination in Richmond.).

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72 *Id.* at 225-26.
74 *Id.* at 564-65.
75 *Id.* at 563.
76 *Id.* at 564-65 (“We hold that benign race-conscious measures mandated by Congress – even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.”).
78 *Id.* at 225 (citing *Metro Broad., Inc. v. F.C.C.*, 497 U.S. 547 (1990)).
79 *Id.* at 218-20 (discussing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978)).
been unheard of for lower courts in recent years to find affirmative action justified on forward-looking grounds,\textsuperscript{80} without a showing of specific past discrimination, post-\textit{Adarand} courts might well assume that even mild forms of affirmative action were subject to invalidation in the absence of such a showing.

The Supreme Court’s most recent attempt to clarify the affirmative action question as applied to higher education provides less than either the strong supporters or the strong opponents of the practice might have hoped. A pair of companion cases involving the University of Michigan caused the Court to revisit \textit{Bakke}. The two opinions each drew from Justice Powell’s decisive \textit{Bakke} opinion, putting to rest questions that had persisted concerning the force of that opinion as precedent, given that, despite providing the necessary fifth vote, it was the opinion of a single justice.\textsuperscript{81}

In \textit{Gratz v. Bollinger}, the Court invalidated the affirmative action program employed by the university’s undergraduate division.\textsuperscript{82} While the program did not establish a system of fixed quotas for minority admission, unlike the program at issue in \textit{Bakke}, the Court held that it went too far in giving preferential weight to minority status and failed to provide a system that “assess[ed] all of the qualities [an] individual possesses.”\textsuperscript{83} Race, in other words, was too determinate a factor in itself.

In \textit{Grutter v. Bollinger}, however, the University of Michigan Law School prevailed, with the Court finding its affirmative action admissions program sufficiently tailored to satisfy the standard set forth in \textit{Bakke}.\textsuperscript{84} While much might be said about the question of how narrowly tailored an affirmative action program must be, the issue relevant to this article concerns the first part of the “strict scrutiny” analysis. In \textit{Grutter}, and even implicitly in \textit{Gratz}, most of the justices accepted the contention of the university that providing students with the educational benefit of a racially and ethnically diverse environment can constitute a sufficiently

\textsuperscript{80} See, e.g., Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996), \textit{cert. denied}, 519 U.S. 1111 (1997) (upholding a hiring criterion for prison boot camp personnel that sought racial balance, in light of evidence that a critical mass of black lieutenants was essential to the operation of the camp).

\textsuperscript{81} With Justice Powell writing only for himself, but casting the deciding vote in \textit{Bakke}, there was considerable debate over the question of whether his opinion was binding precedent. \textit{See} Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), \textit{cert. denied}, 518 U.S. 1033 (1996) (rejecting the contention that Justice Powell’s opinion was binding precedent).

\textsuperscript{82} Gratz v. Bollinger, 539 U.S. 244, 251 (2003).

\textsuperscript{83} \textit{Id.} at 271.

strong interest for some form of affirmative action. This rejects the contention that only a remedial justification, based upon specific findings of guilt for past discrimination, can serve to justify affirmative action.

Whether this aspect of Grutter is strong or secure, however, remains open to debate. It is clear that not all of the current justices will accept any but the most extreme non-remedial, forward-looking justification for affirmative action. Justice Thomas, joined by Justice Scalia, rejects “marginal improvements” in legal education as a sufficiently compelling state interest. He notes that “the Court has accepted only national security, and rejected even the best interests of the child, as a justification for racial discrimination”, outside of the context of affirmative action. This leads Justice Thomas to conclude, “only those measures the State must take to provide a bulwark against anarchy, or to prevent violence, will constitute a ‘pressing public necessity’, justifying race-conscious activity. As a practical matter, then, Justices Thomas and Scalia are committed to limiting affirmative action to situations where it remedies specific past acts of discrimination.

While Grutter clearly endorses the use of some limited forms of affirmative action regardless of the existence of specific acts of past discrimination, it is unclear whether this will have much impact outside of the context of higher education. The Bakke precedent may have caused the Court to maintain a narrow exception to an otherwise hostile response to non-remedial uses of affirmative action. Commentators on Grutter have, unsurprisingly, taken different positions. Some see the opinion as a significant shift away from exclusive concern with past guilt and toward the use of affirmative action “as [an] instrument[] for the achievement of extrinsic social goods.” Others see its impact extending no further than the context of higher education admissions programs. Interestingly,
some supporters of affirmative action have criticized *Grutter*’s focus on the potential future benefits of diversity, preferring the supposedly “more radical arguments [that] focus on the need to remedy past discrimination, address present discriminatory practices, and reexamine traditional notions of merit and the role of universities in the reproduction of elites.”

In 2007, the Court invalidated student assignment plans adopted by Seattle and Louisville that used race as a “tiebreaking” factor in assigning students to elementary schools or high schools. Seattle public schools had never been segregated by intentional legal discrimination; Louisville schools, once segregated by law, were freed from court-ordered integration orders in 2000, upon a finding that “the vestiges” of past discrimination had been eliminated. Thus, neither school district could rely on remedy for past guilt as justification for their plans.

For our purposes, this significant part of the Court’s analysis focuses on the first part of the strict scrutiny test, the existence of a compelling state interest. A four-justice plurality opinion rejects the achievement of racial balance or the remedying of general societal discrimination as a compelling state interest. The four dissenters, in contrast, accept the “interest in promoting or preserving greater racial ‘integration’ of public schools” as compelling.

Justice Breyer supports this conclusion by referring both to the past (“setting right the consequences of prior conditions of segregation”) and to the future (“to create school environments that provide better educational opportunities”).

Justice Kennedy, while providing the fifth vote to invalidate each program, does so on the basis of the necessity of the means chosen by the school districts, rather than the absence of sufficient compelling state interests. In contrast to the plurality opinion, Justice Kennedy finds that “reduc[ing] . . . racial isolation” and achieving “diverse school

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Justice O’Connor’s Closing Comments in *Grutter*, 30 *HASTINGS CONST. L.Q.* 541 (2003) (discussing Justice O’Connor’s comment that she would expect that in 25 years, affirmative action programs will no longer be necessary to further compelling government interests).


*Parents Involved in Cmty. Schs.*, 551 U.S. at 733-34.

Id. at 712, 716.

Id. at 720-33.

Id. at 729-31.

Id. at 838 (Breyer, J., dissenting).

Id.

Id. at 843.

Id. at 787-89 (Kennedy, J., concurring in part and concurring in the judgment).
enrollments” may serve as compelling interests for local school districts.\textsuperscript{101}

As a matter of constitutional law, the question of whether affirmative action can be justified only as a remedy for past guilt remains alive, in the wake of \textit{Grutter}. To the extent that courts will allow non-remedial uses of such programs, however, legislators and administrators will have to decide whether to adopt them. Several states have proposed or adopted prohibitions on the use of race-based affirmative action, and the political opposition to such programs remains strong elsewhere.

To what extent has the Court’s focus on affirmative action as a remedy affected the affirmative action debate, not merely in courtrooms, but in legislative halls and voting booths? Is keeping the focus on past guilt more or less likely to generate support for continued use of affirmative action? To answer the questions, it may be much more useful to focus less on case law, and more on the work of social psychology.

\section*{II. Guilt, Shame, and Affirmative Action}

\textit{Grutter} stands for the proposition that specific past guilt for acts of discrimination is not always required to justify at least limited forms of affirmative action. Still, whether as a consequence of the fact that the first cases involving race-conscious activities designed to benefit racial minorities involved court ordered remedies for past discrimination, or simply flowing from a judicial mindset more comfortable with fault and remediation, guilt remains central to the affirmative action debate. While questions persist concerning which non-guilt based justifications will satisfy the Supreme Court’s strict scrutiny test, past discrimination remains the sole justification clearly accepted by all the justices.\textsuperscript{102}

With guilt for past discrimination being the most secure basis for the maintenance of affirmative action programs, it is unsurprising that disputes would arise over just what we mean by the concept of guilt. From the outset of the legal and political debate over affirmative action, supporters have argued that the guilt of past discrimination need not be confined to a particular party, but could be seen as tainting an entire profession or field, or even society at large.\textsuperscript{103} As we have seen, courts

\textsuperscript{101} Id. at 786.
\textsuperscript{102} See supra text accompanying notes 55-86.
\textsuperscript{103} “[A] state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.” Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 369 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part).
have been reluctant to accept these broadly defined concepts of guilt as justifying affirmative action, and political opponents of these programs similarly reject extending the scope of guilt for past discrimination. Regardless of the effect that extending the concept of guilt might have on the willingness of courts to accept affirmative action, will it make it more or less likely that public and private decision makers will adopt such programs?

At the outset, it will be necessary to define some terms. Specifically, we need to distinguish guilt from shame, a related concept, but not one synonymous with guilt. It is common for people, in everyday conversation, to use the terms interchangeably or simultaneously with little or no thought to whether those might be separate emotions, albeit ones that might co-exist at the same time. In recent years, though, both law and social science have paid attention to the difference between the two.

In law, guilt is, of course, a well-understood term. Along with its correlate of fault, it focuses on the responsibility of a particular party for a particular act or course of action. Criminal punishment cannot be based merely on status; some wrongful act is required. Shame, on the other hand, while it might accompany guilt, does not necessarily require a connection to a particular guilty act. Instead, social science sees shame as a more global feeling of embarrassment about the self. Still, in recent years, interest has grown in the use of “shaming punishments” in criminal law. These consist of various activities ordered by a court after a finding of guilt that are designed not merely to exact retribution or remediation for the wrong committed, but to generate community scorn directed at the offender. The intended result, in addition to any general

104 “[A]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.” City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499 (1989).
107 “[S]hame includes a negative evaluation of the global self, whereas guilt involves a negative evaluation of a specific behavior”. Tangney & Stuewig, supra note 105, at 328 (citing HELEN B. LEWIS, SHAME AND GUILT IN NEUROSIS (1971)).
109 Kahan sees public resistance to alternative sentencing as a consequence of public perception that such punishments “fail to express condemnation as dramatically and
deterrent effects, is to shame the offender into at least a change in behavior, if not a change of heart.\textsuperscript{110} Anyone familiar with legal history will recognize this as a revival of thinking behind such antiquated punishments as the stocks, or Hawthorne’s scarlet letter.\textsuperscript{111}

To the lawyer, then, guilt is a finding of responsibility determined by a judge or jury with respect to a particular act or acts of an individual. The individual may or may not feel a sense of guilt. Shame, on the other hand, is the internal sense of remorse sought to be induced by a particular form of punishment. In a normal legal proceeding, no action will be taken without some sort of finding of guilt, which in this sense is external to the guilty individual’s own self-regard. Shame may or may not be consciously sought to be induced through the means of punishment employed.\textsuperscript{112}

Social science, in contrast, has looked at both guilt and shame as states internal to the individual, states that can exist with or without any external social or legal condemnation. Although both are internal, emotional states and both frequently co-exist,\textsuperscript{113} recent research has drawn a significant distinction between the two emotions, and that distinction has significant consequences for the individual’s response.

The key distinction between the emotions can be summarized as follows: guilt is a feeling of regret or remorse over some specific bad act; shame is a more global feeling that the self is flawed in some significant way, making the subject less worthy of respect or affection.\textsuperscript{114} Having made the distinction, we can see that one might feel guilt over a specific act without feeling an overall sense of shame. Conversely, one might feel shame in the absence of any specific feeling of guilt, and while guilt and shame might co-exist, one might also feel neither guilt nor shame, even

\textsuperscript{110} See the discussion of the related goals of shaming penalties as furthering alternative goals as well as inducing a sense of shame in the offender. \textit{Id.} at 635-49.

\textsuperscript{111} Nineteenth century advocates of prison as an alternative to corporal punishments saw prison as an opportunity for criminals to reflect and undergo a change of heart. \textit{See} MARTIN J. WEINER, RECONSTRUCTING THE CRIMINAL: CULTURE, LAW, AND POLICY IN ENGLAND, 1830-1914 101-22 (1991).

\textsuperscript{112} Kahan, \textit{supra} note 108, at 594-605. Kahan stresses the importance of expressions of condemnation to the general community, whether or not the message gets through to the convicted criminal.


\textsuperscript{114} Tangney & Steuwig, \textit{supra} note 105, at 328.
where a finding of guilt has been pronounced by a source outside of the self.

Specific culpable behavior is generally required for a court to make a finding of guilt; likewise, without a specific act to feel remorse over, an individual will not feel a sense of guilt. Of course, the law may expand the concept of guilt so that it encompasses some people not directly responsible for the culpable act. Business partners may bear responsibility for their partners’ acts[115], parents may be held responsible for the acts of their children,[116] corporate bodies may be responsible for the acts of their agents.[117]

Therefore, when affirmative action cases began to focus on past guilt as a justification, it is unsurprising that advocates would seek to expand the scope of such guilt from specific acts of discrimination by the party involved in past practices in the relevant profession or trade, or even past discrimination in society in general.[118] As we have seen, the Supreme Court has refused to extend the concept of guilt for past discrimination that far.[119]

If guilt seems inappropriate, either as a judicial finding or an internal emotional state, in the absence of particularized bad acts, shame may be put forward as an alternative, and commentators have suggested that shame might well suffice as an appropriate and effective force in justifying affirmative action and in motivating support for it.[120] The notion that one should feel a sense of embarrassment because the acts of others who share one’s racial or ethnic background has provided one with advantages denied unfairly to others does not seem unreasonable. Also, it seems more accurate than the contention that one who has done nothing concrete to further discrimination is nevertheless guilty in the sense of being personally responsible, for its existence, but does the substitution of shame for guilt, along with efforts to induce a sense of shame in decision

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116 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 628 (2nd ed.1988). Most states have enacted statutes that, to some extent, make a parent responsible for a child’s torts.
117 See generally JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS ch. 8 (2nd ed. 2002).
118 See supra text accompanying notes 50-54.
119 In Milliken v. Bradley, the Court held that a desegregation remedy could not be extended to include suburban communities that did not have a history of official racial discrimination. 418 U.S. 717, 744-45 (1974).
makers and voters, increase the likelihood of support for affirmative action?

Recent social science research has shown that the typical reaction to guilt and the typical reaction to shame are quite distinct. These different reactions can have seriously different consequences for the individual and his or her relation to society. These differences have clear relevance to the use of shame as an effective correctional policy in criminal law, and commentators have noted this. These differences, however, would seem to also have relevance to the utility of these emotions in engendering support for affirmative action.

Because guilt and shame so frequently co-exist, it is not always easy to determine which emotion is primarily responsible for a person’s behavior. In recent years, however, social psychologists have developed methods of clarifying subjects as either “guilt-prone” or ‘shame-prone” by presenting them with certain situations, and asking whether their responses tend toward focusing on feelings of blame-worthiness or more global feelings of humiliation or disgrace. On a simpler level, subjects have been interviewed as to their own experiences of guilt and shame. Results of these studies have proven fairly consistent.

Guilt feelings are associated with the urge to “change[ ] the objectionable behavior . . . to repair the negative consequences or . . . extend a heartfelt apology . . . [also], the person can resolve to do better in the future.” Since guilt focuses remorse on a particular act, it can motivate confession and atonement without threatening the overall self-image of the individual. Atonement cannot only benefit the victim of the wrong, then, it can also serve to help repair the wrongdoer’s self-image.

In contrast, shame, implicating the whole person rather than merely a particular act, leads to defensive reactions. “[S]hame is an acutely painful emotion that is typically accompanied by a sense of ‘shrinking’ or ‘smallness’ . . . and powerlessness.” Instead of an urge to confess, the shamed person is more likely to deny. Instead of attempting to repair

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121 Tangney & Steuwig, supra note 105, at 343-47.
122 Id. at 331-32 and the authorities cited therein.
123 Id.
124 Id. at 334.
125 Id. at 328-29.
126 Id. at 334-35. “Guilt-prone” people, as opposed to the “shame-prone,” are not at higher risk for depression, anxiety, or self-esteem.
127 Id. at 328.
128 Id. at 329.
social relationships, the shamed person is likely to retreat in an attempt to escape the shame-provoking situation.¹²⁹

Perhaps more striking than the findings with respect to denial and the urge to escape, studies show that shame is more likely than guilt to lead to anger, and the desire to punish those seen as responsible for inducing the shame.¹³⁰ As opposed to guilt, shame is more strongly related to “physical, verbal, and symbolic aggression”, as well as indirect harmful activity, such as malicious gossip, and even displaced aggression, that is, taking out anger on someone other than the true target.¹³¹

The “common-sense” assumption that making someone feel shame will motivate that person to reform and become more moral and pro-social, then, seems incorrect, and largely a consequence of conflating shame with guilt. While proneness to guilt has been negatively related or inconsistently related to drug and alcohol abuse and delinquency,¹³² positive correlations have been found between shame-proneness and these behaviors.¹³³ It would seem that the shamed person, rather than conforming, is likely to embrace his identity as an outsider and be more likely to reject community values.

The implications of the guilt-shame dichotomy seem clear in the context of criminal punishment. A sense of guilt can lead to pro-social behavior; a sense of shame can lead an individual in the opposite direction. Punishments designed to induce shame, then, may well have counterproductive consequences, but all of this is clouded by the likelihood that where a specific criminal act has occurred, guilt and shame, or at least the potential for each emotion, will co-exist. Focusing attention on the specific act in question can emphasize the guilt-producing, rather than shame-producing, aspects of the community response. What does this mean where there is no concrete act for which one can be induced to feel guilt? While the inability to feel guilt for one’s own actions has been identified as the mark of the sociopath,¹³⁴ the absence of a sense of guilt where one has committed no act that would trigger guilt is hardly uncommon or unexpected.

This leads us back to the issue of affirmative action. The most widely accepted justification for the use of affirmative action is the need to remedy past guilt for discrimination,¹³⁵ yet particular acts of past

¹²⁹ Id. “[S]hame has been associated with attempts to deny, hide, or escape . . . .”
¹³⁰ Id. at 331.
¹³¹ Id. at 332.
¹³² Id. at 335-36.
¹³³ Id.
¹³⁴ Id. at 340-42.
¹³⁵ See supra text accompanying notes 55-70.
discrimination are often absent from an institution’s history. The common response of affirmative action supporters is to broaden the concept of discrimination to include not only specific acts of the people now at issue, but those of a wider group including an entire profession, trade, or even more broadly, society. In advocating the adoption of affirmative action on such grounds, however, the emotion that is likely to be triggered is shame rather than guilt. In other words, persons and institutions are being urged to feel remorse not for what they have done, but for what they are, that is, participants in a profession, trade, activity, or society that is blameworthy. Regardless of the ethical validity of this contention, the practical consequences seem clear. An attempt to induce shame is much more likely to trigger defensiveness, avoidance, and anger than an urge to make amends.

If the absence of specific blameworthy acts makes guilt unavailable as a motivating force, and if shame is more likely to reduce rather than increase one’s receptiveness to change behavior, what is the supporter of affirmative action to do? The answer, it would seem, is to shift focus away from guilt and shame and toward the recognition of a problem to be solved. Grutter provides support for the proposition that minority underrepresentation can be seen as a problem, at least in certain contexts justifying efforts to solve it, without the need to place blame for creation of the problem either on an individual, an institution, society as a whole, or some subset of society.

The mere identification of a problem, though, may be insufficient to motivate legislators, voters, or those in control of corporate bodies or academic institutions to act to solve it. In the absence of a sense of guilt, one or both of two additional motivating factors would seem essential. The first, of course, is self-interest. If a public or private institution can see a concrete benefit from promoting diversity, it will hardly be necessary to apply further pressure to move in that direction. There will be instances, however, particularly where affirmative action is the subject of legislative or voter-initiated debate, where self-interest will be weak or

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136 See supra note 70.
137 Tangney & Steuwig, supra note 105, at 329-33.
138 See supra text accompanying notes 84-85.
139 “American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.” Grutter v. Bollinger, 539 U.S. 306, 308 (2003). “What is more, high-ranking retired officers and civilian leaders of the United States military assert that, ‘[b]ased on [their] decades of experience,’ a ‘highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.’” Id. at 331 (internal citations omitted).
140 States including California and Texas acted to constitutionally prohibit race-based
absent. In these contexts, a majority of citizens, or their representatives, must act in a way that primarily benefits others. If not a consequence of guilt or self-interest, such acts might well find their basis in empathy.

The ability to empathize with others has long been recognized as a potentially significant motivating force in a wide range of pro-social activity. This is hardly surprising. We see evidence of a willingness to help others with whom we empathize on a personal, as well as a political level, on a regular basis. Just as we must differentiate between guilt and shame, though, despite the tendency to treat them as the same thing, social science has found that we must separate two types of empathy in assessing their effect on individual motivation.

When confronting the plight of another, an individual can respond with two different types of distress. The first is sympathetic empathy, which actually does focus on the other’s situation. The second type of empathy is one in which the individual focuses on his or her own discomfort in observing the other’s situation. The first type of empathy is significantly correlated with a strong motivation to help; the second will often motivate merely a desire to withdraw to end one’s own discomfort.

Sympathetic empathy, of course, will not automatically exist when one is confronted by another’s troubles. Consistent social scientific findings strongly indicate that this helpful empathy is more likely to exist when the troubled person is seen by the observer as similar to him or her. Early studies, for example, show that people are less likely to assist foreigners, or those who do not speak the native language well, than they are to assist native speakers, even where the assistance exacts minimal inconvenience. Laboratory studies that lead subjects to believe that others have more or less similar personality profiles have demonstrated affirmative action in state universities, leading public institutions to experiment in class-based, rather than race-based, affirmative action. See generally Richard H. Sander, Experimenting with Class-Based Affirmative Action, 47 J. LEGAL EDUC. 472 (1997).


142 Id. at 361-69.


144 Id.

145 Id.


147 Id.
that more cooperative behavior will occur among those who believe that they share values. Researchers have concluded that:

[T]he mere perception of belonging to two different groups – that is, social characterization per se – is sufficient to trigger intergroup discrimination favoring the in-group. In other words, the mere awareness of the presence of an out group is sufficient to provoke intergroup competitive or discriminatory responses on the part of the in-group.

Given the significance of race and ethnicity in defining groups that Americans self-identify with, this suggests that there may be significant barriers to majority group sympathetic empathy with disadvantaged minorities. Further, these responses are found in real-world studies, as well as under laboratory conditions. Studies have shown, for instance, that while loan applicants whose creditworthiness is clear receive loan approval in roughly equal rates regardless of race, where credit scores are at the margin, neither obviously strong or weak, white applicants are far more likely to receive loans than are black or Hispanic applicants. The loan officer is unlikely to be consciously acting on the basis of race. Instead, this is likely the consequence of the tendency to more readily empathize with the plight of those with whom we feel more like ourselves.

This suggests the importance of providing social support to mitigate this tendency. A study by David Frey and Samuel Gaertner illustrates both the tendency to more readily empathize with those we see as similar to ourselves and the potential of social cues to combat this tendency. A study was constructed in which the subjects, white female undergraduates, observed workers performing tasks that required them to form words from Scrabble letters. Conditions were manipulated to cause the subjects to

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151 Hunter & Walker refer to this tendency as “cultural affinity.” Id. at 16.


153 Id.
believe that the workers were having problems either because of the difficulty of the task or their own poor work habits.\textsuperscript{154} Subjects were then asked to help, with the requests coming either from the workers or from a third party.\textsuperscript{155} Half of the workers were white and half were black.\textsuperscript{156}

Unsurprisingly, subjects were significantly more likely to help when the source of the worker’s difficulty was not seen to be poor work habits, but instead seemed to be something beyond the worker’s control.\textsuperscript{157} The more interesting finding concerned racial differences. When the source of the worker’s difficulty appeared to be the inherent difficulty of the task, and the worker directly asked the subject for help, the white workers received assistance only slightly more frequently than the black workers.\textsuperscript{158} When the subjects were led to believe that the source of the problem was the worker’s own work habits, however, and the worker asked for help, white workers were assisted 73\% of the time, while black workers received help only 33\% of the time.\textsuperscript{159}

When the request for help came not from the troubled worker, but from a third party, results were dramatically different. The entire difference in the frequency of aid given to white and black workers disappeared; in fact, the black workers now received help at a slightly higher rate than the white workers.\textsuperscript{160} Apparently, the social cue that empathy was appropriate countered the tendency to reserve empathy for those with whom the subjects could most easily identify.

This suggests the significance of education and other formal and informal social forces in helping to promote empathy across racial and ethnic lines, and in turn the potential significance of the presence or absence of such empathy in generating support for affirmative action programs. At the same time, we can turn once again to social scientific research on guilt and shame to see their connection with empathy. In light of what we have already seen, it should not be surprising that guilt correlates with the ability to take the perspective of the other and with empathetic concern.\textsuperscript{161}

Shame, on the other hand, interferes with such other-directed empathy.\textsuperscript{162} By turning the shame-prone person’s concern inward toward his or her “bad self”, shame will cause a distancing from the other.\textsuperscript{163}

\textsuperscript{154} Id. at 1084.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 1086.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Tangney and Steuwig, supra note 105, at 330-31.
\textsuperscript{162} Id.
If past guilt becomes the sole justification accepted by the Supreme Court for all, or almost all, types of racial preferences,164 attempts to assign “guilt” beyond the specific actors involved are unlikely to succeed. This is so, we can see, not merely because of the refusal of the Court to accept discrimination in society as a whole or in a profession generally as the type of guilt sufficient to justify remediation,165 but also due to the distinction between guilt and shame. Demands that one atone for what that person has not done, but rather for the action of a group that one is a part of, are more likely to provoke the defensive, hostile reactions associated with shame than the pro-social reactions that can result from a sincere sense of guilt. Even if courts could be persuaded to broaden the definition of guilt for discrimination, therefore, the political response of voters and legislators could be expected to be hostile to proposals to use affirmative action as a remedy.

Empathy may well be the key to the marshaling of support for social programs benefitting disadvantaged groups. As we have seen, however, empathy is more easily generated where people can see similarity, rather than difference, with the other.166 This would suggest what is perhaps already clear in the political arena, that when affirmative action is broadened to include efforts that assist beyond racial or ethnic categories, it encounters far less opposition.167 In addition, of course, an affirmative action program based on poverty, educational deprivation, or other factors that cut across racial and ethnic lines presents few constitutional problems. These types of classifications are not subject to strict scrutiny.168

Efforts to promote empathy, combined with an attempt to rework the categories of beneficiaries of affirmative action to include some beyond race or gender, will likely be opposed by some affirmative action supporters. Arguments, which cannot be lightly dismissed, can be made that these classic forms of discrimination have been more socially pervasive, and thus call for unique consideration. At the same time, abandoning the guilt/shame model may fall short of satisfying those who

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163 *Id.* at 331.
164 *See supra* text accompanying notes 55-80.
165 *See supra* text accompanying notes 62-80.
166 *See supra* text accompanying notes 132-39.
167 *Thus, California, Florida, and Texas, responding to state law prohibiting race-based affirmative action, have adopted plans that guarantee college admission to a fixed percentage of students from each high school. While opponents of race-based affirmative action see this as an acceptable alternative, Justice Souter, dissenting in *Gratz*, saw this as merely “deliberate obfuscation”. *Gratz* v. Bollinger, 539 U.S. 244, 298 (2003) (Souter, J., dissenting). To Souter, open race-consciousness is no more objectionable than its disguised, and concededly constitutional, alternative.*
168 *Id.*
need explicit symbolic recognition of past wrongs in order to feel a sense of justice.

As we move further away from the days of overt racial discrimination tolerated or even approved by law, particularized guilt will become increasingly difficult to show as a justification for affirmative action. The attempt to expand the concept of guilt to include what has been defined here, as shame, is likely to be ineffective, even counterproductive, in rallying support for affirmative action, even if the Supreme Court accepts it as a sufficient basis. To the extent that recent cases leave the door open to the use of forward-looking justifications for affirmative action, the problems caused by underrepresentation of disadvantaged groups will require political support for those programs to be implemented. Shame is unlikely to be effective in increasing that support; the alternative is to create a sense of empathy in the majority of citizens and voters. The most effective way to do that will be to seek to reduce the salience of the difference between those benefited by affirmative action programs and the majority. This suggests that reconfiguring the programs to focus not merely on race or gender is the most effective option available.

Conclusion

As the law of affirmative action built on earlier cases involving race-conscious remedies imposed after a finding of illegal past discrimination, it is unsurprising that such a finding would provide a compelling purpose for voluntary affirmative action programs; however, would providing a remedy for past guilt be the sole acceptable justification for race-conscious state action?

Recent cases show a tenuous Supreme Court majority in support of the proposition that future-oriented goals, such as preventing racial isolation, may serve to justify affirmative action, but whether that majority holds is open to question. If expiation of past guilt becomes the sole justification for affirmative action, can supporters of such programs succeed in broadening the concept of past guilt? The Court’s refusal to accept attempts to remedy broad societal discrimination as acceptable purposes of affirmative action suggests that efforts to expand the concept will fail. The reason may well lie in the distinction between guilt and shame. When we invoke broad concepts of societal discrimination, rather than pointing to particular acts of particular actors, we are asking for acknowledgment of shame rather than guilt by those who feel no personal sense of guilt, and the likely response, as we have seen, is strongly negative.

A continued focus on the past, whether confined to specific instances of state-supported discrimination, or general societal attitudes supporting
racism, is extremely unlikely to permit the survival of race-conscious affirmative action. A focus on the future, emphasizing the benefits of avoiding racial isolation, a focus supported by a fragile majority of the current Supreme Court, provides perhaps the only viable basis for the future of affirmative action.