

# SOCIETAL DISCRIMINATION

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## ABSTRACT

For years, the term societal discrimination has been a constant refrain in the Supreme Court's race cases. It functions as the ultimate rebuke of an affirmative action program thought to rely too heavily on racial classifications in its design or implementation. The Court, though, has never actually defined or explained what this term means. This article undertakes to do just that, exploring key Supreme Court cases in the race area, as well as the unavoidable implications of the Court's reasoning -- for African Americans and other racial minorities -- regarding societal discrimination. Professor Lenhardt contends that, in many ways, it is an ideal time to engage in this inquiry. She argues that Justice Anthony Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School Dist. No. 1, et al.* is properly read as an implicit endorsement of state and local efforts to address, through race-neutral and race-conscious means, what just a generation ago jurists, scholars, and legal practitioners would likely have described as societal discrimination. Given what appears to be a five-Justice majority for the kind of strategies outlined in Justice Kennedy's concurrence, Professor Lenhardt advocates for a social science informed approach to societal discrimination and the passive participation of public entities in it that can be employed in future cases. She contends that this approach can do more to address the harsh effects of the American color line than the policy of avoidance and non-recognition evident in the Court's cases in area of affirmative action.

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