

# THE MYTH OF A COLOR-BLIND CONSTITUTION

KEITH E. SEALING\*

## I. INTRODUCTION

In the frenzied rush to stamp out affirmative action in all of its manifestations, courts and legislatures are losing sight of fundamental realities. A key weapon in the destruction of affirmative action is the myth that the Constitution requires a color-blind approach to all but a very narrowly excepted class of race-based problems.<sup>1</sup> Indeed, if the

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\* Professor of Law, John Marshall Law School (Atlanta). B.S. 1982, University of Northern Colorado; J.D. 1985, Temple University School of Law.

1. For example, the Speaker of the House, Newt Gingrich, has defined affirmative action as "affirmative racism." *Gingrich Says Go Slow on Affirmative Action*, ATLANTA J. & CONST., Feb. 14, 1997, at B1. In an interview in which Gingrich generally urged a "go-slow approach" to federal legislative efforts to end affirmative action, the congressman stated, "We are going to pursue an all-out effort to end affirmative racism in America." *Id.* Justice Clarence Thomas has called affirmative action "racial paternalism." *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring). In addition, Professor Lino Graglia has likened race-based remedial programs to a "fungus." Lino A. Graglia, Podberesky, Hopwood and Adarand: *Implications for the Future of Race-Based Programs*, 16 N. ILL. U. L. REV. 287, 293 (1996) (stating "[r]acial preference programs are a fungus that can thrive only in the dark, covered by evasion and deceit; the light of open discussion and criticism is more than they can survive"). Moreover, in passing Proposition 209, the California voters demonstrated their belief that the University of California, whose racial preferences spawned the *Bakke* decision, has a racist admissions policy. See *New Admissions Policy at U. of California Graduate Schools Called Discriminatory*, THE CHRON. OF HIGHER EDUC., Mar. 28, 1997, at A43. A complaint filed with the United States Department of Education Office for Civil Rights charges that the same entity that was held to discriminate against Allan Bakke, a white male, based its admissions decisions on criteria that favor whites and males. Although the California State University system has always used some criteria in which women and minorities fared poorly (such as standardized

trend in recent state referenda cases<sup>2</sup> continues, we soon will have the mythical color-blind Constitution that Justice Harlan first described in his dissenting opinion in *Plessy v. Ferguson*.<sup>3</sup> In *Plessy*, Justice

tests), past affirmative action programs had compensated. Now, however, there is a decline in the number of minorities and women accepted into California's professional schools.

Proposition 209 amended the California Constitution. See CAL. CONST. art. I, § 31. The initiative, approved by 54% of California voters in the fall of 1996, eliminates all race and gender preferences in state hiring, contracting and college admissions. A federal district court blocked the measure in *Coalition for Economic Equity v. Wilson*, 946 F.Supp. 1480 (N.D. Cal. 1996). On April 8, 1997, the United States Court of Appeals for the Ninth Circuit reversed the district court's decision, upholding the constitutionality of the affirmative action ban. See *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), *reh'g en banc denied*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997).

In its decision, the Ninth Circuit acknowledged that public college enrollment for African-Americans, Latinos, and American Indian students will decline when Proposition 209 is applied (although Asian-American enrollments will increase). See *id.* at 1435. In addition, and most interestingly, the Ninth Circuit addressed the "political structure" line of cases—*Hunter v. Erickson*, 393 U.S. 385 (1969), *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), and *Crawford v. Board of Education*, 458 U.S. 527 (1982)—and held that the political structure theory did not apply, even in light of potential arguments to the contrary from *Romer v. Evans*, 517 U.S. 620 (1996) (holding Colorado's amendment unconstitutional as violative of equal protection to homosexuals).

2. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Pobresky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994); see also *Coalition for Economic Equity v. Wilson*, 110 F.3d 1431 (9th Cir. 1997).

3. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). Writing his famous dissent, Justice Harlan stated, "The Constitution of the United States does not, I think, permit any public authority the right to know the race of those entitled to be protected in the enjoyment of those rights." *Id.* at 554. In a frequently quoted passage, Harlan later stated, "Our Constitution is color-blind and neither knows nor tolerates classes among citizens." *Id.* at 559.

The "color-blind" ideal has been the theme of a number of books and articles. See ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* vii (1992) (contending that "the evidence I adduce tends strongly to refute any . . . contention" that the Framers intended a color-blind application of the Constitution); Jerome M. Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 171 (1994) (noting that "the Constitution was, in modern constitutional parlance, facially neutral while protecting racial subjugation by private parties and even government entities"); Bryan K. Fair, *Foreword: Rethinking the Colorblindness Model*, 13 NAT'L BLACK L.J. 1 (1993); Anthony P. Griffin, *Is the Diminution of Civil Rights the Road to a Color-blind Society? The Law of Mea Culpa, Notwithstanding*, 21 T. MARSHALL L. REV. 1 (1996) (noting that whites' admission of past mistakes in the area of race should not be used as a justification for refusal to use affirmative race-based measures); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99; Laurence H. Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?* 20 J. MARSHALL L. REV. 201 (1986) (questioning the "race neutralists" who would find race-based preferences presumptively invalid except as a remedy for past discrimination); Brian C. Eades, Casenote, *The United States Supreme Court Goes Color-Blind: Adarand Constructors, Inc. v. Peña*, 29 CREIGHTON L.

Harlan stated that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>4</sup> The adoption of Harlan’s color-blind interpretation of the Constitution would almost certainly eliminate race-based protections and benign racial preferences<sup>5</sup> as unconstitutional.

This Article advocates that courts and legislatures should not read the Constitution as a color-blind document. The Framers never intended to create a color-blind Constitution,<sup>6</sup> nor would such a Constitution accurately reflect the social norms and mores of contemporary American society. Accordingly, this author believes that government institutions should not use the myth of a color-blind Constitution to perpetuate the racial problems of a society that itself has failed to reach color-blind status.<sup>7</sup>

Part II of this Article examines the United States Constitution, as

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REV. 771 (1996) (arguing that all race-based affirmative action programs offend equal protection).

4. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

5. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 203-38 (1995).

6. In fact, at the time of ratification, society used the Constitution’s color distinctions to oppress minorities. *See infra* notes 12-19 and accompanying text.

7. The effects of the color-blind myth are already apparent in the nation’s professional schools. It is illustrative to note that after the University of California eliminated their affirmative action program, the arrival of a sole African-American law student on the University of California’s Boalt Hall campus was cause for a press conference. *See Sole Black Law Student Sees Chance for Change*, PHILA. INQUIRER, Aug. 19, 1997, at 3. Following California’s conversion to color-blind admissions, African-American applications declined by 27%, and only 14% were admitted. The 1997 figures represent a decline of 81% from the 1996 figures. All fourteen students offered admission declined to enroll, leaving Eric Brooks, who had been accepted for 1996 but who had deferred enrollment for one year, as the sole entering African-American at Boalt Hall. Similarly, African-American enrollment at UCLA’s law school declined from nineteen students in 1996 to ten in 1997. At the University of Texas, four African-American students enrolled in 1997, down from thirty-one in 1996. This is essentially the result people predicted. *See Linda Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997).

Based upon statistical analysis of applicants’ LSAT scores and grade point averages, 3% of African-American law school applicants would have been admitted to law schools under a color-blind approach, but, in fact, 26% were admitted. *See id.* at 14. Of 3,435 African-Americans who were accepted to at least one law school in 1990-91, only 687 would have been accepted using a color-blind model based on LSAT and GPA, and only 945 would have been accepted if the LSAT score was excluded from the calculation. *See id.* at 15. Therefore, the result of a color-blind admissions process would be “a law school student body that mirrored the ethnic makeup of law schools of thirty years ago.” *Id.* at 50.

drafted and amended by the Bill of Rights,<sup>8</sup> to show that the Framers never intended the Constitution to be a color-blind document. Additionally, Part II discusses the Reconstruction Amendments in an effort to demonstrate that Congress passed on the opportunity to render the Constitution truly color-blind and instead adopted the lesser standard of equal protection, which explicitly rejects non-discrimination. Part III examines the modern cases—from *Bakke* to *Metro Broadcasting*—in which the Supreme Court often failed to develop a majority opinion, but delineated the level of scrutiny appropriate to race-based remedial measures. Part IV examines the recent Supreme Court case, *Adarand Constructors, Inc. v. Peña*,<sup>9</sup> in which the Court depended in part on the color-blindness theory for dismantling an affirmative action program. Part IV also reviews two lower court decisions that go beyond *Adarand* in the context of affirmative action in academia.

Part V argues that some form of race-based affirmative action is still needed and is constitutionally defensible. It also argues that, in today's society, race is an appropriate proxy both for diversity and for the status of a "victim of discrimination." This Article concludes that there are compelling state interests in maintaining affirmative action programs in academia,<sup>10</sup> that affirmative action programs can be narrowly tailored, and that race-neutral alternatives are not practicable.

## II. THE COLOR-BLIND CONSTITUTION

The Constitution is not a color-blind document. The early drafts of

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8. U.S. CONST., amend. I-X.

9. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

10. Although affirmative action is under attack in a broad spectrum of contexts, this Article focuses on higher education. It does so both because of the recent Court of Appeals decisions in *Podberesky* and *Hopwood*, which, it is argued herein, were wrongly decided, and because the competition for limited seats and scholarship money in academia is a zero-sum game.

Economic game theory thinks in terms of zero-sum games, positive-sum games and negative-sum games. In a zero-sum game, the gains of the winner are offset by the losses of the loser, for a net zero effect. In a positive-sum game—a "win-win situation"—the gains to the winner are greater than the losses of the loser or, alternatively, there are no losers. In a negative-sum game, the losses to the loser are greater than the gains achieved by the winner or, alternatively, there are no winners. See Roger Arnold, *ECONOMICS* (West, 1996).

the Constitution indicate that the Framers' original intent was to create a color-conscious document.<sup>11</sup> In addition, Congress's failure to make the Constitution truly color-blind with the Reconstruction Amendments, and the Court's subsequent failure to use the Constitution to cure the present effects of past discrimination, further support the idea that the Constitution was not designed as a color-blind document.

### A. Original Intent

At the time that it was drafted, the Constitution was not color-blind as to election to Congress<sup>12</sup> or the Presidency.<sup>13</sup> Each member of the House of Representatives was required to have been a "Citizen" for seven years,<sup>14</sup> and each member of the Senate was required to have been a "Citizen" for nine years.<sup>15</sup> The Framers of the Constitution also required that the president have been a natural born citizen or a citizen at the time of the adoption of the Constitution.<sup>16</sup>

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11. For an eloquent discussion of the far-from-color-blind origins of the Constitution, see Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987). Justice Marshall delivered his remarks on May 6, 1987 during the bicentennial celebration of the Constitution. *See id.* at 1. Marshall stated:

Nor do I find the wisdom, foresight, and sense of justice exhibited by the framers particularly profound. To the contrary, the government they devised was defective from the start, requiring several amendments, a civil war and momentous social transformation to attain the system of constitutional government we hold as fundamental today.

*Id.* at 2.

Similarly, Professor Kull has stated:

A blanket prohibition of racial classifications is impossible to locate in a literal reading of the constitutional text, and it has never been acknowledged by the Supreme Court as a requirement of the "equal protection of the laws" guaranteed by the Fourteenth Amendment. Yet the color-blind theme persists nevertheless, forming a seemingly indispensable theme in the constitutional law of race.

KULL, *supra* note 3, at 1; *see also* Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (stating "[a]nd thus the framers, while speaking through the Constitution in an unequivocal voice, at once promised freedom for whites and condemned blacks to slavery")

12. *See* U.S. CONST. art. I, § 2 and § 3.

13. *See* U.S. CONST. art. II, § 1.

14. *See* U.S. CONST. art. I, § 2, cl. 2.

15. *See* U.S. CONST. art. I, § 3, cl. 3.

16. *See* U.S. CONST. art. II, § 1, cl. 5.

These requirements were neutral on their face, but failed to include any persons other than whites as citizens. African-Americans were excluded from citizenship.<sup>17</sup> In fact, the Supreme Court's analysis in *Dred Scott*<sup>18</sup> of the Framers' original intent reveals that a "perpetual and impassable barrier was intended to be erected between the white race and the one they had reduced to slavery."<sup>19</sup>

Furthermore, to maintain this color-conscious barrier, from 1790 to 1870 the Constitution limited naturalization to whites, and from 1870 to 1906,<sup>20</sup> the Constitution limited naturalization to whites and freed slaves.<sup>21</sup> Moreover, the number of Representatives allotted to each state was determined by the number of "free Persons,"

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17. The original intent of the founding fathers was not to include African-Americans as citizens, as the founding fathers believed that African-Americans were of an "inferior order" for whom slavery was a "benefit." See *Dred Scott v. Sanford*, 60 U.S. 393 (1856). In his *Dred Scott* opinion, Chief Justice Taney addressed the question of whether "a negro, whose ancestors were imported into this country, and sold as slaves," *id.* at 403, could become a citizen of the United States. See *id.* Taney relied upon original intent analysis to determine that, at the time the Constitution was adopted, the Framers did not intend blacks to have the potential for citizenship. See *id.* at 410-11. Taney held:

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

*Id.* at 407.

18. 60 U.S. 393 (1856).

19. *Id.* at 409. Indeed, it is "too clear for dispute," that the Declaration of Independence itself, when it declared that "all men are created equal," referred to whites and excluded blacks from the calculus. See *id.* at 410. Although it is beyond the scope of this Article to discuss all of the Framers' true thoughts on slavery, volumes have been written on Jefferson, his writings, his actions, and the discrepancies between the two, including JOSEPH J. ELLIS, *AMERICAN SPHINX, THE CHARACTER OF THOMAS JEFFERSON* (1997). Although Jefferson did propose the end of slavery in the new states in 1800, that failed proposal represented the "high water mark of his anti-slavery efforts, which receded afterward to lower levels of caution and procrastination." *Id.* at 68 (citation omitted). From the time of the writing of the Declaration until his death, Jefferson owned an average of 200 slaves, and he died owning 130. See *id.* at 44, 290. Furthermore, even when writing theoretically about the end of slavery, Jefferson remained a believer in segregation. See *id.* at 147. His views regarding war against the Native Americans were also far from color-blind, directing the mass deportations of eastern tribes to the West. See *id.* at 61-62, 201; see also LEONARD LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963); WINTHROP D. JORDAN, *WHITE OVER BLACK* (1968).

20. See *Ozawa v. United States*, 260 U.S. 178, 192-93 (1922). In *Ozawa*, the debate was whether the explicit exclusions of citizenship for blacks and Indians meant that only the enumerated races were excluded or, rather, that the Framers intended inclusion of whites only.

21. See *id.*

“excluding Indians not taxed” and “three fifths of all other persons.”<sup>22</sup> Thus, it is clear that the Framers’ original intent was to create a color-conscious Constitution.

### *B. The Reconstruction Amendments*

With the introduction of the Thirteenth,<sup>23</sup> Fourteenth,<sup>24</sup> and Fifteenth Amendments,<sup>25</sup> Congress had the opportunity to make the Constitution truly color-blind, but chose not to do so.<sup>26</sup> Congressman Thaddeus Stevens offered language of total non-discrimination for these amendments, but Congress rejected total non-discrimination.<sup>27</sup> The language Congress finally implemented in the amendments was Congressman Bingham’s “equal protection,” which ensured the return of the Slave Codes in the guise of the Black Codes, and the lengthy reign of the Jim Crow laws. Thus, it is clear that Congress did not seek a color-blind Constitution.<sup>28</sup> In addition, when the Supreme Court had the opportunity to interpret “equal protection” in the Fourteenth Amendment, Justice Black noted that the amendment

22. U.S. CONST. art. I, § 2, cl. 3. The question was never whether or not slaves would vote, but, rather, how their existence would impact the distribution of white Congressmen.

23. U.S. CONST. amend. XIII.

24. U.S. CONST. amend. XIV.

25. U.S. CONST. amend. XV.

26. For extensive treatment of the drafters’ intent for the Reconstruction Amendments, see KULL, *supra* note 3, at 53-88.

27. Congressman Thaddeus Stevens proposed the following language (based on the original ideas of Wendell Philips): “All national and State laws shall be equally applicable to every citizen and no discrimination shall be made on account of race or color.” KULL, *supra* note 3, at 73. But Congressman Bingham’s counterproposal of “equal protection” carried the day. See *id.* at 87.

28. See Laurence Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?* 20 J. MARSHALL L. REV. 201, 204 (citing Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 56 (1955)) (“[W]e know, with as much certainty as such matters ever permit, that the Framers of the Fourteenth Amendment did not think ‘equal protection of the laws’ made all racial distinctions in law unconstitutional; they did not intend, for example, to outlaw racially segregated public schools.”).

Just a few weeks after the passage of the Fourteenth Amendment, Congress passed laws guaranteeing funds to “colored schools” and granting city lots for their use. See Act of July 23, 1866, 14 Stat. 216, cited in KULL, *supra* note 3, at 258 n.24. Similarly, in *Bakke*, Justice Marshall pointed out that the same Congress that passed the Fourteenth Amendment passed the Freedman’s Bureau Act, 14 Stat. 173 (1866), which was clearly intended to provide race-conscious relief to former slaves. *Bakke*, 438 U.S. at 396-97 (concurring in the judgment in part and dissenting in part).

“came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves.”<sup>29</sup> Yet it was the intentional ambiguity of “equal protection” that guaranteed that a decision such as *Plessy v. Ferguson*,<sup>30</sup> and the doctrine of “separate but equal,” would eventually arrive.<sup>31</sup>

### C. *Plessy v. Ferguson*

In *Plessy v. Ferguson*,<sup>32</sup> the Supreme Court upheld a Louisiana law that required segregation of black and white train passengers. The law at issue in *Plessy* was, in fact, truly color-blind on its face. The Louisiana law required that intrastate railroad passengers ride in train carriages with members of their own race, thus denying the pleasures of diversity to African-Americans and whites alike.<sup>33</sup> When *Plessy*, seven-eighths white, attempted to sit in the passenger car reserved for whites, and refused to move to the car “used for the race to which he belonged,” he was ejected from the train and arrested by the New Orleans police.<sup>34</sup> According to the Court, the fact that the law did not conflict with the Thirteenth Amendment was “too clear for argument.”<sup>35</sup> The Court found, however, that scrutiny of the law

29. *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970) (Black, J., dissenting). *But cf.* *City of Richmond v. J.A. Croson*, 488 U.S. at 559 (Marshall, J., dissenting). Justice Marshall stated:

The fact is that Congress's concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States would *not* adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads.

*Id.*

30. *See Bakke*, 438 U.S. at 401 (Marshall, J., concurring in part and dissenting in part) (“From *Plessy* to *Brown v. Board of Education*, ours was a Nation where, by law, an individual could be given ‘special’ treatment based on the color of his skin.”).

31. Professor Kull argues that, “A rigorous equality before the law . . . can be enforced only by a rule of nondiscrimination; and nondiscrimination can be secured only by requiring it in terms.” KULL, *supra* note 3, at 66. His conclusions have been amply borne out by the constitutional law of racial discrimination over the ensuing 125 years.

32. 163 U.S. 537 (1896).

33. *See Plessy*, 163 U.S. at 540. In fact, “[n]either in the information nor plea was [*Plessy*’s] particular race or color averred.” *Id.* at 541.

34. *See id.* at 541-42.

35. *Id.* at 542. Justice Brown held that a law which recognized the color of the two races

under the Fourteenth Amendment required greater attention.<sup>36</sup> The Court stated that the Fourteenth Amendment did not ban social distinctions based on race or demand “commingling upon terms unsatisfactory to either.”<sup>37</sup> Justice Brown then delivered the great lie of *Plessy*: segregative laws “do not necessarily imply the inferiority of either race to the other.”<sup>38</sup>

### III. THE STRUGGLE FOR A STANDARD

From *Bakke*<sup>39</sup> to *Adarand*,<sup>40</sup> the modern Court has struggled to articulate the appropriate standard of review for race-based affirmative measures. The myth of a color-blind Constitution has always been at the heart of that debate.

#### A. Regents of the University of California v. Bakke

In *Regents of the University of California v. Bakke*, the Supreme Court held that the University of California at Davis’s quota-based

did not destroy their legal equality or reestablish involuntary servitude. *See id.* at 543.

36. *See id.* at 543.

37. *Id.* at 544.

38. *Id.* Later, Justice Brown added that any such interpretation would be “solely because the colored race chooses to put that construction upon it.” *Id.* at 551. Justice Brown supported his position by noting the constitutionality of separate schools for white and black children and laws forbidding racial intermarriages. *See id.* at 544-55.

As noted above, Justice Harlan stated in dissent, “Our Constitution is color-blind and neither knows nor tolerates classes among citizens.” *Id.* at 559 (Harlan, J., dissenting); *see also supra* note 3. Yet, earlier in the same paragraph, Justice Harlan suggested that:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.

*Id.* Furthermore, Justice Harlan stated that, even if the Constitution is color-blind, the Chinese belong to “a race so different from our own,” that they, like the freed slaves of *Dred Scott*, are not entitled to citizenship. *See id.* at 561; *cf.* Laurence Tribe, *In What Vision of the Constitution Must the Law Be Color-Blind?* 20 J. MARSHALL L. REV. 201, 203 (1986) (“The race neutralists always offer the obligatory quotation from Justice Harlan . . .”). Tribe notes that, “[l]ike most Southern gentlemen of the nineteenth century, Justice Harlan—a former slave owner and originally an opponent of the Thirteenth Amendment—was surely the product of his time.” *Id.* at 203 n.16.

39. *Regents of the University of California v. Bakke*, 438 U.S. 256 (1978).

40. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

admissions program was unconstitutional.<sup>41</sup> The University of California at Davis twice turned down Alan Bakke, a white male, for admission to medical school in the zero-sum battle for one of one hundred available freshman seats.<sup>42</sup> The University rejected Bakke despite the fact that he possessed better objective scores than a number of minority students who were admitted under a special program.<sup>43</sup> Bakke's resulting lawsuit confronted the Court with the issue of whether the school's special admissions program violated the Equal Protection Clause of the Fourteenth Amendment.<sup>44</sup>

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41. See 438 U.S. 265 (1978). In the splintered *Bakke* decision, Justice Powell alone favored strict scrutiny of race-based affirmative action programs, four Justices favored intermediate scrutiny, and the other four Justices failed to reach the constitutional issue. See *id.* Significantly, Justice Powell stated that *Bakke* only failed strict scrutiny because it *totally* foreclosed some non-minority individuals from admission to the university's medical school. See *id.* at 315-20.

42. The University of California at Davis Medical School opened in 1968 with 50 freshman seats, and expanded enrollment to 100 seats in 1971. See 438 U.S. at 272. With no special admissions program for minority or disadvantaged students, the first class contained three Asian-Americans, but no other minorities. See *id.* The faculty created a program over the next two years to aid "disadvantaged" applicants. See *id.* A separate admissions committee with a majority of members from minority groups was formed and pre-screened applicants before sending them on to the general admissions committee. See *id.* at 272-75. The special committee continued to send approved applicants to the general committee until 16 of the 100 seats were filled (8 when there were only 50 seats). See *id.* at 275. Although a substantial number of the special committee applicants were white, only minorities were admitted through the program. See *id.* at 275-76, n.5.

43. See *id.* at 276-77. Alan Bakke applied late in 1973 with a composite score too low (468 on a 500-point scale) to qualify him for admission under the regular program. See *id.* at 276. Although there were still four special admissions seats open, he was not considered for them. See *id.* Bakke complained to the Chairman of the Admissions Committee that the program was a racial or ethnic quota system. See *id.* Bakke reapplied in 1974, and, although he was interviewed by and received a low score from the Chairman to whom he had previously complained, he received a score of 549 on a scale of 600. See *id.* at 277. He was again rejected, although, as was the case the prior year, his scores were significantly higher than those of some special admittees. See *id.*

44. See *id.* at 277-78. Bakke filed suit with the Superior Court of California seeking mandatory injunctive and declaratory relief compelling his admission to the school, arguing that the University was in violation of the Equal Protection Clause of the Fourteenth Amendment, the California Constitution, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964). See *Bakke*, 438 U.S. at 277-78. The trial court found that the admissions procedure was a racial quota and violated the federal Constitution, the California Constitution, and Title VI, but the court did not order Bakke's admission, holding that he had not shown that he would have been admitted but for the quota. See *Bakke*, 438 U.S. at 279.

Upon cross-appeal, the Supreme Court of California took the case directly from the trial court. See 553 P.2d 1152, 1156 (Cal. 1976). Basing its decision on the federal Equal Protection Clause, the California court agreed that the admissions program was a racial quota system,

Justice Powell, writing for a divided Court, stated that the University of California at Davis's admissions policy created a distinction drawn on racial or ethnic lines and, therefore, must be subjected to "the most rigid scrutiny"<sup>45</sup> or "the most exacting judicial examination."<sup>46</sup> Justice Powell began his Constitutional examination<sup>47</sup> by discussing the Fourteenth Amendment's purpose of facilitating "freedom of the slave race."<sup>48</sup> Powell stated that while the landmark race cases "could be characterized as involving discrimination by the 'majority' white race against the Negro minority,"<sup>49</sup> the guarantees of the Equal Protection Clause eventually had come to be extended to all persons.<sup>50</sup>

Accordingly, the Court rejected the Medical School's argument that "benign" discrimination against whites is entitled to a lesser standard of scrutiny than when the white majority discriminates

applied strict scrutiny, and, although it found compelling state interests for the program, judged the program not to be the least intrusive way to achieve those goals. *See Bakke*, 438 U.S. at 279; *see also* 553 P.2d at 1162-66.

45. *Bakke*, 438 U.S. at 291 (citing *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

46. *Id.* However, Powell stated, "[t]hat is not to say that all such restrictions are unconstitutional." *Id.*

47. Justice Powell first held that the medical school's admissions program did not violate Title VI of the Civil Rights Act of 1964. Justice Powell spent little time on the question of whether the admissions program represented a "goal" or a "quota." *Bakke*, 438 U.S. at 285-86. Although the issue was not initially briefed by the parties, the Court requested supplemental briefs on the Title VII issue, so as not to preclude the possibility that the case could be decided on statutory rather than constitutional grounds. *See id.* at 281. The Court assumed for the purposes of *Bakke* that there is a private right of action under Title VI. *See id.* at 284. Justice Powell stated that, although there were some indications from the legislative history that Congress intended Title VI to be a color-blind prohibition on discrimination, Title VI proscribes "only" those racial classifications that violate equal protection. *See id.* at 287. Thus, implicit in this argument is Powell's understanding that the protection afforded by the Fifth Amendment is something less than color-blind non-discrimination. *See id.* at 286-89. Title VI's legislative history revealed a legislative intent to halt federal funding of institutions that "violate a prohibition of racial discrimination similar to that of the Constitution." *Id.* at 284. Furthermore, "although isolated statements of various legislators taken out of context can be marshaled in support of the proposition that § 601 enacted a purely color-blind scheme," *id.*, Justice Powell found that a closer reading intended the lesser standard of constitutional equal protection. *See id.* at 285-87. Implicit in Justice Powell's statement is a key component of this Article's argument—an assumption that equal protection means less than non-discrimination.

48. *Bakke*, 438 U.S. at 291 (citing *Slaughter-House Cases*, 16 Wall. 36, 71 (1873)).

49. *Id.* at 294.

50. *See id.* at 292. But Justice Powell cited exclusively in this passage to cases offering equal protection to victimized minorities: Irish, Chinese, Japanese, and Mexican-Americans. *See id.*

against minorities.<sup>51</sup> The Court found that of the four justifications the Medical School offered for its race-based admissions policy,<sup>52</sup> only the goal of attaining a diverse student body was compelling.<sup>53</sup> After finding the diversity interest to be compelling, the Court turned to the question of whether the Medical School's race-based admissions program was necessary to achieve its goal of a diverse student body. The Court found that the University's program failed to withstand strict scrutiny because race was the sole criterion the University used in its search for a diverse student body.<sup>54</sup> Nonetheless, Justice Powell clearly indicated that race may be a "plus" factor in admissions decisions, and cited with approval two university admissions programs using race as a factor.<sup>55</sup> Thus, according to Justice Powell, an admissions program that uses race merely as a "plus" will withstand even strict scrutiny.<sup>56</sup>

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51. *See id.* at 294-95.

52. *See id.* at 306-11. Justice Powell stated that preferring the members of a group solely for their race or ethnicity is constitutionally impermissible. *See id.* at 307. The Court has allowed such classification at the expense of innocent individuals only when there has been a statutory or constitutional violation. *See id.* Justice Powell found that the Medical School had failed to prove its contention that minority doctors would serve underserved minority communities. *See id.* at 310. Furthermore, Justice Powell stated that there are better criteria than race to use in identifying willingness to practice medicine in minority communities. *See id.* at 310-11.

53. *See id.* at 311-12. Powell stated:

This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

*Id.* Justice Powell found support for this proposition in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). *See Bakke*, 438 U.S. at 313-14.

54. *See Bakke*, 438 U.S. at 314-15.

55. *See id.* at 316-17. Justice Powell cited to Harvard's admissions program in which "race has been a factor in some admissions decisions." *Id.* at 316 (citing amici curiae brief for Columbia University, Harvard University, Stanford University and the University of Pennsylvania at 2-3). Powell also referenced Princeton University's admissions program in which "race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished—and against what odds." *Id.* at 317, n.51 (citing Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY, Sept. 26, 1977, at 7, 9). Thus, Justice Powell stated, "[I]n such an admissions program [as Harvard's], race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317 (footnote omitted).

56. *See id.*

Justice Brennan, concurring in the judgment in part and dissenting in part, asserted that the "central meaning" of *Bakke* was that "government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area."<sup>57</sup> Justice Brennan found that, in light of the history of discrimination in the United States, color-blind remedies would not effectively remedy segregation.<sup>58</sup> Brennan found that remedying the effects of past societal discrimination was substantially related to the achievement of important governmental objectives.<sup>59</sup> Brennan noted that past discrimination had resulted in a predominantly white medical community in the United States.<sup>60</sup> More importantly, the lingering effects of past discrimination still acted as a handicap to African-American medical school applicants.<sup>61</sup> Justice

57. *Id.* at 325.

58. *See id.* at 327 ("Against this background, claims that law must be color-blind or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as a description of reality."). Note that Brennan would allow race-based measures to remedy societal discrimination, as opposed to discrimination by the specific governmental actor applying the remedy:

This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot—and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds—let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

*Id.* at 327.

59. *See id.* at 259, 362. It is important that Justice Brennan focused on *societal* discrimination rather than discrimination particular to the state actor seeking to impose a race-based remedial measure, because the latter analysis, when coupled with the strict scrutiny standard now utilized for all race-based measures, raises the standard near—if not beyond—the fatal-in-fact standard of *Podberesky* and *Hopwood*.

60. *See id.* at 369-70.

61. *See id.* at 372. Brennan opined that:

[T]he conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of *de jure* segregation, the resistance of *Brown I*, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination and yet come to the starting line with an education equal to whites.

*Id.*

Brennan found that the Medical School's program did not stigmatize any group, that race was reasonably used in light of the program's objectives,<sup>62</sup> and that it only gave preferences to minority applicants that had faced disadvantages.<sup>63</sup> Finally, he noted that the program was not violative of the Constitution just because there was a set-aside for a predetermined number of students, rather than the use of race as a mere "factor."<sup>64</sup> Justice Brennan opined that, for constitutional purposes, there is no difference between the two approaches.<sup>65</sup> Thus, Justice Brennan would have upheld the University's admission policies as constitutional.<sup>66</sup>

In *Bakke*, Justice Marshall's opinion began by stating the central hypocrisy of the color-blindness argument:

For it must be remembered that, during most of the past 200 years, the Constitution as interpreted by this Court did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.<sup>67</sup>

Justice Marshall cataloged the history of racial discrimination against African-Americans in America<sup>68</sup> and concluded that, "[t]he

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62. *See id.* at 373-74.

63. *See id.* at 377. Brennan stated that other minority applicants who were not disadvantaged would have to gain acceptance through the regular admissions program. *See id.*

64. *Id.* at 378. Justice Brennan avoided the use of the word "quota" here. Had Brennan been able to convince Justice Powell that the program as administered did not constitute an impermissible quota, it appears he could have marshaled a five-justice majority.

65. *See id.* at 379.

66. *See id.* at 378.

67. *Id.* at 387 (Marshall, J., concurring in part and dissenting in part). Similarly, "it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible." *Id.* at 400.

68. *See id.* at 388-94. Justice Marshall began with the Southern delegation's demand that Thomas Jefferson remove passages from the Declaration of Independence criticizing the King of England for participation in the slave trade. *See id.* at 388. Marshall stated, "The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution . . ." *Id.* at 389. Marshall then examined the Court's opinion in *Dred Scott*, and detailed the initial failure of the Thirteenth, Fourteenth and Fifteenth Amendments to protect African-Americans. *See id.* at 389-94. Marshall noted that "[b]y narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights." *Id.* at 391.

position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro."<sup>69</sup> In light of the nation's history of discrimination, Justice Marshall would have held race-based remedial measures to be a state interest "of the highest order."<sup>70</sup>

Similarly, Justice Blackmun's opinion noted the small number of African-American professionals in the United States during the 1970s<sup>71</sup> and agreed that affirmative action programs would one day be rendered unnecessary.<sup>72</sup> Blackmun argued that many highly qualified applicants were denied admission to medical school,<sup>73</sup> and that outside the context of race, admissions decisions were already being made on the basis of preferences.<sup>74</sup> Furthermore, Blackmun argued that admissions decisions are within the competence of educational institutions, not courts.<sup>75</sup> Finally, Blackmun noted that the Fourteenth Amendment, although enlarged in its scope of application, had not "broken away from its moorings and its original intended purposes," which remain the protection of African-Americans from discrimination.<sup>76</sup> As a result, Blackmun opined that "real world" race-based measures were currently necessary to combat racism.<sup>77</sup> He agreed with Justice Marshall that Davis's admissions program met the constitutional criteria.

### B. *Fullilove v. Klutznick*

In *Fullilove v. Klutznick*,<sup>78</sup> the Supreme Court struggled with the proper test to apply to a flexible, congressionally-created affirmative

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69. *Id.* at 395.

70. *Id.* at 396.

71. *See id.* at 403 (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun noted that less than 2% of physicians, attorneys, and medical and law students were minorities.

72. *See id.* at 403.

73. *See id.*

74. *See id.* at 404.

75. *See id.*

76. *See id.* at 405.

77. *See id.* at 403.

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

action program that, unlike the program in *Bakke*, did not involve a quota.<sup>79</sup> Chief Justice Burger, writing for a plurality of three, explicitly stated that nothing requires Congress to act in a color-blind fashion.<sup>80</sup> While Chief Justice Burger did not delineate the applicable standard of review, he held that the federal minority business enterprise program at issue in *Fullilove* would pass either the strict scrutiny standard or the intermediate scrutiny standard.<sup>81</sup> Chief Justice Burger noted that the Court grants paramount deference to the opinions of Congress.<sup>82</sup> It is important to note that the Court examines education cases differently than it examines cases involving federal statutes.<sup>83</sup> Therefore, the standard of review the Court applied

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79. "The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity." *Id.* at 473. *Fullilove's* fact pattern was similar to that which the Court would face fifteen years later in *Adarand*. *See id.* at 473. The Public Works Employment Act of 1977 required that 10% of federal grants for local works projects be used to buy goods or services from "minority business enterprises" (MBEs). The statute defined an MBE as a business owned at least 50% (51% in the case of publicly owned businesses) by people who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.* at 454 (quoting 42 U.S.C. § 6705(F)(2) (Supp. II 1976). Congress adopted the plan because, although there were qualified minority businesses available to do public works projects, they accounted for an "inordinately small percentage of government contracting [because of]. . . the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities . . ." *Id.* at 463.

80. *See id.* at 482 ("As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion." (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971))).

81. *See id.* at 492. Justice Burger's opinion, however, relied upon the fact that the Court was reviewing an Act of Congress, stating, "[h]ere we are not dealing with a remedial decree of a court but with the legislative authority of Congress." *Id.* at 480.

82. *See id.*

83. *See Fullilove*, 448 U.S. at 519 (Marshall, J., concurring). In addition to the majority opinion, three Justices wrote a concurring opinion in which they applied intermediate scrutiny and found the plan constitutional. The Justices differed on *Bakke's* effect on the holding, with Chief Justice Burger disavowing any reliance thereon, stating, "This opinion does not adopt, either expressly or implicitly, the formulas or analysis articulated in such cases as [*Bakke*]." *Id.* at 492 (opinion of Burger, C.J.). Justice Powell applied the same strict scrutiny standard for which he was the sole advocate in *Bakke*, but found that the measure in *Fullilove* was nonetheless justified as serving the compelling interest of eradicating the effects of past wrongs. *See id.* at 496. Justice Marshall (with whom Justices Brennan and Blackmun joined) reiterated his opinion from *Bakke* that racial classifications which provide benefits to minorities in order to remedy the effects of past discrimination are appropriate. *See id.* at 517-18 (Marshall, J., concurring).

In contrast, Justice Stewart's dissent, in which Justice Rehnquist joined, argued for a color-blind application of the Equal Protection Clause. Justice Stewart stated that the Framers of the Constitution "set out to establish a society that recognized no distinctions among *white men* on

in *Fullilove* may not transfer well into affirmative action cases involving education.

### C. United States v. Paradise

In *United States v. Paradise*,<sup>84</sup> the United States Supreme Court upheld the constitutionality of a temporary one-black-for-one-white promotion scheme for Alabama state troopers.<sup>85</sup> The district court ordered the color-conscious promotion scheme after finding that the Alabama Department of Public Safety had engaged in blatant racial discrimination for nearly four decades and had blatantly resisted court-ordered desegregation for more than a decade.<sup>86</sup> While the

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account of their birth." *Id.* at 531 n.13 (Stewart, J., dissenting) (emphasis added). Rather than finding color-blindness in the original document, Justice Stewart found the "seeds" of color-blindness in Jefferson's Declaration of Independence. *See id.*

Justice Stevens's dissent ranged from 18th century France to Nazi Germany to find reasons why the preference for MBEs was unconstitutional. *See id.* at 532 (Stevens, J., dissenting). Justice Stevens analogized the harms possible when characterizing on the basis of race with the economic consequences of using noble birth as a basis for classification in Eighteenth Century France and the Citizenship Law of Nazi Germany and its complex definition of a "Jew." *See id.* at 533, 534 n.5. However, to argue equality between the Public Works Employment Act's less-than-perfect definition of the ethnic groups considered in determining MBE status with Nazi Germany's determination of who should be considered a Jew for extermination purposes is a sadly inadequate analogy. Indeed, it would be confusing a "fit of spite" for a "Kulturkampf," to paraphrase Justice Scalia. *See Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

In what appears to be an attack on *Fullilove*'s lack of narrow tailoring, Justice Stevens argued that discrimination against African-Americans cannot justify discrimination against Eskimos and Indians who "had an opportunity to exploit America's resources before the ancestors of most American citizens arrived." *Id.* at 538. He also noted that those who speak Spanish came voluntarily, often "without invitation," *Id.* at 538, and that the Aleuts were "ruthlessly exploited" by the Russians. *See id.* at 538 n.8.

84. *United States v. Paradise*, 480 U.S. 149 (1987).

85. *See id.* at 153.

86. *See id.* In 1972, a district court found that, in thirty-seven years, there had never been an African-American Alabama state trooper. *See id.* at 154. In 1979, the court found that none of the 232 troopers with a rank of corporal or higher were African-American. *See id.* Only after eleven years of local failure to act did the district court order the remedy of one-for-one promotions. *See id.*

Although facially strict, the one-for-one requirement contained a number of mitigating provisions. First, the requirement would be terminated when 25% of the troopers were African-American. *See id.* at 154-55. Second, the requirement could be waived if no qualified African-Americans were available for existing openings. *See id.* at 177. Third, the provision did not require the layoff or firing of any whites. *See id.* at 182. Finally, the requirement would be dropped as soon as the Alabama Department of Public Safety put forth a nondiscriminatory

Supreme Court did not specify the appropriate level of scrutiny, Justice Brennan stated that the district court's plan would pass even strict scrutiny.<sup>87</sup> The Court held that the scheme would survive even the highest level of scrutiny because the district court's plan was narrowly tailored and served a compelling governmental interest.<sup>88</sup> The Court noted that remedying past and present discrimination by a state actor is unquestionably a compelling governmental interest.<sup>89</sup>

However, in her dissent, Justice O'Connor argued that "the Court adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny."<sup>90</sup> Justice O'Connor argued that a "rigid quota" could not be considered narrowly tailored because there was no evidence that it was necessary to erase the effects of the Department's delay.<sup>91</sup> Justice O'Connor also found that more benign alternatives were available.<sup>92</sup> Moreover, Justice O'Connor would have required the district court to articulate its reasons for rejecting the more benign alternatives.<sup>93</sup>

#### D. City of Richmond v. J.A. Croson

In *City of Richmond v. J.A. Croson*,<sup>94</sup> the Supreme court held that the City of Richmond's Minority Business Utilization Plan (the "Plan") was unconstitutional.<sup>95</sup> Richmond had designed the Plan in 1983 to increase business among Minority Business Enterprises

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hiring and promotion procedure, as had been ordered in 1972. *See id.* at 178.

87. *See id.* at 166-67.

88. *See id.*

89. *See id.*

90. *Id.* at 197 (O'Connor, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined in the dissent. African-American troopers still find vestiges of racism in the system today. *See* Gita M. Smith, *Blacks See Slow Gains Since '87 Court Victory*, ATLANTA J. & CONST., Feb. 25, 1997, at B1. Leon Hampton, who became the first African-American Alabama state trooper in 1972, argues that percentage gains by African-Americans have more to do with an overall reduction in force than with African-American promotions. *See id.* Although a consent decree required that there be 30% African-American participation among new recruits, the last two new classes only contained 8% African-Americans.

91. *See Paradise*, 480 U.S. at 187. Apparently, even a 37-year delay could not justify a temporary "quota."

92. *See id.* at 198-99.

93. *See id.* at 199-200.

94. 488 U.S. 469 (1989).

95. *See id.* at 511.

("MBEs").<sup>96</sup> In holding the Plan unconstitutional, the Court noted the Plan was not narrowly tailored to remedy the effects of past discrimination,<sup>97</sup> and that the city had failed to demonstrate a compelling governmental interest.<sup>98</sup> The Court also noted that Richmond had not been even a "passive participant" in the system of racial exclusion in the local construction industry.<sup>99</sup>

The Court further noted that Richmond had failed to attempt race-neutral alternatives before enacting the Plan.<sup>100</sup> The Court also stated that the Plan failed the narrow-tailoring test because it was unrealistic to assume that minorities would choose the construction trade in proportion to their numbers in the population.<sup>101</sup> In other words, the city had no reason to expect that its Plan would successfully remedy the past effects of discrimination in the construction industry.<sup>102</sup> Finding that the city failed to demonstrate a compelling governmental interest for the Plan, Justice O'Connor reiterated that affirmative action programs, unless "strictly reserved for remedial settings," "promote notions of racial inferiority" and create racial hostility.<sup>103</sup> The Court found that the construction industry in Richmond was not such a remedial setting, and, thus, the city was wrong in relying on general findings of discrimination in the entire construction

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96. *See id.* at 478. Richmond, with an African-American population of 50%, had awarded only 0.67% of its contracts to minorities between 1978 and 1983 and had virtually no minority members in its contractors' associations. *See id.* at 479-80.

97. *See id.* at 507-08.

98. *See id.* at 505.

99. *See id.* at 492.

100. *See id.* at 507. O'Connor did not explain why Richmond could not conclude, based on the federal attempts at race-neutral measures, that race-neutral alternatives would also be futile at the local level.

101. *See id.* at 507-08 (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part) (stating that members of a race will not gravitate to a given profession proportionately with "mathematical exactitude").

102. *See id.*

103. *Id.* at 493. Justice O'Connor then turned to an aspect of the case that was novel before the Court, noting that one of the justifications for allowing a less stringent standard than strict scrutiny in the case of "benign" racial classifications is that they represent a choice by the dominant majority to act against their own self-interest. *See id.* at 495. Richmond's nine-seat City Council, which adopted the Plan, had a five person African-American majority. *See id.* But the vote was not made purely along racial lines. *See id.* at 555 (Marshall, J., dissenting). One of the white councilmen voted in favor of the Plan, one abstained, and two voted against it. *See id.* Furthermore, in recent years, the white and African-American members of the council had "increasingly joined hands on controversial matters." *Id.* at 554.

industry.<sup>104</sup> Reliance on the generalized assertion that there had been past discrimination in an entire industry gave Richmond no guidance as to how to determine the “precise scope of the injury it [sought] to remedy.”<sup>105</sup>

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104. *See id.* at 498. The relevant number of African-Americans was, to Justice O'Connor, not the 50% African-American population of Richmond, but, rather, the pool of qualified MBE contractors. *See id.* at 501-02. O'Connor stated, “Blacks may be disproportionately attracted to industries other than construction.” *Id.* at 503. O'Connor concluded that “in sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry.” *Id.* at 505. Therefore, there was no compelling state interest. *See id.*

105. *Id.* at 505. In an opinion in which he concurred in part and concurred in the judgment, Justice Stevens disagreed with O'Connor's position that racial classifications are only permissible as a remedy for past wrongs. *See id.* at 511 (Stevens, J., concurring in part and concurring in the judgment). Justice Stevens referred to his *Wygant* dissent in which he stated that, “even if we completely disregard our history of racial injustice, race is not always irrelevant in sound governmental decisionmaking.” *Id.* at 512 (citing *Wygant*, 476 U.S. at 313-15). However, Justice Stevens agreed with Justice O'Connor that the Plan benefited persons who were not victims of discrimination and that the Plan imposed a stigma on its beneficiaries. *See id.* at 515-16.

Justice Kennedy also concurred in part and concurred in the judgment, concluding that, although “the moral imperative of racial neutrality is the driving force of the Equal Protection Clause,” racial preferences should not be automatically invalid. *Id.* at 518-19 (Kennedy, J., concurring in part and concurring in the judgment).

Justice Scalia, who concurred only in the judgment, would have gone beyond Justice O'Connor to hold that state and local governments may never discriminate on the basis of race to remedy the effects of past discrimination. *See id.* at 520 (Scalia, J., concurring in the judgment). Later, Justice Scalia stated that a State could use race to undo the effects of its own unlawful racial classification, such as giving raises to minority employees after it had denied them raises on the basis of race in the past. *See id.* at 524. Scalia concluded:

Racial preferences appear to “even the score” (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.

*Id.* at 528.

Justice Marshall, writing for himself and Justices Brennan and Blackmun, found “deep irony” in the fact that the majority had second guessed the City of Richmond's judgment on the issue of past discrimination in its construction industry. *See id.* at 529 (Marshall, J., dissenting). The majority did so despite the fact that “a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination.” *Id.* Marshall stated that failure to see this discrimination “blinks credibility,” *id.* at 541, and “does violence” to the principles of comity in the federal system. *See id.* at 543-44. Cases in which the city's discriminatory past was revealed included *Richmond v. United States*, 422 U.S. 358 (1975), in which the city attempted to annex white majority county land in order to maintain white political control when the racial composition of the city approached 50%, and *Bradley v. School Board of Richmond*, 412 U.S. 92 (1973), in which the Court reviewed Richmond's inadequate compliance with *Brown v. Board of Education*. Moreover, Marshall's opinion suggested that the city was well aware of the nationwide information on racial

### E. Metro Broadcasting, Inc. v. FCC

In *Metro Broadcasting, Inc. v. FCC*,<sup>106</sup> in what can be described as Justice Brennan's last stand,<sup>107</sup> a five-Justice majority held that "benign" race-based classifications enacted by Congress must be subjected to intermediate scrutiny.<sup>108</sup> The Court stated that classifications would withstand such scrutiny if they did not "impose undue burdens on non-minorities."<sup>109</sup> At issue in *Metro Broadcasting* were two FCC policies.<sup>110</sup> The policies favored minority<sup>111</sup> owned businesses applying for radio and television broadcast licenses.<sup>112</sup> In upholding the policies, Justice Brennan took pains to detail the lack of minority ownership of radio and television stations<sup>113</sup> and to note that the FCC only adopted race-conscious methods of achieving diversity after other methods had been tried and failed.<sup>114</sup>

Holding that the Court's prior decision in *Fullilove*<sup>115</sup> supported less than strict scrutiny in the constitutional analysis of

discrimination in the construction industry that Congress had gathered prior to adopting the MBE set-aside. *See id.* at 533-34. Justice Marshall found two compelling state interests: eradicating the effects of past racial discrimination and preventing the city's own spending from perpetuating the discriminatory pattern established in the past. *Id.* at 536-37.

Finally, Justice Marshall found the MBE plan to be narrowly tailored. *See id.* at 548. He took issue with the Court's decision to apply strict scrutiny to a race-conscious remedial measure because "discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society." *Id.* at 552 (Marshall, J., dissenting).

106. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990). For a critical race theorist's critique of *Metro Broadcasting*, see Patricia J. Williams, *Metro Broadcasting v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

107. This was Brennan's last opinion before retiring. He was replaced by President Bush's nominee David Souter and then saw his *Metro Broadcasting* opinion overruled in *Adarand*.

108. *See* 497 U.S. at 596-97.

109. *Id.*

110. *See id.* at 552. First, the program awarded "enhancement" for minority status in the competitive application process for new licenses, and, second, the program required that certain "distress sale" transfers of existing radio and television stations be made only to minorities. *See id.*

111. Minorities were defined by the FCC as "Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *Id.* at 553 n.1.

112. *See id.* at 556-58.

113. Although in 1986 minorities made up at least 20% of the population, they owned only 2.1% of the 11,000 radio and television stations in the United States. *See id.* at 553.

114. *See id.* at 554-56. The FCC had evaluated its policies and attempted other solutions in 1969, 1971, and 1978. *See id.* at 554 n.3, 555-56.

115. 448 U.S. 448 (1980).

congressionally mandated race-based programs,<sup>116</sup> Justice Brennan announced a more flexible standard:

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.<sup>117</sup>

Justice Brennan held that Congress’s interest in enhancing broadcast diversity was “at the very least, an important governmental objective”<sup>118</sup> in the context of radio and television programming.<sup>119</sup> Such an interest was sufficient to uphold the FCC’s minority ownership policies.<sup>120</sup>

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116. Justice Brennan held that *Fullilove* stood for the proposition that all congressionally mandated programs were entitled to a greater degree of deference than that provided by strict scrutiny, rather than just those congressional programs enacted pursuant to section five of the Fourteenth Amendment. See *Metro Broadcasting*, 497 U.S. at 563.

117. *Id.* at 564-65 (footnotes omitted).

118. *Id.* at 567.

119. The beneficiaries of this diversity were not only the minority groups given access to the airwaves, but also the members of the viewing and listening audiences. See *id.* at 568.

120. See *id.* Justice O’Connor would have applied strict scrutiny to *Metro Broadcasting*, arguing that *Fullilove*’s holding depended on Congress’s unique powers under section five of the Fourteenth Amendment. See *id.* at 606-07 (O’Connor, J., dissenting). To Justice O’Connor, “Benign’ racial classification is a contradiction in terms,” *id.* at 609, and the Court misplaced confidence in its own ability to distinguish between good and bad governmental uses of race. See *id.* The Court’s *Metro Broadcasting* decision attracted a great deal of critical commentary. See, e.g., Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990). Professor Fried, then United States Solicitor General, authorized the *amicus curiae* briefs of the United States in *Metro Broadcasting*, and was the principal signatory of the government briefs in *Croson* and *Wygant*. See *id.* at 107. To Professor Fried, “the Court turned away from its past understandings” in *Metro Broadcasting* by applying intermediate scrutiny, *id.* at 113, and thereby introduced “uncertainty and instability into the law.” *Id.* at 123.

## IV. THE COURTS GO COLOR-BLIND

## A. Adarand Constructors, Inc. v. Pena

In *Adarand Constructors, Inc. v. Pena*,<sup>121</sup> the Court overruled its decision in *Metro Broadcasting*<sup>122</sup> and held that race-based classifications are constitutional only if they are “narrowly tailored measures that further compelling governmental interests.”<sup>123</sup> The Court’s holding in *Adrand* thus resolved all existing ambiguities by making strict scrutiny the standard of review for all race-based programs. Hence, strict scrutiny applies to a raced-based program regardless of whether the program is state or federal, and regardless of whether it benefits the racial majority or minority.<sup>124</sup>

In *Adarand*, Adarand Constructors, Inc. sued the federal government when congressionally created preferences resulted in the award of a guardrail subcontract to the minority-owned Gonzales Construction Company.<sup>125</sup> Gonzales was awarded the project despite the fact that Adarand had submitted the lowest bid for the project.<sup>126</sup>

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121. 515 U.S. 200 (1995). The case has already generated a good deal of commentary. See, e.g., Lino A. Graglia, Podberesky, Hopwood and Adarand: *Implications for the Future of Race-Based Programs*, 16 N. ILL. U.L. REV. 287 (1996); Brain C. Eades, casenote, *The United States Supreme Court Goes Color-Blind: Adarand Constructors, Inc. v. Pena*, 29 CREIGHTON L. REV. 771 (1996); Margaret A. Sewell, Note, *Adarand Constructors, Inc. v. Pena: The Armageddon of Affirmative Action*, 46 DEPAUL L. REV. 611 (1997) (arguing that *Adarand* was wrongly decided and that Justice O’Connor’s majority opinion created a new level of scrutiny between traditional strict scrutiny and intermediate scrutiny).

122. See 515 U.S. at 227.

123. *Id.*

124. See *id.*

125. See *id.* at 205.

126. See *id.* The prime contractor, Mountain Gravel & Construction Company, received additional compensation if it hired subcontractors certified as small businesses controlled by “socially and economically disadvantaged individuals.” *Id.* Gonzales was certified; Adarand was not. See *id.* Mountain Gravel would not have chosen Gonzales but for the additional compensation. See *id.* Under the relevant statutory provision, social and economic disadvantage could be manifest in a person of any race, but the contractor was allowed to presume such disadvantage in the case of African American, Hispanic American, Native American, Asian Pacific Americans and other minorities. See *id.* (citing section 8(a) of the Small Business Act, 15 U.S.C. §§ 637(d)(2)(3) (1994)). The Act defines “socially disadvantaged individuals” as those individuals who are subject to racial or ethnic prejudice or cultural bias, and defines “economically disadvantaged individuals” as those individuals who are socially disadvantaged individuals with a diminished ability to compete in the free enterprise system. See *id.* at 206 (quoting 15 U.S.C. § 637(a)(5), (a)(6)(A)).

Adarand Constructors argued that the government's use of race-based presumptions in their project award process violated the equal protection component of the Fifth Amendment's Due Process Clause.<sup>127</sup>

The parties agreed that some degree of heightened scrutiny was appropriate.<sup>128</sup> They disagreed, however, on exactly what level of heightened scrutiny the Court should apply.<sup>129</sup> Because the case was brought under the Fifth Amendment, the Court first re-examined the differing levels of scrutiny it had applied under the Fifth Amendment and the Fourteenth Amendment.<sup>130</sup> The Court ultimately found that the levels of scrutiny it applied to the two Amendments were indistinguishable.<sup>131</sup> Thus, the Court found that the same level of

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The compensation provision at issue in *Adarand* was one of a number of provisions designed to provide such individuals with not less than 5% of subcontracts. *See id.* at 206 (citing 15 U.S.C. §§ 637(a)(5), (d)(3)(C), 644(g)(1)). However, non-minorities could prove disadvantaged status on the basis of "clear and convincing evidence," and the presumption of disadvantage enjoyed by minorities could be rebutted by third persons. *See id.* at 207-08 (citing 13 C.F.R. §§ 124.105(e), 124.111(c)-(d), 124.601-124.609 (1994)). The contract at issue was also covered by the Surface Transportation and Uniform Relocation Assistance Act of 1987, which required that not less than 10% of funds go to disadvantaged individuals. *See id.* at 208 (citing Pub. L. No. 100-17, § 106, 101 Stat. 132, 145-56 (1987)). This Act included the race-based presumptions and added women to the group entitled to a presumption of disadvantaged status. *See* § 106(c)(2)(B), 101 Stat. at 146. As with the Small Business Act, the presumption of disadvantage could also be rebutted by third persons. *See* 49 C.F.R. § 23.69 (1994).

127. *See Adarand*, 515 U.S. at 204. The district court granted the government's motion for summary judgment. *See id.* at 210 (citing *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992)). The United States Court of Appeals for the Tenth Circuit affirmed. *See id.* (citing *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994)). The Circuit Court read *Fullilove* as having adopted "a lenient standard, resembling intermediate scrutiny in assessing" federal race-based measures, and further held that *Metro Broadcasting* had refined this lenient standard. 515 U.S. at 210 (citing 16 F.3d at 1544-47). *Adarand* sought declaratory and injunctive relief against any future use of the race-based presumptions. *See id.* at 210. The Supreme Court held that *Adarand* had standing to seek such relief because *Adarand* would bid on other government contracts in the relatively near future, and would likely have to compete against "small disadvantaged businesses." *Id.* at 211-12.

128. *See id.* at 213.

129. *See id.*

130. *See id.* The Court stated that "[o]ur cases have accorded varying degrees of significance to the differences in the language of those two clauses. We think it necessary to revisit the issue here." *Id.* at 213.

131. *See id.* at 217. Justice O'Connor's analysis began with the Court's early rejection of an equal protection component of the Fifth Amendment. *See id.* at 214 (citing, *inter alia*, *LaBelle Iron Works v. United States*, 256 U.S. 377, 392 (1921) ("The Fifth Amendment has no equal protection clause.")). However, Justice O'Connor stated that the Court "explicitly questioned" the difference between the federal government's obligations under the Fifth and

scrutiny applies to actions undertaken by state governments and the federal government.<sup>132</sup>

Having found that the federal government's equal protection obligations are the same as those of the states, Justice O'Connor turned to the heart of the case—whether race-based governmental actions should be subjected to strict scrutiny when benefitting historically disadvantaged groups.<sup>133</sup> After examining the Court's fractured decisions in *Bakke*,<sup>134</sup> *Fullilove*,<sup>135</sup> *Wygant*,<sup>136</sup> *Paradise*,<sup>137</sup> and *J.A. Croson*,<sup>138</sup> O'Connor gleaned three principles the Court should look to: (1) "skepticism" of any race-based preference, (2) "consistency"<sup>139</sup> of review regardless of the race benefited or burdened, and (3) "congruence" between the equal protection guarantees of the Fifth and Fourteenth Amendments.<sup>140</sup>

In light of these principles, Justice O'Connor stated that the

Fourteenth Amendments in 1954, *see id.* at 217 (citing *Bolling v. Sharp*, 347 U.S. 497 (1954)), and ultimately came to hold that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Id.* (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

132. *See* 515 U.S. at 217 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)).

133. *See id.*

134. *See id.* at 218 (citing *Bakke*, 438 U.S. 265 (1978)). Justice O'Connor noted that *Bakke* yielded no majority opinion, but that Justice Powell, author of the judgment, would have applied strict scrutiny. *See id.* (citing 438 U.S. at 291). Four other Justices in *Bakke* advocated an intermediate level of scrutiny. *See id.* (citing 438 U.S. at 359).

135. *See id.* at 219 (citing *Fullilove*, 448 U.S. 448 (1980)). Justice O'Connor noted that this first test of federal race-based affirmative action adopted none of the *Bakke* proposals, but, rather, the two-part test of whether the objectives were within the scope of Congress's power and whether the means to achieving those objectives were constitutionally permissible. *See id.* (citing 438 U.S. at 473, 492).

136. *See id.* at 220 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986)). In *Wygant*, which involved the actions of a local school board, Justice Powell held that strict scrutiny must be applied regardless of the race of the benefited or burdened individuals. *See id.* at 220 (citing *Wygant*, 476 U.S. at 273-74).

137. *See id.* at 221 (citing *United States v. Paradise*, 480 U.S. 149, 166 (1987)).

138. *See id.* (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)). Justice O'Connor stated that uncertainty as to the proper analysis of race-based remedial affirmative action was resolved "at least in part" in *Croson*. *Id.* at 221-22 (quoting *Croson*, 488 U.S. at 493-94) ("[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification . . .").

139. One aspect of the Court's affirmative action decisions is remarkably consistent: every action has been brought before the Court by a white individual. *See* David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99. But note that if the Court had granted *certiorari* in *Podberesky*, this string would have been broken, as Mr. Podberesky is Hispanic.

140. *See Adarand*, 515 U.S. at 223-24.

Court's *Metro Broadcasting* decision was a "surprising turn."<sup>141</sup> Justice O'Connor found *Metro Broadcasting* to have ignored the Court's precedent<sup>142</sup> and, thus, pronounced it overruled.<sup>143</sup> Justice O'Connor found that there was appropriate justification for this departure from *stare decisis*<sup>144</sup> and proceeded to overrule *Fullilove* as well.<sup>145</sup> The Court then vacated the appellate court's judgment in *Adarand*, and remanded the case to the district court.<sup>146</sup> The district court was thus instructed to determine whether the Government's use of subcontractor compensation clauses could survive strict scrutiny.<sup>147</sup>

Justice Scalia concurred in the judgment, but declined to join in Part III-C of Justice O'Connor's majority opinion because of his belief that racial preferences can never survive strict scrutiny.<sup>148</sup> He stated that "government can never have a 'compelling interest' in

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141. *Id.* at 225.

142. *See id.* at 226. *Metro Broadcasting* "turned its back" on *Croson*'s holding in applying intermediate scrutiny to the "benign" racial classification at issue and "squarely rejected" the congruence between Court analysis of state and federal race-based measures. *See id.*

143. *See id.* at 227.

144. *See id.* at 231-32. Justice O'Connor held that the approach of prior case law was "intrinsically sounder" than the departure that *Metro Broadcasting* represented. *See id.* at 231 (citing *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). Furthermore, Justice O'Connor opined that following *Metro Broadcasting* would "simply compound the recent error . . ." *Id.* at 231.

This reasoning provided the "special justification" needed to depart from the doctrine of *stare decisis*. *See id.* (citing *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); cf. George S. Swan, *The Political Economy of State Democracy: Romer v. Evans*, 7 SETON HALL CONST. L. J. 1, 32 n.229 (noting Justice Scalia "mocking his fellow Justices [in *Romer*] for . . . ignoring inconvenient precedent"). But see *Romer v. Evans*, 517 U.S. 620, 640 (1996) (Scalia, J., dissenting) (attacking the Court's departure from precedent "to suit current fashion").

145. *See id.* at 235 ("to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling").

146. *See id.* at 239.

147. *See id.* at 238.

148. *See id.* at 239 (Scalia, J., concurring). Thus, for Justice Scalia, strict scrutiny would indeed be fatal in fact.

Justice Ginsburg did not agree with Justice Scalia that the law does not differentiate between races. *See id.* at 271 (Ginsburg, J., dissenting). For Justice Ginsburg, the irony of Justice Scalia's claim that "we are just one race" was apparent in the fact that the present effects of past discrimination exist today because our lawmakers and judges have not been color-blind for generations. *See id.* at 272 (quoting 515 U.S. at 239 (Scalia, J., concurring)).

Justice Ginsburg did agree with Justice Scalia that the Court's articulated standard was fatal in fact: "But [Justice O'Connor's] opinion's elaboration strongly suggests that the strict standard announced is indeed 'fatal' for classifications burdening groups that have suffered discrimination in our society." *Id.* at 275.

discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."<sup>149</sup> Justice Thomas also concurred in the judgment, but wrote separately to emphasize his belief that there is not a "racial paternalism exception to the principle of equal protection."<sup>150</sup> Thus, like Justice Scalia, Justice Thomas also would not allow any distinctions based upon race.<sup>151</sup>

### B. Podberesky v. Kirwan

In *Podberesky v. Kirwan*,<sup>152</sup> the Fourth Circuit was faced with the issue of whether the University of Maryland at College Park's voluntarily established Banneker scholarship program for African-Americans could survive strict scrutiny.<sup>153</sup> The University argued,

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149. *Id.* at 239 (Scalia, J., concurring).

150. *Id.* at 240 (Thomas, J., concurring).

151. *See id.* In a dissent joined by Justice Ginsburg, Justice Stevens agreed with Justice O'Connor's skepticism toward race-based laws but was critical of her desire for consistency of analysis in all situations. *See id.* at 242 (Stevens, J., dissenting). Stevens saw what O'Connor did not: the lack of "moral or constitutional equivalence" between "a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority." *Id.* Thus, Stevens recognized the difference "between a 'No Trespassing' sign and a welcome mat." *Id.* at 245. Justice Stevens was also critical of O'Connor's use of congruence to find an equivalence between action of the United States Congress and states or municipalities. *See id.* at 249-50.

Justice Stevens also stated:

The Fourteenth Amendment directly empowers Congress at the same time that it expressly limits the states. This is no accident. It represents our Nation's consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the states, some of which may be inclined to oppress such minorities.

*Id.* at 250 (footnote omitted). Stevens was equally critical of the majority's dismissal of the Court's precedent in its willingness to explicitly overrule *Metro Broadcasting* and in undermining *Fullilove*. *See id.* at 256-57. Stevens stated that *Adarand* was only the third case in which the Court had considered a federal race-based affirmative action program, and that the decision in *Adrand* conflicted with the previous two holdings. *See id.* Justice Stevens further noted that the majority's reliance on any inconsistency between *Metro Broadcasting* and *Croson* was misplaced because *Croson* involved a city ordinance. *See id.*

152. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

153. *See id.* at 151. The University's Banneker scholarship program was a merit-based program open only to African-Americans. *See id.* at 152. The University also offered Francis Scott Key scholarships, but the Francis Scott Key program had stricter academic standards than the Banneker program. *See id.* Daniel Podberesky was ineligible for a Banneker scholarship because he was Hispanic and did not meet the academic requirements of the Key scholarship.

and the district court agreed, that the scholarship program was aimed at the present effects of past discrimination at the University,<sup>154</sup> and that it was narrowly tailored to remedy those effects.<sup>155</sup> The Court of Appeals for the Fourth Circuit applied strict scrutiny in a way that appeared to be fatal in fact<sup>156</sup> and reversed the district court's summary judgment in favor of the University.<sup>157</sup> The Fourth Circuit, in turn, entered summary judgment in favor of Podberesky.<sup>158</sup>

The court of appeals took issue with the district court's finding that the University suffered present effects resulting from historical racial discrimination.<sup>159</sup> First, the court of appeals could find no link between the University's prior admitted discrimination and present campus attitudes.<sup>160</sup> Instead, the court attributed any current problems at the University to societal discrimination.<sup>161</sup> The appellate court held that, although the University admitted to past discrimination and it demonstrated that there was a basis in fact for the perception by African-Americans of a hostile climate, the fact that societal discrimination exists precluded the inference of a nexus between the two facts.<sup>162</sup> The court did not indicate how the University could overcome this hurdle, leaving one to wonder if this portion of the

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*See id.*

154. *See id.* (citing 838 F. Supp. 1075, 1082 (D. Md. 1993)).

155. *See id.* (citing 838 F. Supp. at 1094).

156. The court stated: "To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program." *Id.* at 153.

157. *See id.* at 156.

158. *See id.* at 162.

159. The University and the district court had agreed on four present effects: (1) a poor reputation within the African-American community, (2) underrepresentation by African-Americans at the University, (3) low retention and graduation rates for African-American students, and (4) the perception that the campus atmosphere was hostile to African-Americans. *See id.* at 152.

160. *See id.* at 154. The district court found that student surveys and focus groups revealed hostility manifested by fraternities and sororities, self-segregation in classrooms, social situations and dining rooms, and claimed racist or patronizing behavior by faculty. *See id.* at 154 n.2 (citing 838 F. Supp. at 1092-93). The circuit court held that "mere knowledge" of prior discrimination alone could not be considered, "[o]therwise, as long as there are people who have access to history books, there will be programs such as this one." *Id.* at 154.

161. *See id.* at 154.

162. Societal discrimination was found by the fact that several Northern universities suffered from similar racial problems. *See id.* at 154.

*Podberesky* test remains fatal in fact so long as societal discrimination exists.

The Fourth Circuit next turned to the defendant's reliance on statistical data, namely African-American underrepresentation in the student population and low retention and graduation rates, to demonstrate present effects of past discrimination.<sup>163</sup> Relying on the case's posture as a motion for summary judgment, the court found that the possibility of other causes, such as "economic . . . factors," could preclude summary judgment.<sup>164</sup> However, even if the University had been able to demonstrate sufficient present effects of past discrimination to satisfy the court of appeals, the program still would have failed the "narrowly tailored" test.<sup>165</sup> The court of appeals admitted that the program did not establish a quota<sup>166</sup> and held that, in considering whether the scholarship program was in fact narrowly tailored, the court would look to race-neutral alternatives and "whether the program actually furthers a different objective from the one it claimed to remedy."<sup>167</sup> However, the court of appeals stated that the district court had erred in not giving weight to the fact that the scholarships were not exclusively for Maryland residents.<sup>168</sup> The court of appeals found this fact indicative of a lack of narrow tailoring<sup>169</sup> because the University argued that the purpose of the Banneker scholarship was to increase the number of qualified

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163. *See id.* at 155.

164. *See id.* at 155-56. It could be argued that the African-American students' economic problems could be attributed to past discrimination, but those problems would be attributed to society as a whole and not the University. Thus, this is not the kind of present effect that the court would be willing to consider.

165. *See id.* at 157-58.

166. *See id.* at 158 n.10.

167. *Id.* at 158 (citing *Croson*, 488 U.S. at 507).

168. *See id.* at 158 n.11. In one year, seventeen of thirty-one Banneker scholars were students from outside Maryland. *See id.* The court of appeals chided the University for admitting one (presumably black) Jamaican to the program, giving "African-American a hemispheric meaning." *Id.*

169. *See id.* at 159. It is not clear why awarding a scholarship to an African-American from Pennsylvania, for example, is any less capable of remedying the effects of past University of Maryland discrimination than awarding the same scholarship to a Maryland-born student. Certainly the court cannot suggest that African-Americans perceived the University as aiming its prior discrimination at African-Americans from Maryland only, while during this same period of historical discrimination, welcoming African-Americans from the other forty-nine states.

African-American Maryland residents attending the University.<sup>170</sup>

The court of appeals also rejected the University's argument that Banneker scholars would act as role-models, and, thus, attract more African-American students.<sup>171</sup> In rejecting this argument, the court of appeals seemed to erroneously believe that the use of a Banneker scholar as a role model was rejected by the Supreme Court in *Wygant v. Jackson Board of Education*.<sup>172</sup> However, the *Wygant* decision rejected the role-model theory only as applied to the hiring of teachers based on race.<sup>173</sup> The *Wygant* decision, therefore, was not applicable to the use of Banneker scholars as role models.

Finally, the court of appeals held that the University had not attempted any race-neutral alternative measures.<sup>174</sup> It would,

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170. *See id.*

171. *See id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (plurality opinion)).

172. *See id.* The court stated that *Wygant* "expressly rejected" the role-model theory. *Id.* (citing *Wygant*, 476 U.S. at 276). However, *Wygant's* discussion of the role-model theory is contained in an opinion by Justice Powell that announces the judgment of the court, but is joined by only three other Justices. *See Wygant*, 476 U.S. at 269. In addition, *Wygant* was decided in a very different context because African-American teachers were sought as role models for African-American students in a school system in the process of desegregation. *See id.* at 270-72. In *Wygant*, the issue was whether a collective bargaining agreement, pursuant to which a school board gave preferential layoff protection to minority hires, violated equal protection. *See id.* at 269-70. When layoffs became necessary, compliance with the agreement would have meant the dismissal of tenured non-minority teachers, while the probationary minorities would have retained their jobs. *See id.* at 271.

The *Wygant* plurality expressed several concerns with the role-model theory. First, it had "no logical stopping point," because it would allow the School Board to engage in "discriminatory hiring and layoffs long past the point required for any legitimate remedial purpose." *Id.* at 275. Second, it would require year-to-year calibration, even after desegregation was achieved. *See id.* Third, the role model theory could be used to discriminate *against* African-Americans because a small number of African-American students could be used to justify a small number of African-American teachers. *See id.* at 276. This third reason had absolutely no relevance to the *Podberesky* situation, because when students are intended to be used as role models for each other, there can not possibly be any use of the role-model theory to limit the number of African-American students admitted to a university. Furthermore, the first two reasons for the plurality's rejection of the role-model theory in *Wygant* necessarily hinge on the fact that the teacher-to-student role model theory involves what is essentially a quota system, and, as the Court held, leads to a separate but equal system of African-American teachers teaching African-American students. *See id.* (citing *Brown v. Board of Educ.*, 347 U.S. 483 (1954)).

173. *See id.* at 270-72.

174. *Podberesky*, 38 F.3d at 161. The court relied upon a University of Maryland study which suggested that drop-out rates could be lowered by increasing campus job activities and by providing more reasonably priced campus housing. *See id.*

however, seem difficult for the University to have fashioned any race-neutral remedy that would have demonstrated to African-Americans that the University had ceased to be an environment hostile to African-American students. Thus, alternative measures would have been ineffective, and, therefore, useless.

### C. Hopwood v. Texas

In *Hopwood v. Texas*,<sup>175</sup> the Court of Appeals for the Fifth Circuit held the University of Texas School of Law's affirmative action program unconstitutional.<sup>176</sup> The *Hopwood* holding is steeped in irony, having involved the best-intentioned efforts<sup>177</sup> of the prestigious University of Texas School of Law to boost its minority enrollment.<sup>178</sup> In *Hopwood*, the Fifth Circuit appears to have applied Justice Scalia's cynical argument that racial preferences appear to "even the score" . . . only if one embraces the proposition that our society is appropriately viewed as divided into races."<sup>179</sup> Appearing to contradict *Bakke*,<sup>180</sup> the Fifth Circuit held that the law school "may not use race as a factor" in admissions.<sup>181</sup> In so doing, the court found "no compelling justification"<sup>182</sup> for the law school's affirmative action program under strict scrutiny analysis.<sup>183</sup>

The Fifth Circuit began its analysis by noting the Equal Protection Clause's purpose of preventing discrimination on the basis of race.<sup>184</sup> The court found that strict scrutiny must be applied when "evaluating all racial classifications, including those characterized by their

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175. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

176. *See id.* at 934.

177. *See id.* at 935 (citing *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1984)).

178. *See id.* at 935 (citing *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., May 20, 1995, at 84).

179. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia J., concurring), *cited in Hopwood*, 78 F.3d at 940 n.17.

180. *See Hopwood*, 78 F.3d at 941-42; *Bakke*, 438 U.S. at 316-17.

181. 78 F.3d at 954.

182. *Id.* at 934.

183. *See id.* The district court in *Hopwood* had found two constitutional justifications for the use of race as a factor in admissions decisions: obtaining the educational benefits of diversity and overcoming the effects of past discrimination. *See id.* at 4 (citing *Hopwood*, 861 F. Supp. at 571).

184. *See id.* at 940.

proponents as 'benign' or 'remedial.'"<sup>185</sup> The *Hopwood* plaintiffs argued that diversity is not a compelling state interest or, in the alternative, that the law school had misapplied Powell's *Bakke* standard and used race not as a "plus" but, rather, as a "strong determinate."<sup>186</sup> Rather than finding a misapplication of the *Bakke* standard, the Fifth Circuit rejected Justice Powell's argument entirely, holding that any consideration of race or ethnicity for the purpose of achieving a diverse student body can never be a compelling state interest.<sup>187</sup> The Fifth Circuit further criticized the diversity argument by rejecting the proposition that race can be used as a proxy for other characteristics that contribute to genuine diversity.<sup>188</sup>

The court ultimately rejected the law school's diversity justification by stating that "there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs."<sup>189</sup> But the *Hopwood* court, like the *Podberesky* court, failed to make the one-part "past wrongs" test a genuine test. Instead, the Fifth Circuit Court of Appeals created just another "test" that is strict in theory but fatal in fact.<sup>190</sup> The court made its test "fatal in fact" by narrowing the scope of the discrimination that the University or the court may consider.<sup>191</sup> The court agreed with the *Podberesky* court that knowledge alone of past racial bias by the University cannot

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185. *Id.* at 940 (quoting *Adarand*, 515 U.S. at 227).

186. *Id.* at 944.

187. *See id.* at 945-46, 948. The court based its decision on three rationales. First, the court observed that Powell's *Bakke* opinion was not a majority opinion. *See id.* at 945. Second, the court stated that *non-remedial* use of racial classification can *never* be justified in education cases. *See id.* Finally, the court held that classification on the basis of race for purposes of diversity "frustrates rather than facilitates, the goals of equal protection." *Id.*

188. *See id.* at 946. The court stated that the assumption that "a certain individual possesses characteristics by virtue of being a member of a certain racial group . . . does not withstand scrutiny." *Id.* Furthermore, the court stated that "[t]o believe that a person's race controls his point of view is to stereotype him." *Id.* The court was willing, however, to go as far as to state, "[w]e recognize that the use of some factors such as economic or educational background of one's parents may be somewhat correlated with race." *Id.* at 947 n.31.

189. *Id.* at 944.

190. *See infra* notes 264-80 and accompanying text for a discussion of the "fatal in fact" test.

191. *See id.* at 949-50 (noting societal discrimination cannot be used as a justification for remedial measures) (citing *Wygant*, 476 U.S. 267, at 286 (1986) (O'Connor, J., concurring)).

justify race-based remedies.<sup>192</sup> Moreover, the court stated that the past discrimination must have occurred in the same governmental unit seeking to apply the remedial measure.<sup>193</sup>

While the *Hopwood* court conceded that the State of Texas had discriminated in the past,<sup>194</sup> it concluded that the State's education system as a whole was an overly broad classification of a state actor to target for remedial measures, and that the University of Texas was itself "too expansive."<sup>195</sup> Thus, the court concluded that the law school was the sole state actor whose past discrimination was relevant to the analysis.<sup>196</sup> Finding that the University of Texas School of Law's admissions program failed strict scrutiny, the Fifth Circuit held that the school may not use race as a factor in admissions decisions.<sup>197</sup>

In a concurring opinion, Judge Wiener argued that neither the law school nor the Texas university system as a whole had "established the existence of present effects of past discrimination sufficient to justify the use of racial classifications."<sup>198</sup> Judge Wiener assumed *arguendo* that diversity can be a compelling interest, but voted with the majority because he concluded that the law school's remedy was not narrowly tailored.<sup>199</sup> Judge Wiener's *ratio decendi* was three-fold. First, Wiener stated that if *Bakke* is to be "declared dead, the Supreme Court, not a three-judge panel of a circuit court should make that pronouncement."<sup>200</sup> Second, he noted that Justice O'Connor specifically stated that *Adarand* was not the "death knell" for affirmative action.<sup>201</sup> Third, he stated that, because the remedy was not narrowly tailored, the court need not reach the issue of whether a

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192. *See id.* at 953.

193. *See id.* at 950-51.

194. *See id.* at 951 ("No one disputes that in the past, Texas state actors have discriminated against some minorities in public schools.")

195. *Id.*

196. *See id.* at 952. The court ignored the possibility that undergraduate grade point average is a more important factor than race in admissions and that African-American students' lower GPAs may have been obtained as a result of admitted past discrimination in lower level educational facilities.

197. *See id.* at 962.

198. *Id.* (Wiener, J., specially concurring).

199. *See id.*

200. *Id.* at 963.

201. *See id.* at 963-64 (citing *Adarand*, 515 U.S. at 237).

compelling interest existed.<sup>202</sup>

In rendering its decision, the *Hopwood* court failed to see either that the past effects of discrimination linger in the present or that we do not live in a color-blind society.<sup>203</sup> This oversight is ironic,

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202. See *id.* at 964.

203. It seems beyond the need for debate that our society is not yet color-blind. However, Justice Scalia claims, at the very least, that we have a color-blind government: "In the eyes of government, we are just one race here. It is American." *Adarand*, 515 U.S. at 239 (Scalia, J. concurring). Society clearly is not color-blind, despite Justice Scalia's assertions to the contrary. See *id.*

Landlords are not color-blind. "[I]n many metropolitan areas one-quarter to one-half of all housing inquiries by blacks are met with clearly discriminatory responses." A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 50 (G. Jaynes & R. Williams eds., 1989), cited in *Adarand*, 515 U.S. at 273 n.5 (Ginsburg, J., dissenting); see also Christopher Edley, Jr., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE AND AMERICAN VALUES 49 (1996); MARGERY A. TURNER ET AL., U.S. DEP'T OF HOUS. & URB. DEV., HOUSING DISCRIMINATION STUDY: SYNTHESIS i-vii (1991) (finding that over half of all African-Americans and Hispanics surveyed experienced some form of unfavorable treatment in their housing search), cited in *Adarand*, 515 U.S. at 274 n.5 (Ginsburg, J., dissenting).

Attorneys conducting *voir dire* are not color-blind. "Do not take Jews, Negroes, Dagos, Mexicans or member of any minority race on a jury, no matter how rich or how well educated." Instruction Book of the Dallas, Texas Prosecutor's Office, quoted in Steve McGonigle & Ed Timms, *Race Bias Pervades Jury Selection*, DALLAS MORNING NEWS, Mar. 9, 1986, at 1A. Justice Marshall cited the excerpt in *Batson v. Kentucky*, 476 U.S. 79, 104 n.3 (1986).

Prospective employers are not color-blind. Blacks and Hispanics encounter potential employers who exhibit some degree of prejudice 25% of the time. See CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE AND AMERICAN VALUES 49 (1996). In one study, whites received 52% more job offers than equally qualified Hispanics. See H. Cross et al., *Employee Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers* 42 (Urban Institute Report 90-4, 1990); see also Margery A. Turner et al., *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring* xi (Urban Institute Report 91-9, 1991).

Patterns of income distribution are not color blind. Blacks earn about 60% of the median income of whites. See Christopher Edley, Jr., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE AND AMERICAN VALUES 43 (1996).

The Confederate battle flag, which appears in a number of modern southern state flags, is not a color-blind symbol. In Georgia, Governor Zell Miller failed in his attempt to convince the state legislature to remove the Confederate battle emblem from the state flag in 1993. See Chris Burritt, *Focus on a Disputed Banner*, ATLANTA J. & CONST., Jan. 24, 1997, at A10. A black's suit challenging the continued use of the flag on equal protection and First Amendment grounds also failed. See *Coleman v. Miller*, 117 F.3d 527 (11th Cir. 1997), cert. denied, 118 S. Ct. 1199 (1998). The Confederate battle flag flew over Alabama's state capital until 1993, when a state judge ordered its removal. See Burritt, *supra*, at A10. However, it still flies on the Capitol's grounds at a confederate monument. See *id.* Mississippi still incorporates the emblem in its state flag. See *id.* The Confederate battle flag still flies above the South Carolina Capitol, but on January 23, 1997, the state House of Representatives voted to let South Carolina's citizens vote on its removal in a referendum. See *id.*; see also *Flag Removal Unpopular in New York*, ATLANTA J. & CONST., Feb. 15, 1997, at H2 (discussing public outcry after Governor Pataki

considering that it took an order by the United States Supreme Court for the University of Texas School of Law to admit its first African-American student, Herman Marion Sweatt,<sup>204</sup> and that, after attending his first year of law school, Sweatt was compelled to leave because he was subjected to a series of racial slurs and threats.<sup>205</sup> While the *Hopwood* court seemed not to draw any lesson from Sweatt's experience,<sup>206</sup> Texas African-Americans have absorbed the message

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ordered Georgia flag removed from display at New York State Capitol).

Car salesmen are not color-blind. See Ian Ayers, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991) (stating black males pay twice the mark-up of white males using identical bargaining strategies in retail car sales).

Sports attitudes and ownership are not color-blind. See generally KENNETH L. SHROPSHIRE, IN BLACK AND WHITE: RACE AND SPORTS IN AMERICA (1996), reviewed in Timothy Davis, *Who's In and Who's Out: Racial Discrimination in Sports*, 28 PACIFIC L. J. 341 (1997). Professor Shropshire argues that the racial bias that exists against African-Americans in professional sports demonstrates why the use of color-blind policy is premature. SHROPSHIRE, *supra*, at 7. Professor Shropshire notes that only 7 of the 275 individuals with ownership interests in the 3 major professional sports (football, baseball, and basketball) were African-American, and none held a controlling interest. See *id.* at 36, cited in Davis, *supra*, at 352. Furthermore, African-Americans represented just 3% of the 150 active agents in Major League Baseball, and 14% of those in the National Football League. SHROPSHIRE, *supra*, at 131, cited in Davis, *supra*, at 370. Appropriately, when Tom Cruise shouts, "Show me the money," JERRY MAGUIRE (TriStar 1996), the money is green, the player is black, and the agent is white. See *id.* College athletics are also not color-blind. See, e.g., *Black Football, Basketball Players Source of Cheap Labor for Schools*, ATLANTA J. & CONST., Mar. 2, 1997, at E9 (arguing that the two sports in which African-Americans constitute the majority of athletes—basketball and football—account for 91% of all sports revenues and subsidize "white" sports such as gymnastics, golf, swimming, and soccer). A majority of African-American athletes at Division I schools fail to graduate (only 39% of African-American basketball players graduate and 46% of African-American football players graduate). See *id.*

204. See *Sweat v. Painter*, 339 U.S. 629 (1950).

205. See 84 F.3d 720, 724 (5th Cir. 1996) (Stewart, J., dissenting from failure to grant rehearing en banc).

206. The experience of Mr. Sweatt was not lost on Judge Stewart, one of the seven Fifth Circuit Judges voting for rehearing en banc in *Hopwood*. See 84 F.3d at 724. Judge Stewart stated in his dissent:

A year after the Supreme Court ordered that Sweatt be admitted, he left the law school "without graduating after being subjected to racial slurs from students and professors, cross burnings, and tire slashings." Furthermore, "the record reflects that during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students." It was not until 1983 that Texas even agreed, after years of threats of federal action, to an acceptable plan to desegregate its higher education system. In 1987 and again in 1994, the Department of Education instructed Texas to maintain its plan. To this day, Texas's higher education system still has not been declared in compliance with Title VI and the Fourteenth Amendment.

of *Hopwood*: African Americans' applications were down forty-two percent at the law school.<sup>207</sup>

#### D. *Wooden v. Board of Regents*

In *Wooden v. Board of Regents*,<sup>208</sup> eleven plaintiffs filed suit in the United States District Court for the Southern District of Georgia,<sup>209</sup> seeking injunctive relief against the University of Georgia.<sup>210</sup> The plaintiffs have requested that the court order Georgia's university system to cease using race as a factor in admissions,<sup>211</sup> faculty hiring, faculty promotions, and faculty assignment decisions.<sup>212</sup> All of the University's facilities would be affected, from the more than ninety percent white flagship University of Georgia at Athens, to the University's three predominantly black colleges.<sup>213</sup> The plaintiffs' brief argues that the three predominantly black colleges are academically inferior because of the large number of remedial classes they offer, and that this inferiority creates a "separate but equal"

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*Id.* at 725 (quoting *Hopwood v. Texas*, 861 F. Supp. 551, 555-57 (W.D. Texas 1994)) (citations omitted).

207. See Tom Teepen, *Segregation Resurges to Our Nation's Shame*, ATLANTA J. & CONST., Apr. 13, 1997, at G2.

208. *Wooden v. Board of Regents*, No. CV 497-45 (S.D. Ga. filed Mar. 3, 1997) (on file with the author).

209. See *id.*, Complaint at 3-8 (on file with the author). The plaintiffs include a black teacher (the named plaintiff), white teachers, black parents of an African-American student in the Georgia University system, and two white students who argue that they were denied admission to a school that admitted African-Americans with objective scores lower than their own scores. See *id.*

210. See *id.* The plaintiffs seek (1) a declaration that the state's policies violate the Equal Protection Clause, (2) temporary and preliminary injunctions prohibiting the use of race in all admissions and all faculty hiring, promotion, and placement decisions pending a decision on the merits, (3) an injunction requiring the University system to implement a desegregation plan that would end the racial and qualitative differences within the system, and (4) a jury trial on damages and costs of the suit. See *id.*

211. Of course, this presupposes that the University system uses race as a factor in admissions. Race is one of fifteen factors considered by the University of Georgia at Athens and is not used elsewhere in the University system. No whites are excluded from the three historically African-American schools. See Cynthia Tucker, *College Admissions: Lawsuit Might Shore up Affirmative Action*, ATLANTA J. & CONST., Mar. 5, 1997, at A14.

212. See *Wooden*, No. CV 497-45, Complaint at 17.

213. See *id.* at 8. The three predominantly black colleges are Fort Valley State, Albany State, and Savannah State. African-Americans represent more than 88% of the students in these schools. See *id.* at 9.

system in Georgia.<sup>214</sup>

Three aspects of the case are of particular interest.<sup>215</sup> First, the plaintiffs' brief follows the Fifth Circuit's holding in *Hopwood*<sup>216</sup> and rejects Justice Powell's dicta in *Bakke*,<sup>217</sup> to argue that racial diversity can never be a compelling state interest.<sup>218</sup> Second, the suit asks that the University give preferences to those from disadvantaged backgrounds, rather than just those of a certain race.<sup>219</sup> Finally, the suit demands that any University of Georgia plan that seeks to achieve desegregation not be race-based.<sup>220</sup> However, the suit fails to suggest a methodology for accomplishing desegregation without taking race into consideration.<sup>221</sup>

214. See *id.* at 9-11. Scholastic Aptitude Test scores at the three schools range from 675 to 708 for the 1994 entering classes at the three majority African-American schools, but the lowest average SAT score at a predominantly white university was 822. See *id.* at 11.

215. Of equal interest are the key players in the case. The firm representing the plaintiffs successfully argued *Miller v. Johnson*, 515 U.S. 900 (1995), before the United States Supreme Court. The judge assigned to the *Wooden* case, United States District Court Judge B. Avant Edenfield, had previously ruled that Georgia's eleventh congressional district was a racial gerrymander in *Miller v. Johnson*, 865 F. Supp. 1354 (S.D. Ga. 1994). When *Wooden* was filed, the state's Attorney General was Michael Bowers, who had previously sent a letter to the state's chancellor suggesting that the University's policies be brought into compliance with the law as articulated in *Hopwood*, even though Georgia is not in the same judicial Circuit as Texas. See Mark Sherman & Reagan Walker, *Ga. Colleges Face Scrutiny on Race*, ATLANTA J. & CONST., Apr. 10, 1996, at C1.

Subsequently, Bowers resigned from his position as Attorney General to run for Governor and was replaced by Thurbert Baker, Georgia's first African-American Attorney General, and the only African-American currently serving as an Attorney General in the United States. See Kathy Alexander, *Baker Blazing Trail as Black Attorney General*, ATLANTA J. & CONST., May 3, 1997, at A1; see also Kathy Alexander, *Baker Now Must Earn His Own Place in the Sun*, ATLANTA J. & CONST., May 3, 1997, at A1.

In addition, the NAACP, the Southern Christian Leadership Conference, and sixteen African-American high school and college students have sought to intervene as defendants, expressing concern that the state's defense that it has eliminated all vestiges of past discrimination is inaccurate. See Bill Rankin, *Intervention Sought in Suit Against Colleges*, ATLANTA J. & CONST., June 21, 1997, at D7.

216. See *Hopwood*, 78 F.3d at 944.

217. See *Bakke*, 438 U.S. at 316-17.

218. See *Wooden*, No. CV 497-45, Complaint at 17.

219. See *id.* As discussed *infra* Part V.C, this Article argues that because of the present effects of past discrimination, race is an excellent proxy for economic disadvantage.

220. See *id.*

221. See *id.* This defect was noted by Judge Edenfield, who has called upon the plaintiffs to specify the remedy that they seek. See *Judge Tells Attorney to Clarify Lawsuit on Bias at Ga. Colleges*, ATLANTA J. & CONST., July 18, 1997, at C6.

Initially at least, if the preliminary injunction is granted and the state cannot use race in its

## V. AFFIRMATIVE ACTION JUSTIFIED

### A. Race as a Proxy for Disadvantage: Preliminary Considerations

Any discussion of the color-blind theory is fraught with irony<sup>222</sup> because “[i]n order to get beyond racism we must first take account of race.”<sup>223</sup> Moreover, it is ironic that race-conscious legislators and judges have often applied the color-conscious Constitution to the detriment of African-Americans and other minorities.<sup>224</sup> Only now, when minorities have made some minor gains, have political and judicial leaders claimed the need to apply the Constitution in a color-

admissions process, the University of Georgia at Athens will admit fewer African-American students because its current African-American enrollment of less than 10% is a product of a system that counts minority status as a “plus” factor in admissions. Similarly, it is hard to imagine how additional white students will be attracted to the predominantly African-American schools without a campaign that utilizes race in some manner.

222. Justice Marshall recognized in his *Bakke* opinion that

it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today’s judgment ignores the fact that for several hundred years Negroes have been discriminated against, not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been the victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he has never even made it into the pot.

*Bakke*, 438 U.S. at 400-01. *But cf.* Professor Strauss:

The one option that is not open is the ideal of colorblindness—treating race as if it were, like eye color, a wholly irrelevant characteristic. That is because it is not a wholly irrelevant characteristic. Race correlates with other things . . . . Moreover, it is hardly surprising that race correlates with other things. Whatever the other possible causes of the correlation, centuries of discrimination explicitly based on race have forced some characteristics on blacks—on all blacks, simply because they are black, since that was the basis of the discrimination. In these circumstances it would be a miracle if a correlation between race and other characteristics did not exist. That correlation makes colorblindness unattainable, no matter what the legal rules.

Strauss, *supra* note 139, at 114-15 (footnotes omitted).

223. *Bakke*, 438 U.S. at 407, (Blackmun, J., concurring in part and dissenting in part).

224. *See, e.g., Plessy v. Ferguson*, 163 U.S. 537 (1896).

blind manner.<sup>225</sup> In some zero-sum game situations, the call for change has indeed come at the expense of “innocent”<sup>226</sup> whites,<sup>227</sup> such as Allan Bakke or Cheryl Hopwood. As Professor Kull has noted, “[t]here is an undeniable irony, which close attention to the color-blind history will only underscore, in applying a rule of nondiscrimination to frustrate measures designed (however imperfectly) to promote equality of condition for black Americans as a group.”<sup>228</sup>

The legacy of slavery and color-conscious treatment by both society and the legal system in the post-slavery era is an African-American populace that can legitimately claim the lack of a level playing field in many areas. This uneven playing field is particularly evident in the area of admission to university programs (and related scholarship opportunities). Even affirmative action opponent Professor Fried admits that, “It is impossible to ignore racial differences entirely—pure color-blindness is too extreme a principle.”<sup>229</sup>

Although the courts would have us look only at the present effects of past discrimination by the individual educational institution actor,<sup>230</sup> it is instructive to look at the present effects of past discrimination faced by a prospective African-American applicant to any educational institution. A hypothetical examination will help to determine whether a grave injustice is heaped upon white applicants when a minority applicant is awarded a “plus” in admissions by using

225. See, e.g., *Hopwood v. Texas*, 78 F.3d at 945-48.

226. The term “innocent” assumes that the whites who lost out to African-Americans in the zero-sum admissions game were not themselves *participants* in societal discrimination against minorities. To use the courts’ more restrictive test, it assumes that they were not participants in the prior discrimination by the state actor now found guilty of taking affirmative action to cure the present effects of that past discrimination. Of course, it can be argued that one can be innocent of any personal racism and still have received a benefit from societal discrimination.

227. Such “innocent” victims may also belong to minority groups, such as Daniel Podberesky, a Hispanic. See 38 F.3d 147 (4th Cir. 1994).

228. KULL, *supra* note 3, at ix.

229. Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 111 (1990). Professor Fried’s article describes situations in which color-blindness is inappropriate, such as screening for ethnic-particular diseases such as sickle-cell anemia and Tay-Sachs syndrome. See *id.* (citing *Wygant*, 476 U.S. at 314 (Stevens, J., dissenting)); see also *id.* at 111 n.19 (providing a remedy for situations in which a bigot has victimized a person based on his or her race).

230. See, e.g., *Hopwood*, 78 F.3d at 950-51.

race as a proxy for disadvantage.

Assume that a thirty-year-old African-American is applying to law school and that the educational attainments of one's parents are a factor in one's own educational success. In addition, assume that having a lawyer or other professional as a parent is a "plus" in the eyes of law school admissions committees. Finally, assume that our theoretical African-American applicant's parents were born in 1937.<sup>231</sup> What sort of present effects will they—parents and children—have witnessed?

The parents will have grown up in a very segregated society, one in which their chances of becoming lawyers or other professionals were very slim. They were thirteen when the United States Supreme Court ordered the University of Texas to admit Herman Marion Sweatt to its law school,<sup>232</sup> and just a year older when Sweatt left the school after being subjected to racial slurs by students and faculty alike.<sup>233</sup> They were in their forties when the Texas university system finally implemented an acceptable desegregation plan.<sup>234</sup>

Were things a great deal better for our hypothetical African-American applying to law school in 1997?<sup>235</sup> Our student was born the year *Loving v. Virginia*<sup>236</sup> was decided—at a time when "federal

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231. This assumes a thirty-year generation. See 6 OXFORD ENGLISH DICTIONARY 436 (2d ed. 1991).

232. See *Sweatt v. Painter*, 339 U.S. 629 (1950).

233. See 84 F.3d at 724 (Stewart, J., dissenting).

234. See *supra* note 178.

235. Progress has been slow, and present effects of past discrimination remain. For example, our hypothetical applicant was three years old when the Virginia state legislature attempted to repeal "Carry Me Back to Old Virginia" as the state song. Although the song was considered offensive to some because it contained words like "darkey" and "massa," and allegedly glorified the institution of slavery, the move was consistently defeated every year until 1997. In 1997, the Virginia legislature retired the song without fanfare after a 100-0 vote and no debate. See *Controversial State Song Retired*, ATLANTA J. & CONST., Feb. 18, 1997, at A5. In addition, just this past year, five white students recently painted themselves black in order to look like the Jackson 5 in a fraternity skit at the predominantly white State University of West Georgia, prompting the filing of formal complaints by African-American students. See Don Melvin, *University Seeks Racial Dialogue*, ATLANTA J. & CONST., May 24, 1997, at D1.

236. *Loving v. Virginia*, 388 U.S. 1 (1967) (holding Virginia's law prohibiting interracial marriages unconstitutional). The statute at issue in *Loving* was facially neutral because it applied equally to whites and African Americans. This attribute was relied upon by the Supreme Court for finding a statute constitutional in *Pace v. Alabama*, 106 U.S. 583 (1883) (holding an Alabama law prohibiting sexual relations between persons of different races not a denial of equal protection because it applied equally to all races).

judges in the still-segregated South were fighting desegregation with massive resistance.”<sup>237</sup> When she was born, the infamous Tuskegee Syphilis Study was still underway.<sup>238</sup> Racism still impacts many areas of our society, and certainly has done so during the lives of our hypothetical student and her parents.

African-American students applying for university admission have grown up in a society impacted by racism. Therefore, it can be argued that using race as a proxy for disadvantage is justified by reference to the very real present effects of past discrimination faced by African-American applicants to educational institutions. But opponents of a color-conscious admissions process attack this thesis on two major grounds. First, they argue that the Constitution mandates a color-blind approach. Second, they argue that if disadvantage and the leveling of the playing field are the issues that affirmative action seeks to remedy, then disadvantage rather than race should be the basis for awarding a “plus.”

The remainder of this Article addresses these issues and makes the case that there is still a place for color-conscious affirmative action in the higher education admissions process. First, as has been demonstrated throughout this Article, the Constitution as written, amended, and interpreted does not mandate a color-blind approach. Second, it is an unfortunate reality that in contemporary American society, racial minority status makes a very good proxy for disadvantage and, indeed, makes a more appropriate justification for a “plus” than many other proxies that are used more prevalently.

Turning then to affirmative action in admissions as it exists today, this Article discusses what affirmative action is *not*: a quota or an irrebutable presumption of disadvantage. It examines the constitutional test for affirmative action programs as it exists after *Adarand*, and argues that the *Podberesky* and *Hopwood* courts have misstated the test. The Justices of the Supreme Court must be taken at their word that the applicable strict scrutiny is not “fatal in fact.”<sup>239</sup>

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237. KULL, *supra* note 3, at 170.

238. See JAMES H. JONES, *BAD BLOOD: THE TUSKEGEE SYPHYLIS EXPERIMENT* (2d ed. 1993).

239. *Adarand*, 515 U.S. at 237 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”).

Working under this assumption, this Article presents a theoretical admissions program that addresses a compelling state interest and is narrowly tailored to achieving its goal.

*B. The Constitution is not Color-Blind*

If the Constitution is to be viewed as color-blind, as Justices Thomas and Scalia and the *Podberesky* and *Hopwood* panels would have it, the debate ends at that point. A color-blind Constitution would require us to solve the problems of a color-conscious society with color-blind solutions. Undergraduate and graduate admissions programs would, thus, be totally precluded from considering race as a "plus" or otherwise. However, the Constitution as drafted and amended by the Bill of Rights, and as interpreted by early case law such as the *Dredd Scott* decision, was not a color-blind document. Instead, it saw Eighteenth Century America in colors of white, black, red, and yellow, denying citizenship to all but the white. Indeed, it protected and guaranteed the institution of slavery into the nineteenth century without actually using the term "slave" or "black." Despite occasional exceptions, such as *Yick Wo v. Hopkins*,<sup>240</sup> this Constitution gave minorities none of the protections one would expect from a color-blind document.

With the Reconstruction Amendments, Congress had a clear opportunity to make the Constitution truly color-blind. Congress could have included color-blind language, mandating that "no discrimination shall be made on account of race or color."<sup>241</sup> Such color-blind language was presented and debated, but eventually rejected on the grounds of political expediency.<sup>242</sup> Congress instead

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240. 118 U.S. 356 (1886).

241. KULL, *supra* note 3, at 73 (quoting Senator Stevens's proposed language).

242. Any argument that color-blind equality was created by the Privileges and Immunities Clause, under the Fourteenth Amendment to the Constitution, was destroyed by the five-to-four decision in the *Slaughter-House Cases*, 83 U.S. 36 (1873) (refusing to give any greater scope to the Reconstruction Amendments than that which was suggested by their purpose of securing the freedom of the slave race). Subsequent expansion of the Due Process and Equal Protection Clauses left the Privileges and Immunities Clause outside the mainstream of the color-blindness argument, although it was "probably the clause from which the Framers of the Fourteenth Amendment expected most." JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 22 (1980).

substituted an ambiguous standard—equal protection—that would be continuously debated, but would have the immediate advantage of attacking the South's Black Codes without putting at risk segregated schools<sup>243</sup> or bans on interracial marriages.<sup>244</sup>

Progress came in the form of affirmative action programs designed to remedy the present effects of discrimination in a wide range of contexts, and in a manner that could not be color-blind. In the context of higher education, affirmative action sometimes took the form of impermissible quotas, but also manifested itself as constitutionally permissible "plusses."<sup>245</sup> For example, even though the *Bakke* Court found the University of California at Davis's Medical School admissions process to be flawed, five Justices held that an admissions program that took race into account would withstand an Equal Protection Clause challenge.<sup>246</sup> The crucial point from *Bakke*—that race may be a factor in higher education admissions decisions—has not been directly overruled by the Supreme Court.<sup>247</sup>

### *C. Race as a Proxy for Disadvantage in a Color-Conscious Society*

African-Americans as a group are disadvantaged in our society because of the present effects of past discrimination. Of course, not all African-American individuals are disadvantaged, and many applicants who are disadvantaged are not African-American. Thus, the opponents of using race as a proxy in affirmative action programs argue that educational institutions seeking diversity in their student bodies should seek out students with diverse viewpoints and

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243. See Tribe, *supra* note 28, at 204. The same Congress that drafted the Equal Protection Clause funded segregated schools for the District of Columbia. See *id.*

244. See Melissa L. Sanders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 331 (1997).

245. See *Bakke*, 438 U.S. 265 (1978).

246. See *id.*

247. Judge Stewart argued in his dissent to the denial of rehearing Hopwood en banc that if *Bakke* is to be overruled, the Supreme Court must take such action. See 84 F.3d at 724 (Stewart, J., dissenting). Yet *Bakke* has not been overruled for two reasons. First, the Supreme Court has called for universal application of strict scrutiny for all race-based measures, a test that by definition anticipates the possibility that some race-based measures are constitutional. Second, the cases since *Bakke* have all involved affirmative action programs in contexts other than the unique one of higher education.

lifestyles, and not just those of a specific race. They argue that entities that have discriminated in the past should seek out their specific victims.

In an ideal world, it would indeed be preferable to only look at individual applicants as individual people. However, in the real world, a good proxy is sometimes a practical and financial necessity. In addition, past discrimination continues to have present effects on the entire African-American populace. Moreover, every single African-American in the United States is in some way affected by the present discrimination that permeates our society.<sup>248</sup> As Justice O'Connor has noted: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."<sup>249</sup> Race makes a useful proxy for disadvantage because it is race that society discriminates against. It is also clear that race makes a better proxy for disadvantage than other human characteristics. As this Article has demonstrated, our society clearly is not color-blind. It is far less clear that society continues to discriminate based on other factors, such as sex and sexual orientation. While this author does not doubt that other groups continue to suffer from widespread discrimination, such discrimination is much more difficult to identify. If members of such groups are able to demonstrate that they have been discriminated against, then admissions committees should consider that

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248. Although a full treatment of the subject is outside the scope of this analysis, the proponents of Critical Race Theory have written much that illuminates the proposition that American society has deep racial problems. Critical Race Theory traces its origins to a June, 1989 conference in Wisconsin. See generally T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 COLUM. L. REV. 325 (1992); Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (a work predating the theoretical start date of the movement but expressing its themes); Derrick Bell, *Reconstruction's Racial Realities*, 23 RUTGERS L.J. 261 (1992); Richard Delgado, *Legal Scholarship: Insiders, Outsiders, Editors*, 63 U. COLO. L. REV. 717 (1992); Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WISC. L. REV. 627; Robert L. Hayman, Jr., *Re-Cognizing Inequality: Rebellion, Redemption, and Struggle for Transcendence in the Equal Protection of the Law*, 27 HARV. L. REV. 9 (1992); Alex M. Johnson, *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for a Last Reconstruction*, 100 YALE L.J. 1329 (1991).

249. *Adarand*, 515 U.S. at 237.

discrimination in formulating their admissions decisions. However, because we know that every single African-American feels the present effects of past discrimination, race is an instrumental proxy for disadvantage. Other potential factors are either less useful<sup>250</sup> or are already a part of the admissions calculus.<sup>251</sup>

Race can be used as a proxy in American society precisely because of the present effects of past discrimination. Where race is used as a proxy for an admissions plus, it can survive strict scrutiny as long as it does not establish a quota. As the Court discussed in *Adarand*, the need for solutions to this nation's racial problems is compelling.<sup>252</sup> Using race as a proxy is indeed a narrowly-tailored solution because every African-American is affected by society's racial discrimination. Perhaps when race ceases to be such an accurate proxy, this issue will have become moot, and affirmative action will no longer be needed.<sup>253</sup>

#### D. A "Plus" is not a Quota

Where quotas, or rigid "numerical straitjackets,"<sup>254</sup> are used, they are illegal and not within the spirit of affirmative action. Affirmative action seeks to give opportunities to the qualified, not elevate the unqualified. Where affirmative action is applied illegally, the proper solution is to correct the illegality, rather than to altogether eradicate the affirmative measures.

While minority status can create the presumption of an entitlement to a plus, and majority status can create the presumption that one is not entitled to a plus, there is no reason why either presumption cannot be rebutted in the admissions context. Both of these

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250. For example, variations in relative wealth could be considered to create diversity. The fact remains, however, that society continues to see a rich African-American as "African-American" and a poor white as "white."

251. For example, parents' education and, in the case of graduate admissions, one's undergraduate institution already play a role in admissions decisions. In addition, schools already seek out geographic diversity.

252. See *Adarand*, 515 U.S. at 235-37.

253. Any justification of affirmative action implies a termination date when the playing field has finally been leveled.

254. Deval Patrick, *Confronting the Question of Conscience*, 46 HASTINGS L.J. 1339, 1334 (1995).

presumptions were rebuttable in the federal legislation at issue in *Adarand*.<sup>255</sup> It is admittedly difficult to picture a third party coming forward to an admissions committee to rebut a minority applicant's presumptive plus for disadvantaged status when race is used as a proxy.<sup>256</sup> However, most institutions of higher education have a mechanism whereby a white student can rebut the presumption that she is not entitled to a plus for disadvantaged status. The mechanism is usually an essay submitted with other admissions material, detailing the facts that explain why the white student should be considered for disadvantaged status.

Even an admissions policy adjusted to compensate for advantaged minorities and disadvantaged whites will result in the admission of more minorities and, therefore, fewer whites. Necessarily, the "loser" in this zero-sum game is the marginal white applicant—the candidate who scored lower than fellow white applicants offered admission, but higher than the minority applicant that was elevated because of her minority plus. However, the fact that some students are admitted because of a plus should not be a societal concern; all public policy is about redistribution of wealth and opportunity. A law is not unconstitutional just because it creates winners and losers. Such redistribution is fair when the plus creates a level playing field where one did not previously exist. Redistribution is unfair to the marginal white applicant only if it tips the playing field in the minority applicant's favor. Affirmative action merely levels the playing field by compensating for the present effects of past discrimination. It does not seek to punish an innocent, marginal white for the sins of his ancestors.<sup>257</sup>

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255. See *supra* note 126 and accompanying text.

256. This is more plausible when the third party is also a candidate for the same seat.

257. As Justice Souter stated in his *Adarand* dissent:

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this price is considered reasonable, it is in part because it is a price to be paid only temporarily . . . ."

*Adarand*, 515 U.S. at 270 (Souter, J., dissenting); cf. *Bakke*, 438 U.S. at 366 n.41 ("Our school cases have deprived whites of the neighborhood schools of their choice, our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations and UJO

American decisions are rarely made strictly on merit, particularly in the context of education.<sup>258</sup> In fact, a whole host of plusses affect the admissions process in institutions of higher education.<sup>259</sup> Plusses may even be available in private grade schools that provide their pupils with an advantage in the college admissions process.<sup>260</sup>

Consider again a hypothetical but typical university with an affirmative action program that was instituted because the school is overwhelmingly white, and the school's administration has concluded that this was caused by prior societal discrimination. In addition, the school has concluded that an ethnically diverse student body will enhance the school's educational quality. One hundred seats are available for the fall semester class. Ninety-nine seats have been filled, and the admissions committee is considering two applicants for the last seat. The admissions committee examines the grades and Scholastic Aptitude Test scores of applicants, and awards a single score on a scale of one to one hundred.<sup>261</sup> In keeping with the

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deprived the Hassidim of bloc voting strength." Justice Brennan's point in *Bakke* was that the Court was well aware that its decisionmaking in the area of race and ethnicity necessarily created winners and losers.

258. As Justice Blackmun noted in *Bakke*:

It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous and the powerful.

*Bakke*, 438 U.S. at 404.

259. See Alvin P. Sanoff, *Did They Admit Me?* U.S. NEWS & WORLD REP., Apr. 14, 1997, at 48. Sanoff's lengthy article focuses on the admissions process at the prestigious University of Pennsylvania, which offers admission each year to about 4,800 out of 15,400 applicants. Among the "plusses" noted: rural Pennsylvanians (in part because the school receives \$36 million a year in state funds for its veterinary school, which is of interest to rural Pennsylvanians); Nebraskans (because the state is one of those underrepresented in the applicant pool); athletes on the cusp of meeting the University's academic admissions criteria (admittedly, only about thirty-six seats are so allotted); "development cases" (students whose parents are or may become major contributors (again, only a small number: fifteen to twenty seats); "legacies" (the children of graduates, "who seem to have only a modest advantage"). See *id.* at 56.

260. Both savvy guidance counselors who are not overworked and advanced courses are more likely to be available in private schools. See Sanoff, *supra* note 259.

261. See generally *Hopwood*, 84 F.3d 720 (5th Cir. 1996) (essentially, the same methodology).

affirmative action goal, the committee then awards five additional points to any minority candidate. The highest ranked white student not offered admission has a score of seventy, the highest scoring minority candidate not admitted with the first ninety-nine admittees has a raw score of sixty-eight and an adjusted score of seventy-three. She is admitted and the marginal white candidate is not.

The opponents of affirmative action would attempt to focus the debate on the contest between the minority admittee and the displaced, marginal white candidate. They would argue that the white candidate has been "cheated" because of the sins of his fathers and the minority candidate has been forever tainted with the stigma of being an "affirmative action baby."<sup>262</sup> But the student who received the plus is not competing for the last remaining seat—she is competing for one of the available one hundred seats. It must also be remembered that some of the ninety-nine seats have already been filled by less qualified siblings, legacies, athletes, and the sons and daughters of high rollers and celebrities, all of whom were admitted because of a plus.<sup>263</sup> It makes little sense that such a plus is accepted more readily than a plus that, however imperfectly, attempts to remedy the effects of prior racial discrimination.

*E. Affirmative Action after Adarand—The Current Test is not Fatal in Fact*

Leaving aside the debate as to whether an affirmative action program that seeks to benefit minorities should be subjected to some lesser degree of scrutiny than strict scrutiny,<sup>264</sup> it is still necessary to apply the standard articulated in *Adarand* to affirmative action. The strict scrutiny test that the Court expressed in *Adarand* is not "strict in theory but fatal in fact"<sup>265</sup> because compelling governmental interests demand a race-based solution. Moreover, recent cases demonstrate

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262. STEPHEN CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

263. See Sanoff, *supra* note 259, at 48.

264. But see *Metro Broadcasting*, 497 U.S. 547 (1990) (expressing a willingness to apply intermediate scrutiny to a "benign" race-based measure).

265. The issue was first articulated in these terms in Gerald Gunther's article, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

how a race based affirmative action admissions program can be tailored narrowly. Finally, history demonstrates that there are no viable race-neutral alternatives.

As Justice Stevens asserted in *Adarand*, the label "strict scrutiny" has "usually been understood to spell the death of any governmental action to which the court may apply it."<sup>266</sup> If such is the case, the debate on color-conscious affirmative action admissions programs need go no further. But Justice O'Connor<sup>267</sup> and other members of the Court<sup>268</sup> have assured us that such is not the case.

Only two Justices have overtly indicated that the test they would apply guarantees fatality. For Justice Scalia, the Court's *Adarand* test was indeed fatal in fact.<sup>269</sup> He stated, "It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny."<sup>270</sup> It is clear that Justice Thomas would take the same position.<sup>271</sup> There is a disturbing trend in the direction of a test that would end all affirmative action programs—including those in educational admissions—regardless of how compelling the interests or how narrow the tailoring. Nonetheless, Justices Scalia and Thomas have not yet forged a majority on this point. Therefore, the strict scrutiny test, while a formidable obstacle to the creation or maintenance of an affirmative action admissions plan, is not fatal in fact.

### 1. Compelling State Interests

In attempting to determine the nature of the compelling state interests that may justify a color-conscious affirmative action admissions program, a number of questions remain unanswered. First, is the remedying of the present effects of past *societal*

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266. *Adarand*, 515 U.S. at 243 n.1 (Stevens, J., dissenting).

267. See 515 U.S. at 237 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'").

268. See, e.g., *Fullilove*, 448 U.S. at 519, in which Justice Marshall stated, "[w]e wish to dispel any notion that strict scrutiny is 'strict in theory but fatal in fact.'" *Id.*

269. See *Adarand*, 515 U.S. at 239 (Scalia, J., concurring).

270. *Id.*

271. See *Adarand*, 515 U.S. at 240 (Thomas, J., concurring). Justice Thomas stated, "There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution."

discrimination an appropriate rationale, or must the affirmative action program be aimed at the effects of prior discrimination by the specific state actor seeking to implement the affirmative action plan? Second, is diversity a compelling interest? Finally, is there any remaining vitality to the role model theory in the context of higher education?

To pass strict scrutiny, the case law suggests that the prior discrimination that has left present effects must have been committed by the specific state actor seeking to apply a color-conscious affirmative action remedy. Although this conclusion is by no means logical, it does not create a truly fatal test. Strict scrutiny becomes fatal only when, as was the case in *Podberesky* and *Hopwood*, the court ignores overwhelming evidence or declares it statistically invalid.

The question of whether or not to consider the racial diversity of a student body as a compelling interest is an academic issue subject to special deference under the First Amendment.<sup>272</sup> Because the Supreme Court has not considered a higher education admissions case since *Bakke*, no recent case has considered diversity in that context. Moreover, although the value of diversity was ignored by the majority opinion in *Hopwood*, a number of circuit court judges have concluded that the diversity rationale is still alive. Still others have concluded that, however moribund, only the Supreme Court can deliver the death blow to the diversity rationale.<sup>273</sup>

The issue of the diversity rationale will remain open until the

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272. See SHROPSHIRE, *supra* note 203. Professor Shropshire would argue that diversity has a significant impact:

Once diversity is introduced into any setting, those accustomed to a monochromatic institution must change. Both blatant and unconscious acts of racism are more likely to be addressed by a diverse group. People of diverse backgrounds generally will provide a varied perspective and encourage more thoughtful viewpoints from others.

SHROPSHIRE, *supra* note 203, at 39; see also *Bakke*, 438 U.S. at 312 (noting the First Amendment's "special concern" with academic freedom).

273. See 78 F.3d at 965 (Weidner, J., concurring) (stating he would pass over the question of diversity as a compelling state interest for race-based affirmative action programs, waiting for the Supreme Court to decide the issue). Seven Fifth Circuit Judges emphatically stated in *Hopwood*, "Lest there be any doubt, we are firmly convinced that, until the Supreme Court expressly overrules *Bakke*, student body diversity is a compelling governmental interest for the purposes of strict scrutiny." *Hopwood*, 84 F. 3d at 724 n.11 (denying rehearing en banc).

Supreme Court decides to answer it. Similarly, the question of whether the role model theory can be applied to higher education must await Supreme Court determination because the holding of *Wygant* is sufficiently off point to provide hope that this theory is still alive.

## 2. Narrow Tailoring and Race-Neutral Alternatives

The concept of narrow tailoring can be used to prevent the unfortunate consequences of sloppy or lazy administration of affirmative action programs. Unfortunately, affirmative action opponents also attempt to use narrow tailoring to assure that the strict scrutiny test is fatal in fact. The University of Maryland's present "sin" in *Podberesky*, discriminating against a Hispanic in favor of a black Jamaican in the awarding of a scholarship, was not adequately tailored to the University's prior sins, which included discrimination against Maryland residents of African descent.<sup>274</sup> Presumably, the University's program could have satisfied the narrow-tailoring test by requiring the Jamaican to compete against only white students for the scholarship. Accordingly, the Hispanic student could have been spared unfavorable treatment that lacked any historical justification. Thus, it would seem that one key to narrow tailoring would be the avoidance of any "plusses" that result in a detriment to members of groups who did not previously benefit from an actor's societal discrimination.

Similarly, an overly strict application of the race-neutral alternatives strand of strict scrutiny analysis can be used to assure that strict scrutiny is indeed fatal in fact. There are always theoretically workable race-neutral alternatives available, and they almost always fail to work. For example, faced with a lack of diversity caused by a lack of minority ownership in the radio and television industries, the FCC attempted a variety of race-neutral solutions over a period of eighteen years before adopting the race-

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274. Although far beyond the scope of this Article, a case could be made for an African-Caribbean-American suffering the present effects of past United States discrimination. See MICHAEL MANLEY, *JAMAICA: STRUGGLE IN THE PERIPHERY* (1982).

conscious measures that prompted *Metro Broadcasting*.<sup>275</sup> Nevertheless, writing in dissent, Justice O'Connor wrote that race-neutral means of enhancing broadcast diversity existed.<sup>276</sup> Similarly, in *Paradise*, the Court was presented with facts that demonstrated that there had been four decades of blatant racial discrimination in the Alabama state troopers department, as well as more than a decade of equally blatant resistance to court-ordered desegregation.<sup>277</sup> Nevertheless, Justice O'Connor again argued for race-neutral alternatives.<sup>278</sup>

As Justice Blackmun pointed out in *Bakke*, when we turn to "the real world of which we are all a part,"<sup>279</sup> it is a fact of life that some race-based measures are necessary:

I suspect that it would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot—we dare not—let the Equal Protection Clause perpetuate racial supremacy.<sup>280</sup>

## VI. CONCLUSION

The degree to which institutions of higher education can utilize affirmative action programs that take race into account is unclear at this time. The fact that such programs will be subject to strict scrutiny does not end the matter, but merely sets the stage for a variety of possibilities.

In *Bakke*, Justice Powell argued that creating a diverse student body was a compelling state interest that could withstand strict scrutiny, but he was not able to convince a majority of the Court to

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275. See *supra* note 114.

276. *Metro Broadcasting*, 497 U.S. at 622 (O'Connor, J., dissenting).

277. See *supra* note 86 and accompanying text.

278. See *Paradise*, 480 U.S. at 199-200.

279. *Bakke*, 438 U.S. at 407 (Blackmun, J., concurring in the judgment and dissenting in part).

280. *Id.*

sign his opinion. The Court has declared that remedying the present effects of prior discrimination is also a compelling state interest, but it is unclear whether the discrimination in question can be societal, or must be specific to the state actor seeking to apply the affirmative action remedy. Although *Adarand* made it clear that strict scrutiny would be applied in all cases in which state actors use race-based decision making, *Adarand* did not involve the unique situation of higher education<sup>281</sup> and, thus, left many issues unresolved. In *Podberesky* and *Hopwood*, the Fourth and Fifth Circuit Courts of Appeals attempted to resolve the issue by denying that *Bakke* has any precedential value and crafting tests that are "strict in theory but fatal in fact."

This Article has argued that affirmative action programs that do not constitute quotas and do not violate the Equal Protection Clause can survive strict scrutiny. The Supreme Court has never held that creating a racially diverse student body is not a compelling state interest. The Court has also never stated that an affirmative action program can only address the present effects of prior discrimination by the specific actor seeking to apply the remedy. Therefore, the tests that the Fourth and Fifth Circuit Courts of Appeals created are much narrower than the Supreme Court's test.

Opponents of affirmative action have attacked remedial programs by arguing that a color-blind Constitution prohibits any race-based decision-making. The fault of this argument is that the color-blind Constitution is a myth. The Constitution was not drafted as a color-blind document and was not initially interpreted by the Supreme Court as color-blind. Moreover, even though Congress had the clear opportunity to make the Constitution color-blind with the Reconstruction Amendments, it chose to leave it as a color-conscious document.

Finally, the primary constitutional basis for the color-blind myth, the Equal Protection Clause, was an impediment to minority progress during much of its history. Thus, the central irony of the myth of a color-blind Constitution has been that, for most of our history, the courts have been far from color-blind in their discrimination against

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281. See 515 U.S. at 212-37.

minorities. Only now, when the Constitution has been used in a color-conscious manner to remedy the present effects of past discrimination, has the myth of a color-blind Constitution arisen. To heighten the irony, this process has taken place in a society that is far from color-blind and plagued with present effects of past discrimination. It is the centuries of past discrimination that makes race such a useful proxy for disadvantage.

In the 1850s, the Supreme Court's decision in *Dred Scott* was seen as a reflection of the unbiased reality that there existed an inferior race entitled to paternalistic concerns, but certainly not entitled to the right to vote. In the 1890s, society saw *Dred Scott* as overtly racist and a product of less enlightened times. However, the same society saw the *Plessy* doctrine of separate but equal as a modern, enlightened understanding of the relationship between the white and black races. Today's society sees *Plessy* as overtly racist and views the myth of a color-blind Constitution as the product of enlightened times. Will some future generation see the strict scrutiny of *Adarand*, the Scalia/Thomas color-blind Constitution, and the dismantling of affirmative action as the final stage in the continuum from slavery to equality? Or, instead, like *Dred Scott* and *Plessy*, will future generations see today's court decisions as the embarrassing relics of an unenlightened past?

## **NOTES**

