A Not Quite Color-Blind Constitution: Racial Discrimination and Racial Preference in Justice O'Connor's "Newest" Equal Protection Jurisprudence

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Under the leadership of Justice O'Connor, the Supreme Court has fashioned a uniform standard for examining the constitutionality of racial classifications under the Equal Protection Clause. Though her standard is appropriately labeled as strict scrutiny for both invidious and benevolent classifications, it should not be understood as "strict in theory, fatal in fact" and it is not color-blind. Instead, Justice O'Connor's newest equal protection jurisprudence is "not quite color-blind." The standard is consistently high and it demands that for a classification to be acceptable it must normally be confined to remedial aims and that the claims to a benevolent purpose must be genuine and justified.

I. INTRODUCTION

In a series of recent cases concerning racial preferences, the Supreme Court, largely under the leadership of Justice O'Connor, has articulated a new doctrine concerning the constitutionality of governmental racial classifications under the Equal Protection Clause of the Fourteenth Amendment.[1] The Court has determined, after twenty five years of debate, that the most stringent standard of review ("strict scrutiny") applies to all such classifications, even those intended to benefit rather than to burden historically disadvantaged minorities.[2] This standard has been applied to racial preference programs in

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[1] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person . . . the equal protection of the laws.").

[2] My discussion focuses mainly on racial preferences for Blacks, who have been in a uniquely disadvantaged social, economic, and political position, and who remain so despite significant improvements. I do not slight the problems faced by other minority groups, but space prevents treating of these more than incidentally. In any event, the Court's doctrine regarding race does not distinguish between different minority groups, nor indeed, today, in

employment, state and federal government contracting, and voter districting.[3] The Court has yet to revisit affirmative action programs in higher education.[4] Does the new standard mean that the Court has adopted a color-blind theory of equal protection, holding in effect that any racial classification by the government is unconstitutional, that no governmental unit may take race into account except to cure a plain constitutional violation of equal protection?[5] Has the Court *sub silentio* overruled *Regents of the University of California v. Bakke*, the charter for affirmative action in higher education?

While several Justices now adhere to a color-blind view, I argue in Part II that the Court's new doctrine should not be so understood. Rather, its approach is "not quite color-blind." This is roughly in accord with the modern tradition in equal protection jurisprudence. After explaining the policy interests behind the racial preference programs developed since the late 1960s, I then show that these programs are consistent with the original intentions of the framers and with the modern tradition of Supreme Court equal protection jurisprudence of race. In current debates around the constitutionality of racial preference itself, the Court is closely divided.

I then consider in Part III whether the adoption of a uniform standard of review for all governmental racial classifications means that the Court has departed from tradition and precedent. This depends on the intent of Justice O'Connor, the pivotal vote on these issues in the last decade and author of the crucial opinions in *Richmond v. J.A. Croson Co.*, *Adarand Constructors, Inc. v. Pena*, and *Shaw v. Reno* (*Shaw I*). Given the current alignment of the Court, Justice O'Connor's views are dispositive in this area.[6] Her views do not support

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an important sense, between different races at all.

[3] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (opinion of O'Connor, J.) (holding federal minority set-aside subject to strict scrutiny); Shaw v. Reno, 509 U.S. 630, 653 (1993) (*Shaw I*) (opinion of O'Connor, J.) (holding racially based voting reapportionment plan subject to strict scrutiny); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion of O'Connor, J.) (invalidating a municipal minority set-aside for government contracting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 280 (1986) (plurality opinion of Powell, J.) (stating that a race-conscious layoff provision in education is subject to strict scrutiny).

[4] The Court declined to review *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (holding diversity-promoting affirmative action in higher education unconstitutional), *cert. denied*, 116 S. Ct. 2581 (1996), raising doubts about the continued viability of *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). See *infra* Section III (C) for discussion.

[5] This is the interpretation of current Supreme Court doctrine urged by the majority in the Fifth Circuit panel in *Hopwood*, 78 F.3d at 939–40, 946.

[6] Justice O'Connor is "the key voice on the Supreme Court in affirmative action cases." David P. Stoelting, Case Note, *Minority Business Set-Asides Must Be Supported by Specific*

a color-blind interpretation of current doctrine. Justice O'Connor's "newest" equal protection jurisprudence means that the strict scrutiny applied in racial preferences is not "strict in theory, fatal in fact,"[7] but rather lowers the demands of strict scrutiny to allow some government flexibility in view of the persistence of racial discrimination and its effects.

On one hand, Justice O'Connor would allow an as-yet undetermined scope for some racial preference as a remedial measure even where a governmental actor has not discriminated in the past and perhaps, at least in higher education, as a forward-looking nonremedial measure to attain goals such as diversity, vindicating *Bakke*. On the other hand, the application of even a lowered strict scrutiny standard involves a departure from the Burger and early Rehnquist Courts' fairly permissive approach towards remedial and other noninvidious racial preferences, especially federal ones.[8] Her new standard is especially rigorous in the voting apportionment context, but even there it eschews color-blindness.

II. RACIAL PREFERENCE AND THE HISTORY OF EQUAL PROTECTION JURISPRUDENCE

A. *The Historical Interests Behind Racial Preference Programs*

Looming over the public and judicial debate concerning racial preference is the legacy of slavery and racism. Segregation, institutionalized in the Jim Crow policies authorized under *Plessy v. Ferguson*,[9] was overturned only in 1954 by *Brown v. Board of Education*.[10] From 1954 to 1969, when the Nixon administration firmly established affirmative action as national policy,[11] Blacks were largely confined to the lowest rungs of the economic ladder and to a great

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Evidence of Prior Discrimination: Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989), 58 U. CIN. L. REV. 1097, 1118 (1990). With Justice O'Connor's subsequent opinions in *Shaw I* and *Adarand Constructors*, Stoelting's judgment has been vindicated and extended from affirmative action to broader issues of racial preference. Justice O'Connor is now not merely a swing vote, but a leader of the Court on this issue, able to win not merely pluralities but actual majorities for her views.

[7] The expression is due to Gerald Gunther, *The Supreme Court 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[8] *See infra* note 25.

[9] 163 U.S. 537, 538 (1896) (upholding segregation in public transportation).

[10] 347 U.S. 483, 495 (1954) (striking down "separate but equal" in public education).

[11] See JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 175–221 (1996), for a history of the origins of the policy.

though somewhat lesser extent they still are.[12] They remain severely underrepresented in the professions.[13] Comparatively few Blacks owned or own businesses of any size.[14] In higher education, Blacks do worse on the measures used by universities to assess applicants[15] and so, before affirmative action, were largely excluded especially from the better programs in higher education.[16] Color-blind admissions would mean, for example, that Black enrollment at law schools would drop from between 60% to 80%.[17] The most

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[12] Comparing 1960 to 1990, Blacks, then as now comprising about 10% of the workforce, were 2.2% of electricians and are now 6.2%; 4.6% of aircraft mechanics, now 9.8%; 2.5% of firefighters, now 11.5%; 5.0% of structural metal workers, now 3.7%; but they were 54.3% of domestic servants, now "only" 24.7%; and 24.9% of chefs and cooks, now "only" 18.3%. *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 111–13 (1992). At the high end of the socioeconomic scale, the situation is similar. In the 1980s, only three Blacks appeared among *Forbes* magazine's list of the 400 richest Americans. In 1991 only one Black headed one of America's top 1,000 corporations. *See id.* at 108.

[13] Still comparing 1960 to 1990, Blacks were 1.6% of accountants and auditors and are now 7.4%; 4.4% of college teachers, now 4.5%; 1.3% of lawyers, now 3.2%; 4.4% of physicians, now 3.0%. *See id.* at 113.

[14] Based on 1990 Census figures, there are about 425,000 Black-owned businesses, roughly 2.4% of the nation's enterprises. The average annual receipts are around $50,000 and 85% of these firms are one-person enterprises or family firms with no employees. *See id.* at 108.

[15] In general, whites average more than 100 points higher than minorities on examinations of the Scholastic Aptitude Test (SAT) sort than minorities. *See* ALAN P. SINDLER, BAKKE, DEFUNIS, AND MINORITY ADMISSIONS 122 (1978). In the 1990 SATs, Blacks averaged 737 out of 1600 compared to whites at 933. While scores improve with income, even the average of the highest income Blacks (854) is lower than that of the lowest income whites (879). *See* HACKER, *supra* note 12, at 142–43. Grades for Blacks are similarly systematically lower. In the mid-1970s, 20% of white but only 1% of Black applicants had a 600+ (out of 800) LSAT and a higher than B+ GPA. *See* Amicus Brief for Association of American Law Schools at 20, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (No. 76-811).

[16] In 1965, fifteen years after the Supreme Court ordered the desegregation of professional schools in *Sweatt v. Painter*, 339 U.S. 629, 636 (1950), Blacks were 1.3% of all law students; about half were at Black law schools. There were 434 Black students at *all* the ABA-approved, mostly white law schools. By 1976, largely due to affirmative action, minority enrollment at the ABA-approved law schools was 8.2%, of which Blacks comprised 58%. *See* SINDLER, *supra* note 15, at 31–33.

[17] *See* Franklin P. Adams, *The Social Impact of* Bakke, 4 LEARNING AND THE LAW 1, 51–52 (1977) (summarizing *Applications and Admissions to ABA Accredited Law Schools: An Analysis of the Data for the Class Entering in the Fall 1976* (1977)). These figures are borne out by the 80% drop in minority admissions to the University of Texas Law School, after

plausible explanation for these grim facts is historical and continuing racism,[18] much of it governmentally authorized or sanctioned at least through the end of the 1960s. There is no reason to suppose that Blacks are innately less able than whites to excel in employment, business, or education.[19] Blacks have also been disproportionately excluded from political representation. Before the Voting Rights Act of 1965, Blacks were, practically speaking, denied the right to vote in many states. Voter districting, racial bloc voting, and winner-take all elections ensure that Blacks are still less able than whites to gain public office.[20]

Hopwood, for the class entering in 1998, and by a similar drop in the law schools at Berkeley and UCLA after the California Civil Rights Amendment was enacted. *See* Anthony Lewis, *Whiter than White*, N.Y. TIMES, May 23, 1997, at A31; *infra* note 223.

[18] "[S]ubstantial numbers of Americans are perfectly willing to express frankly negative characterizations of blacks." PAUL M. SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE 64 (1993). Of whites surveyed in the 1991 National Race Survey 52% agree with characterizing Blacks as "aggressive or violent"; 45% as "boastful"; 41% as "complaining"; 34% as "lazy"; 21% as "irresponsible." *Id.* at 45. This translates into discrimination. The Urban Institute found that Black testers in Chicago and Washington, D.C., were denied a job offered to an equally qualified white counterpart 15% of the time; vice versa, only 5%. Discrimination was markedly higher in Washington, D.C., despite the government's dominant role as employer. MARGERY AUSTIN TURNER ET AL., OPPORTUNITIES DENIED, OPPORTUNITIES DIMINISHED: DISCRIMINATION IN HIRING 1-2 (Urban Institute 1991).

[19] Careful studies show that there are no inherent group-related differences among the races. *See generally* STEPHEN JAY GOULD, THE MISMEASURE OF MAN 321-34 (1980); LEON KAMIN, THE SCIENCE AND POLITICS OF IQ 15-30 (1974); Richard C. Lewontin, *Race and Intelligence*, *in* THE IQ CONTROVERSY 78 (N.J. Block & Gerald Dworkin eds. 1976). Income as well as racism makes a difference in explaining the racial differential in test scores. In 1972 to 1989, Black income was 68% of the national average while various white groups ranged from 93% to 155% of the national average. *See* CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS 28 (1992). But income cannot be the whole story. Hispanics had lower test scores than whites and higher incomes than Blacks during this period and the test scores of the best-off Blacks averaged lower than those of the worst-off whites. *See* HACKER, *supra* note 12, at 142-43. It has been suggested that cultural differences such as the relative importance placed on education are salient causes of differential performance. *See* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 286-88 (1994). These alleged differences are disputable for discussion see various essays in THE BELL CURVE DEBATE: HISTORY, DOCUMENTS, OPINIONS (Russell Jacoby & Naomi Glauberman eds. 1995) but in any case neither culture nor lower Black incomes are variables independent of the history of racism.

[20] From the end of Reconstruction to 1993 there were no Blacks in the United States Senate. In this century no Black governor was elected until the 1980s, when Douglas Wilder won the statehouse in Virginia. Only 1.5% of elected officials nationally are Black, mostly mayors from majority-Black towns with populations under 1,000. *See* LANI GUINIER, THE

Against this unhappy background, it was recognized early in the civil rights revolution that strictly color-blind policies were inadequate to remedy the effects of racial discrimination. In President Johnson's famous words, "[y]ou do not take a person . . . hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."[21] Once systematically disfavored in law and practice, minorities had to be systematically favored to gain redress and attain the equality guaranteed by the Constitution.

As race-conscious remedies like busing and minority districting were developed in the late 1960s[22] to enforce school desegregation and violations of minority voting rights, businesses, universities, and government turned towards racial preference programs. These have varied in form from minority quotas, hiring targets and timetables, and set-asides to treating race as a "plus" factor among others or designing voting districts so that minority votes had greater weight. All were designed to redress past and ongoing inequities, to afford minorities opportunities previously denied them and which would be generally unavailable under color-blind policies and individualized enforcement of anti-discrimination law, and in some cases, such as university admissions policies, to foster nonremedial goals such as diversity.

From the perspective of minorities and government, the alternatives to color-conscious policies were impracticable. Individual civil rights lawsuits are expensive and involve long delays. Claims of discrimination are difficult to prove even when justified. Federal enforcement in individual cases, given the level of resources committed by Congress, has been extremely slow.[23] From the perspective of business, racial preferences have been a way to mollify widespread minority discontent and avoid the threat of lawsuits.[24] From the

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TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 38 (1994).

[21] President Lyndon B. Johnson, *To Fulfill These Rights*, Commencement Speech at Howard University (June 4, 1965) *in* THE AFFIRMATIVE ACTION DEBATE 16, 17 (George E. Curry ed. 1996).

[22] For a discussion of these policies, see SKRENTNY, *supra* note 11 (affirmative action), GUINER, supra note 20 (minority districting), and RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1976) (busing).

[23] The EEOC backlog was over 125,000 cases by 1976. The law stated that complaints would be processed in 60 days, but by 1968, the average case took from 16 months to two years. *See* SKRENTNY, *supra* note 11, at 124.

[24] *See id.* at 89–91; United Steelworkers of Am. v. Weber, 443 U.S. 193, 210–11 (1979) (Blackmun, J., concurring).

perspective of universities, affirmative action allowed the enhancement of racial diversity. Color-consciousness thus combined economic efficiency, provident use of government resources, and justice for minorities, as well as furthering important nonremedial goals. Such programs won the imprimatur of the Burger and early Rehnquist Courts in a series of important cases in the 1970s and 1980s.[25]

These policies and decisions were and remain quite controversial.[26] Many people view such race-conscious policies as reverse discrimination, no better than, or in their own way as harmful as, the racism they purport to combat. Some legal scholars, accepting this characterization, have argued that racial preference policies, whatever their purpose, are unconstitutional, violative of the Equal Protection Clause, which, they say, requires a color-blind reading of the Constitution.[27] This is not Justice O'Connor's view. Neither is it consistent

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[25] The key employment cases are *Weber*, 443 U.S. at 208 (holding voluntary affirmative action in private employment consistent with Title VII); *Johnson v. Transportation Agency*, 480 U.S. 616, 641–42 (1987) (holding same for public employers); *Sheet Metal Workers Local 28 v. EEOC*, 478 U.S. 421, 442 (1986) (upholding use of union funds to increase minority membership); *International Association of Firefighters, Local 93 v. City of Cleveland*, 478 U.S. 501, 515 (1986) (upholding consent decree requiring employer to promote minority employees). *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), is the key case in university admissions. In school desegregation, the leading case is *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 3 (1971) (approving involuntary busing). In government contracting, the high-water mark of the Court's tolerance for racial preference was *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1980) (approving a federal minority set-aside). Finally, in *United Jewish Organizations v. Carey*, 430 U.S. 144, 155 (1977), the Court upheld apportionment of voting districts to ensure that minority voters are represented.

[26] It is hard to assess public attitudes towards affirmative action because the figures are so variable depending on how the survey questions are framed. The 1988 National Election Study found that 90% of whites opposed "[p]reference in hiring and promotion for jobs" and 76% opposed "[r]acial quotas for college admissions" (illegal under *Bakke*), but a 1988 Harris poll found that 55% of whites favored "affirmative action programs for blacks and other minorities, which do not have rigid quotas." SNIDERMAN & PIAZZA, *supra* note 18, at 130. Minority support for race-conscious policies is very high. In 1996, the referendum on California Proposition 209, requiring that the state follow entirely color-blind policies, *see infra* note 223, passed 54%-46%, with white voters (63% 37%) favoring it; and Blacks (26%-74%), Latinos (24%-76%), and Asians (39% 61%) opposing it. *See State Propositions: A Snapshot of Voters*, L.A. TIMES, Nov. 7, 1996, at A29.

[27] *See, e.g.*, Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 22, *reprinted in* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 364 (1983); William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809–10 (1979).

with the history of Equal Protection Clause jurisprudence, as is argued in the following section. Her position, which would allow racial preferences that pass the strict scrutiny test, is more consonant with traditional doctrine, although not fully so. After a brief survey of that history, the rest of this Comment is devoted to an explication of her treatment of racial preference in the opinions that define current equal protection doctrine about race.

B. *The Equal Protection Clause Is Not Color-Blind: Background*

1. *Original Intent and Early History*

The original intent of the framers of the Fourteenth Amendment was not to bar governmental use of racial classifications.[28] They saw equal protection as a matter of guaranteeing the "civil rights" of Blacks as citizens of the United States to free movement, access to the courts, and property ownership, but not political rights to vote or serve on juries, much less the promotion of social equality reflected in a right to intermarry, attend integrated schools, and the like.[29] Their specific concern was to protect newly freed slaves from certain extreme and specific abuses embodied in the Southern "Black Codes." This conception allowed for race-conscious legislation that designedly favored Blacks, such as the Freedman's Bureau Act.[30] It also allowed much that

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[28] *See* Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 *passim* (1955); JACOBUS TENBROEK, EQUAL UNDER LAW 201–33 (rev. ed. 1965).

[29] It is clear from the legislative history that the Fourteenth Amendment was intended, minimally, as a constitutional embodiment of the Civil Rights Act of 1866. *See* Bickel, *supra* note 28, at 61. But the "civil rights" it was meant to protect were narrowly conceived. *See id.* at 16. Rep. Wilson explained, "'Do [civil rights] mean that in all things civil, social, and political, all citizens without distinction of race or color, shall be equal? By no means . . . . [C]ivil rights [include] the right of personal security, [t]he right of personal liberty, and the right to acquire and enjoy property.'" *Id.* at 16–17 (citations omitted). Congress repeatedly rejected proposals to bar discrimination on account of race or color. *See* TENBROEK, *supra* note 28, at 205–06. Bickel says, "[I]t is difficult to interpret the deliberate choice against using the term 'civil rights' [rather than 'equal protection'] as anything but a rejection of what were deemed its wider implications." Bickel, *supra* note 28, at 57.

[30] *See* Bickel, *supra* note 28, at 8. As Justice Marshall observed, the Freedman's Bureau Act "provided many of its benefits only to Negroes" and "since [the] Congress [that] considered and rejected the objections to [that Act] concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 397–98 (1978).

disfavored Blacks. Notoriously, the Reconstruction Congress did nothing about segregated schools in the District of Columbia or about many other racially discriminatory federal and state policies.

The late nineteenth century Court followed the outlines of this approach in its main equal protection decisions. The first strand of the original understanding, as a charter for Black emancipation, was reflected in the *Slaughter House Cases*,[31] which stated the "Negro rights theory" of the Fourteenth Amendment while effectively limiting its application by limiting the authority of the federal government to enforce it. More true to the spirit of this strand was *Strauder v. West Virginia*, striking down a state prohibition on Blacks serving as jurors.[32] There the Court said that the Equal Protection Clause is an "exemption from legal discriminations implying inferiority . . . [and] which are steps towards reducing [Blacks] to the condition of a subject race."[33] The second strand of the original understanding, as allowing Blacks to be disfavored, was inscribed in the infamy of *Plessy v. Ferguson*, which enshrined "separate but equal" in the Constitution for 58 years. The remark that the Constitution is "color-blind"[34] was coined in Justice Harlan's famous *dissent*. The second strand is, happily, dead. But equal protection must be considered in light of modern conditions, as Chief Justice Warren acknowledged in *Brown*, which sounded the death knell for segregation.[35]

2. *The Modern Tradition*

The line of cases regarded as authoritative in the modern tradition departs from the second strand of the original intent but not from the first. It prohibits racial classifications that disfavor racial minorities but cannot be construed to require a color-blind theory of equal protection. That explains why the comparatively conservative Burger Court found it so natural to uphold the racial preference programs developed to defeat the effects of discrimination.

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[31] 83 U.S. 36 (1873). This case did not concern a racial classification. The Court rejected the sort of substantive due process claim, advanced by white artisans, that it later embraced in *Lochner v. New York*, 198 U.S. 45 (1905), on the grounds that due process was narrowly procedural and equal protection was solely about the protection of Blacks. *See* Slaughter House Cases, 83 U.S. 36, 71 (1872).

[32] 100 U.S. 303, 310 (1880).

[33] *Id.* at 308.

[34] Plessy v. Ferguson, 163 U.S. 537, 559 (1896), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

[35] *See* Brown, 347 U.S. at 492-93.

Modern equal protection doctrine, up until recently, has been cast in the mode of guarding against "prejudice *against* discrete and insular minorities."[36] Although racial preferences were not considered by the Court until the 1970s, the rationale of the decisions invalidating invidious discrimination clearly admits of noninvidious racial preferences that do not involve the evils of racism. As the Court understands them, these evils seem to be two.[37] One is that invidious discrimination stigmatizes its victims. The other is that it reflects animus on the part of its majority perpetrators. Consider these in turn.

a. *Stigmatization*

Justice Harlan's great dissent in *Plessy* was based on the idea that segregation "proceed[ed] on the ground that colored citizens are . . . inferior and degraded" and so imposed on them "a badge of servitude" for the benefit of a "dominant race."[38] In *Brown*, the Court rejected segregation in public education because it "generates a feeling of inferiority as to [the] status [of Black children] in the community that . . . affects their hearts and minds in a way unlikely ever to be undone."[39] In *Loving v. Virginia*,[40] the Court struck down laws prohibiting racial intermarriage as "measures designed to maintain White Supremacy."[41] Justice O'Connor is concerned that noninvidious racial preferences may stigmatize their beneficiaries.[42] I argue below that this is an improper consideration from a legal perspective. Whatever its factual merit,[43]

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[36] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (emphasis added); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77, 82-88 (1980) [hereinafter ELY, DEMOCRACY] (providing more extensive analysis); John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 741 (1974) [hereinafter Ely, *Constitutionality*] ("There is nothing suspicious about a majority's [legislating] against itself.").

[37] *See* Paul Brest, *The Supreme Court 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6-9 (1976).

[38] *Plessy*, 163 U.S. at 560, 562.

[39] *Brown*, 347 U.S. at 494.

[40] 388 U.S. 1 (1967).

[41] *Id.* at 11.

[42] *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) ("Classifications based on race carry [the] danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority . . . .").

[43] Certainly the concern is felt by some Blacks. Professor Carter reports feeling insulted when he discovered that he was preferred for Harvard Law because he was Black—he went to Yale, where his race also counted. *See* Stephen L. Carter, *Racial Preferences?: So What?*,

remedial racial preferences, unlike invidious discrimination, are in no way intended to mean that anyone is inferior or degraded because of race.

b. *Prejudice*

Racial classifications may be "expressions of hostility or antagonism to[wards] certain groups of individuals."[44] This concern was stated as a basis for heightened review in *United States v. Carolene Products Co.*[45] In *Korematsu v. United States*,[46] the case that originated the notion of strict scrutiny regarding racial classifications, Justice Black said, "Pressing public necessity" might justify "curtail[ing] the civil rights of a single racial group," but "racial antagonism never can," and while "*all* [such] legal restrictions . . . are immediately suspect," this was because they might embody racial prejudice.[47] Justice Black felt that restrictions that did not, as he believed the Japanese-American relocation policy would not, would survive strict scrutiny.[48] This emphasis on prejudice is reflected in the Court's subsequent determination that a violation of equal protection requires discriminatory purpose,[49] or in the public education context, segregative purpose or intent,[50] and not merely disparate impact. The only way to sensibly understand the concern with discriminatory purpose or intent is as a concern with imposition of racial classifications because of prejudice, not the mere intentional use of such classifications for any purpose whatsoever.

c. *Ethics*

The ethical theory implicit in the modern tradition is that the intended

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in DEBATING AFFIRMATIVE ACTION: RACE, GENDER, ETHNICITY, AND THE POLITICS OF INCLUSION 151, 155 (Nicolaus Mills ed. 1994). Justice Thomas has also supported this view. *See infra* notes 75–76 and accompanying text.

[44] Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 358 (1949).

[45] 304 U.S. 144 (1938); *see also supra* note 36 and accompanying text.

[46] 323 U.S. 214, 219 (1944) (upholding the relocation of Japanese-Americans during World War II). As is now universally recognized, this was not Justice Black's finest hour. Congress has instituted reparations to the victims of the relocation policy. *See generally* PETER IRONS, JUSTICE AT WAR (1983) (discussing the history of Japanese-American internment camps in World War II).

[47] *Id.* at 216 (emphasis added).

[48] *See id.* at 223–24; *see also* IRONS, *supra* note 46 at 325–41.

[49] *See* Washington v. Davis, 426 U.S. 229, 239–48 (1976).

[50] *See* Keyes v. School Dist. No. 1, 413 U.S. 189, 198 (1973).

effects and actual purpose of a challenged classification are relevant and indeed legally dispositive. In contrast, the color-blind theory posits that racial differentiation is immoral, and in this context unconstitutional, *merely* because it is race-conscious. In his dissent in *Adarand Constructors, Inc. v. Pena*, Justice Stevens restates the insight of the modern tradition to explain why this is false:

> There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society.[51]

Color-blindness disregards "the difference between a 'No Trespassing' sign and a welcome mat."[52]

Two defects of the color-blind view deserve comment. One is that it fails to grasp what racism is or why it is wrong. In Professor Van Alstyne's revealing elision, it equates "differential treatment of other human beings by race" with "racism."[53] The modern tradition rightly rejects this theory, which trades on the fact that historically such differential treatment has been accompanied by stigma and motivated by prejudice to brand as racist differential treatment that is meant to defeat stigma and overcome prejudice. By itself, racial classification is no more pernicious than classification by athletic ability or home state. If there were no history of racial oppression, as there is none of the athletically limited or geographically handicapped, racial differentiation might or might not be rational, but it would not be racist. What makes it racist, when it is, is precisely that history and the predicates of racism, prejudice, and stigmatic harm. Racism, in the modern tradition, is not a matter of distinctions but degrading discrimination driven by animus.

The other defect is concomitant. Because the color-blind view fails to grasp the wrong that, in the modern tradition, equal protection seeks to avert, it cannot grasp the right that equal protection seeks to secure. As Professor Dworkin explains, this is not equal treatment but "treatment as an equal."[54] The right that equal protection guarantees cannot sensibly be that each person

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[51] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995). Justice Stevens attributes the color-blind view to the majority. Justice O'Connor, as noted below in the text, see *infra* text accompanying notes 116–17, takes some pains to disavow it.

[52] *Id.* at 229.

[53] Van Alstyne, *supra* note 27, at 809–10.

[54] Ronald Dworkin, *Reverse Discrimination*, *in* TAKING RIGHTS SERIOUSLY 223, 227 (1977).

shall be treated in exactly the same way, but that no person shall be treated so as to "suffer from the prejudice and contempt of others."[55] Since no one can seriously claim that modern racial preference programs reflect prejudice against whites or subject them to contempt and stigma because of their race, they should, if otherwise properly designed, raise no equal protection claim.

In sum, it would be a very considerable departure for the Court to adopt a wholly color-blind approach that never allowed race to be taken into account except to remedy a pre-existing violation of equal protection. The weight of precedent is against such a view. Taking race into account in a way that neither stigmatizes nor reflects prejudice is acceptable to the modern tradition. I dwell on this not only to exhibit the coherence of the modern tradition and the consistency of the Burger and early Rehnquist Courts in upholding racial preference programs, but also to show that Justice O'Connor's views are informed by the ethical theory that sustains it.

C. *Opposing Views on Racial Preference and the Standard of Review Debate*

The Court has been as sharply divided as the country in its deliberations on whether noninvidious racial preferences are permissible to serve remedial or other ends. This difference was expressed in the quarter century of debate over the proper standard of review for racial classifications intended to benefit rather than disadvantage racial minorities, a debate settled by *Richmond v. J.A. Croson Co.*, *Adarand Constructors*, and *Shaw v. Reno* (*Shaw I*). The question was how much deference should be accorded to the policymaking of other branches of government. In view of America's bleak legacy of official racism, the courts agree that racial classifications are not entitled to the deferential review deemed appropriate for most social and economic legislation, requiring

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[55] Ronald Dworkin, *Bakke's Case: Are Quotas Unfair?*, *in* A MATTER OF PRINCIPLE 293, 298 (1985). This should be distinguished from Professor Tribe's "antisubjugation principle," according to which equal protection does not merely permit but actually requires race-conscious measures "to break down legally created or legally reenforced [sic] systems of subordination that treat some people as second-class citizens." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1515 (2d ed. 1988). The Court has indeed sometimes implicitly invoked such a principle in requiring race-conscious measures to remedy violations of equal protection, say, in upholding school busing, *see, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 454 (1979), or ordering racial targets in hiring to overcome egregious discrimination, *see, e.g.*, United States v. Paradise, 480 U.S. 149, 166 (1987). But it cannot explain the modern tradition, on which voluntary racial preference plans are permitted but not required.

only that a classification bear a "rational relation" to a "legitimate" governmental end. "Invidious" measures that disadvantage minorities on account of race are "suspect" and face the strictest scrutiny. They must be "narrowly tailored" to meet a "compelling" governmental interest, and so rarely survive. What about noninvidious measures of the sort generally upheld by the Burger and early Rehnquist Courts, but without clear resolution of the standard of review?

A more senior group of Justices—Brennan, Marshall, Blackmun, and White—now all retired from the Court, defended an intermediate standard of review, used in classifications based on gender[56] and illegitimacy,[57] requiring that the classification be "substantially related" to an "important" governmental end.[58] The senior Justices in *Bakke* argued that while racial classifications required some heightened level of scrutiny, those that were benign in purpose should not be found virtually per se invalid, as they would have been under the then prevailing understanding of strict scrutiny as "fatal in fact."[59] It may have been reflected in *Fullilove v. Klutznick*, which used no clearly articulated standard of review.[60] Intermediate scrutiny was briefly law, at least for federal racial preferences, under *Metro Broadcasting, Inc. v. FCC*,[61] reversed in this respect by *Adarand Constructors*.[62] Justice Stevens originally opposed racial preference but came to support both it and intermediate scrutiny in his *Adarand Constructors* dissent;[63] he was joined in this by Justice Ginsburg, which seems

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[56] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[57] *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).

[58] *See, e.g., id.*

[59] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 256–62 (1978) (opinion of Brennan, Marshall, White & Blackmun, JJ.).

[60] 448 U.S. 448, 492 (1980). Justice Powell, concurring in the plurality opinion, thought that *Fullilove* applied, or at least accorded with, his own favored strict scrutiny standard. *See id.* at 495–96. In *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 564–65 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 243 (1995), the Court read *Fullilove* as using intermediate scrutiny and providing precedential support for its own adoption of this standard in the context of federal racial preference policies.

[61] 497 U.S. at 564–65.

[62] 515 U.S. at 256.

[63] In *Bakke*, Justice Stevens wrote that Title VI of the 1964 Civil Rights Act was intended by Congress to be color-blind, *see Bakke*, 438 U.S. at 413–16, although he declined to address the constitutional question or consider whether equal protection itself was color-blind. *Id.* at 417. In *Adarand Constructors*, he dissented from the Court's adoption of a strict scrutiny standard for all governmental racial classifications, saying that "benign programs deserve different treatment [from] invidious programs." *Adarand Constructors*, 515 U.S. at 243 n.1. See also his remarks quoted *supra* notes 51–52 and accompanying text.

to leave them the only two voices on the Court supporting a lower standard of review in general. The other dissenters in that case, Justices Breyer and Souter, did not take issue with the holding on the standard of review.[64]

Newer justices appointed by Republican Presidents held out for strict scrutiny. This was Justice Powell's position in *Bakke*,[65] in which he was joined by no other Justice. In *Wygant v. Jackson Board of Education*, however, Justice Powell won a plurality of four—Justices Powell, Rehnquist, O'Connor, and Chief Justice Burger—for strict scrutiny.[66] Justice Powell, however, clearly did not understand this strict scrutiny to be fatal. In *Wygant* he said, "We have recognized . . . that in order to remedy the effects of prior discrimination, it may be necessary to take race into account."[67] His opinion in *Bakke* stated that affirmative action in educational admissions could pass constitutional muster under certain conditions.[68] He concurred in *Fullilove*.[69] In both *Wygant* and *Bakke*, he insisted on findings by competent authorities of governmental discrimination as a condition for a legitimate racial preference, indicating that there could be such preference.[70]

A minority of Republican appointees followed Justice Powell as to strict scrutiny, but rejected his position that racial preferences are constitutional. Adopting color-blindness, they regarded race-conscious measures as per se invalid unless necessary to remedy a constitutional violation. Justice Scalia said:

> The benign purpose of compensating for social disadvantages, whether they have been acquired by reason of prior discrimination or otherwise, can no more be pursued by the illegitimate means of racial discrimination than can other assertedly benign purposes we have repeatedly rejected. . . . [T]here is only one circumstance in which the states may act *by race* to "undo the effects of past discrimination": where that is necessary to eliminate their own

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[64] *See Adarand Constructors*, 515 U.S. at 265 (Souter, J., dissenting) ("I would not have entertained [the standard of review] question in this case."). In *Shaw I*, Justice Souter suggests that he would treat electoral districting cases differently from nondistricting cases, using lower scrutiny in districting cases. *See* Shaw v. Reno, 509 U.S. 630, 684–85 (Souter, J., dissenting). In *Vera*, he joins with Justice Ginsburg in Justice Stevens' dissent, agreeing on this point. *See* Bush v. Vera, 116 S. Ct. 1941, 1978 (1996).

[65] *See* 438 U.S. at 307–08.

[66] *See* 476 U.S. 267 (1986) (opinion of Burger, C.J., Rehnquist, O'Connor, & Powell, JJ.) (invalidating a minority-favoring layoff policy for public school teachers).

[67] *Id.* at 280.

[68] *See Bakke*, 438 U.S. at 316–18.

[69] *See supra* note 60.

[70] *See Wygant*, 476 U.S. at 276–78; *Bakke*, 438 U.S. at 308–10.

maintenance of a system of unlawful racial classification.[71]

Justice Kennedy wrote in *Croson* that he would prefer Justice Scalia's theory, creating "a rule of automatic invalidity for racial preferences in almost every case," but that since that would depart from precedent, "we need [not] adopt it at this point" if strict scrutiny would have nearly that effect.[72] Justice Kennedy elsewhere equated the racial preferences for minority broadcasters sustained in *Metro Broadcasting* with the segregated rail cars upheld in *Plessy* and with the former South African regime's Apartheid system.[73] However, he joined in Justice O'Connor's opinion in *Adarand Constructors*, which, as we shall see, embodies a far less negative appraisal of racial preference. This may reflect a shift in his views since 1989–1990.

Justice Thomas, speaking to the remark of Justice Stevens quoted above,[74] said that "[s]o-called 'benign' discrimination" is "paternalis[t]" and "patronizing" as well as "poisonous" and "pernicious."[75] He wrote: "I believe that there is a 'moral [and] constitutional equivalence' .... between laws designed to subjugate a race and those that distribute benefits on the basis of race . . . to foster some current notion of equality .... In each instance, [this is noxious] racial discrimination, plain and simple."[76]

At least two Justices, then, clearly maintain the color-blind theory. Justice Kennedy once did, although he may have changed his mind. Chief Justice Rehnquist opposes any racial preferences, voting to strike them down or dissenting when they are upheld on all occasions. He has not, however, made any significant pronouncements of his own on the subject, although he has recently endorsed Justice O'Connor's views in principle.[77]

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[71] Richmond v. J.A. Croson Co., 488 U.S. 469, 520, 524 (1989) (Scalia J., concurring).

[72] *Id.* at 518–19.

[73] *See* Metro Broadcasting v. FCC, 497 U.S. 547, 630, 635 (1990) (Kennedy & Scalia, JJ., dissenting).

[74] *See supra* notes 51–52 and accompanying text.

[75] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 241 (1995) (Thomas, J. concurring).

[76] *Id.* at 240–41 (Thomas J., concurring).

[77] *See* Shaw v. Hunt, 116 S. Ct. 1894, 1907 (1996) (*Shaw II*) (opinion of Rehnquist, C.J.) (striking down a race-conscious districting plan). Chief Justice Rehnquist wrote, "A State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions." *Id.* at 1902.

III. JUSTICE O'CONNOR'S EQUAL PROTECTION JURISPRUDENCE OF RACE

A. *The Pivotal Vote in a Divided Court*

Where on this spectrum does Justice O'Connor fall? The current Court, like the Court in *Regents of the University of California v. Bakke*, is split 4-4 on racial preferences. The dissenters in *Adarand Constructors*, *Shaw v. Hunt* (*Shaw II*)[78] and related voting cases[79]—Justices Souter, Ginsburg, Breyer, and Stevens—indicate that there are four solid votes to uphold such preferences in some circumstances, opposed by at least three and perhaps four solid votes to strike them down in any circumstances. In this situation, Justice O'Connor's vote will carry the day. She has generally voted against particular programs, dissenting even in *United States v. Paradise*.[80] But the question is whether her position is that racial preference is *ipso facto* unconstitutional or merely that the particular programs that the Court has considered fail to satisfy constitutional constraints. In theory, the answer is clearly the latter.

The later Rehnquist Court's retrenchment from the Burger Court's tolerance of racial preference shows that the composition of the Court matters in the fate of the policy. Justice Stevens and Justice Rehnquist are the likeliest candidates for soonest retirement. If their replacements are appointed by President Clinton or a Democratic successor, the Court is likely to tilt in favor of noninvidious racial preference; if by a Republican successor, it will tilt against, but in either case the Court will be bound by precedent. What that precedent says is effectively determined by what Justice O'Connor has written in her key opinions, *Richmond v. J.A. Croson Co.*, *Adarand Constructors*, and

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[78] *Id.* In *Shaw v. Reno*, 509 U.S. 630, 658-87 (1993) (*Shaw I*), the dissenters included Justices White, Blackmun, Stevens, and Souter.

[79] *See* Bush v. Vera, 116 S. Ct. 1941, 1963 (1996) (plurality opinion of O'Connor, J.) (striking down a Texas plan); Miller v. Johnson, 515 U.S. 900 (1995) (opinion of Kennedy, J.) (striking down a race-conscious Georgia districting plan).

[80] 480 U.S. 146, 196 (1987). This case would seem to meet even Justice Scalia's high standards for a racial preference program, although he predictably dissented. Justice Powell concurred. The State of Alabama had never hired a Black state trooper. The discriminatory conduct was "pervasive, systematic, and obstinate." *Id.* at 167. In 1972 a district court ordered that a qualified Black must be promoted for every white until the violation was cured, and the Supreme Court affirmed. Justice O'Connor, however, objected that while some race-conscious remedy was appropriate, "the Court adopts a standardless view of 'narrowly tailored' far less stringent than that required by strict scrutiny." *Id.* at 197. Further, she rejected the district court's use of the strict quota as not "manifestly necessary." *Id.* Justice O'Connor now appears to be reconciled to the Court's holding in *Paradise*. *See infra* note 116 and accompanying text.

Shaw v. Reno (*Shaw I*), and as illuminated by her views elsewhere.

Justice O'Connor's view, as befits a moderate centrist, is moderate and centrist. *Shaw I* aside, it generally respects the traditional view that the wrong of racism is the harm that it causes and the animus that motivates it rather than the bare fact of racial differentiation itself. In *Croson*, she adopted the "equal dignity and respect" interpretation of equal protection urged above.[81] She emphasized the "danger of stigmatic harm"[82] and said in defense of the strict scrutiny standard that without it "there is simply no way of determining what classifications are 'benign' . . . and what classifications are . . . motivated by illegitimate notions of racial inferiority."[83]

Accordingly, she allows for taking race into account in some circumstances. In an early statement, she said, "We ought not delude ourselves that the deep faith that race should never be relevant has completely triumphed over the painful social reality that, sometimes, it may be."[84] In *Adarand Constructors* she said, "When race based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test this Court has set out in previous cases."[85] In *Shaw I*, she expressly rejected an appeal to the first Justice Harlan's "color-blind[ness]," saying, "This Court never has held that race-conscious state decisionmaking is

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[81] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989). This language is a very close paraphrase of Professor Dworkin's analysis of equal protection as involving "the right to *treatment as an equal* . . . [*i.e.*, treatment] with the same respect and concern as anyone else." DWORKIN, *supra* note 54, at 227. This shows that Justice O'Connor did operate within the ethical framework of the modern tradition. Justice O'Connor also refused to dismiss, except as a justification for a lower standard of review than strict scrutiny, Professor Ely's *Carolene Products* thesis that the purpose of equal protection is to protect minorities against majoritarian prejudice, so that "these concerns are not implicated when the 'white majority' places burdens upon itself." *Croson*, 488 U.S. at 495. Neither did she endorse this reasoning. She merely remarked that it was inapplicable in Richmond, a city with a majority-Black population. *Id.*

[82] *Id.* at 493. Here she was worried about harm to the beneficiaries of racial preference policies.

[83] *Id.*

[84] Brown v. North Carolina, 479 U.S. 940, 941 (1981) (concurring in denial of certiorari). Compare Justice O'Connor's statement with Justice Powell's statement in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280 (1986), at *supra* note 67 and accompanying text.

[85] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 223-24 (1995); *accord Croson*, 488 U.S. at 509 ("Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.").

impermissible in *all* circumstances."[86]

Her position closely tracks that of Justice Powell, who argued in *Bakke* both that racial classifications require strict scrutiny and that affirmative action was permissible to further both remedial and (in higher education) nonremedial goals. The holding in that case was not merely that the University of California, Davis Medical School affirmative action program violated the Fourteenth Amendment and Title VI, but also that the California Supreme Court erred in prohibiting race from being taken into account in admissions decisions.[87] This doctrine both permits and limits the use of race-conscious remedies to overcome the effects of discrimination. Justice O'Connor is in the position of Justice Powell both strategically, as the pivotal vote in a divided Court, and doctrinally, in adopting and developing the main lines of his position.

I proceed as follows. First, I discuss the meaning of this new strict scrutiny standard, arguing that it is broadly congruent with the modern tradition in equal protection jurisprudence canvassed above and it is inconsistent with a color-blind analysis. Then, I turn to the question of whether Justice O'Connor's emphasis on the importance of the remedial character of permissible racial preferences comports with *Bakke*'s allowance that nonremedial interests such as diversity may be sufficiently compelling to satisfy that standard. I suggest that Justice O'Connor's position may well comport with *Bakke*. Finally, I take up her discussion of race-conscious districting in *Shaw I* and related cases, which some have thought supports a color-blind reading of equal protection. I argue that it does not.

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[86] Shaw v. Reno, 509 U.S. 630, 642 (1993) (*Shaw I*) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan J., dissenting)).

[87] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 271–72 (1978). The Fifth Circuit panel in *Hopwood v. Texas* held that is not and never has been a rule of law, but represents only Justice Powell's individual opinion, because the *Bakke* Court split 4–4–1, with Justice Powell's opinion, not joined by any other Justice, deciding the case. *See* 78 F.3d 932, 944 (5th Cir. 1995). This controls in the Fifth Circuit, but it is plainly wrong. "The holding of the Court [in a divided case] may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). In *Bakke*, the Brennan group would have supported intermediate review and allowed a far wider scope for affirmative action than Justice Powell, *see Bakke*, 438 U.S. at 325 (Brennan, Marshall, Blackmun & White, JJ., concurring in part and dissenting in part), while the Stevens group would have ruled out affirmative action on statutory grounds and did not reach the constitutional issue, *see id.* at 421 (Stevens, Rehnquist, Stewart, JJ. & Burger, C.J., concurring in part and dissenting in part). Justice Powell's opinion therefore states the narrowest grounds for supporting affirmative action in principle, and, outside the Fifth Circuit, it is law.

B. Croson *and* Adarand Constructors*: Strict Scrutiny for All Racial Classifications*

1. Croson *and State Racial Classifications*

Justice O'Connor's elaboration of the Powell view was most fully articulated in her key opinions in *Croson* and *Adarand Constructors* which establish a strict scrutiny standard for all racial classifications whatever their purpose. These cases concern minority business set-asides ("MBEs") and racial preference in government contracting. In the first, Justice O'Connor won a majority to the strict scrutiny view for state governmental racial preferences, even if they are meant to benefit rather than burden minorities. The Court rejected a "two standard" view for the states.[88] In the second, this view was extended to federal race-conscious classifications, overturning *Metro Broadcasting*, which had briefly established intermediate scrutiny as the appropriate standard with respect to federal racial preferences, and, implicitly, perhaps overturning *Fullilove* if that case in effect used a standard lower than strict scrutiny.[89]

In *Croson*, Justice O'Connor rejected the "stark alternatives" that a governmental unit either "must limit any race-based remedial efforts to eradicating . . . its own prior discrimination" or that it enjoys "sweeping legislative power to define and attack the effects of prior discrimination."[90] The first is the view of Justices Scalia, Thomas, and, at least at the time, of Kennedy and probably of Chief Justice Rehnquist. The second is that of the Brennan group in *Bakke*. Justice O'Connor attempted in effect to steer between the Scylla of Justice Scalia's color-blindness and the Charybdis of the Brennan view.[91] The proper balance requires strict scrutiny to "'smoke out' illegitimate uses of race,"[92] while permitting race-conscious measures if the governmental unit could establish a "prima facie case of discrimination," documented by evidence, of public participation even in private discrimination.[93]

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[88] *See Croson*, 488 U.S. at 493–94. Justice Powell called this view a "two-class theory." *Bakke*, 438 U.S. at 295–97.

[89] *See Adarand Constructors*, 515 U.S. at 200, 226.

[90] *Croson*, 488 U.S. at 486.

[91] Scylla is a mythical many-headed man-eating monster that lurked in a cave by Charybdis, a terrible whirlpool that sucked in passing ships. Odysseus had to steer through them on his way home from Troy. *See* THE ODYSSEY OF HOMER xii, at 80–110 (Richmond Lattimore trans. 1967).

[92] *Croson*, 488 U.S. at 493.

[93] *Id.* at 503–04.

What, in Justice O'Connor's view, do the compelling interest and narrow tailoring conditions of this strict scrutiny test require? In *Croson*, she said that the compelling interest prong means that permissible classification based on race must be "strictly reserved for remedial settings."[94] Following Justice Powell, she wrote that what is governmentally remediable by racial preference is only identified governmental discrimination, not "societal" discrimination, that is, discrimination in which governmental action is not implicated.[95] Like Justice Powell, she derived this requirement not doctrinally from the state action doctrine associated with the Fourteenth Amendment but from the ethical and policy grounds that remedial use of racial classifications against societal discrimination is "'too amorphous a basis'" and "'ageless in [its] reach into the past, and timeless in [its] ability to affect the future.'"[96] The concern is that such remedies be sharply limited in the evils they are used to correct, because even used remedially, racial classifications compromise the "'personal rights'" of all citizens to be treated "with equal dignity and respect" regardless of race.[97] "[D]eviation from the norm of equal treatment of all racial . . . groups," Justice O'Connor said, must be "a temporary matter [and undertaken] in the service of . . . equality itself."[98]

Accordingly, race-conscious remedies must be justified by particularized findings of the appropriate kind of discrimination to show that there is a compelling interest of the required sort.[99] In *Croson*, Justice O'Connor found that Richmond's recitation of remedial purpose and a conclusory "generalized assertion" of racial discrimination "'in this area, and the State, and around the nation'" (in places such as Pittsburgh) were no substitute for particularized findings.[100] Likewise, mere statistical disparities in awarding more contracts to whites than their proportion in the area population would not substitute for a showing that qualified minorities were being disproportionately disfavored.[101]

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[94] *Id.* at 493. However, she cites here to Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978), which expressly found the nonremedial goal of diversity to be a compelling interest. I defer consideration of the prospects for nonremedial interests under the new standard to Part III (C).

[95] *See Croson*, 488 U.S. at 497–98 (quoting *Bakke*, 438 U.S. at 307 (opinion of Powell, J.) and Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (opinion of Powell, J.)).

[96] *Croson*, 488 U.S. at 497–98 (quoting *Bakke*, 438 U.S. at 308); *see also Wygant*, 476 U.S. at 276.

[97] *Croson*, 488 U.S. at 493 (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)).

[98] *Id.* at 510.

[99] *See id.* (opinion of Powell, J.) (citing *Bakke*, 488 U.S. at 308–09).

[100] *See id.* at 500 (quoting the statements of Councilperson Marsh and City Manager Deese).

[101] *See id.* at 501–02.

Finally, she said that Congressional findings of discrimination on a national level that might warrant a federal program like that approved in *Fullilove* under Section 5 of the Fourteenth Amendment cannot be invoked by a state or municipal government in lieu of a finding of discrimination in "its own bailiwick."[102]

The kind of discrimination that, when established by a proper showing, Justice O'Connor held may be remedied by racial classification is not narrowly governmental. This is an important difference between Justice Powell and Justice O'Connor. Outside the context of higher education, Justice Powell would have prohibited racial preferences except as a limited remedy for identified acts of discrimination by the particular governmental actor in question. "[T]he court has insisted [on] some showing of prior discrimination by *the governmental unit involved* before allowing limited use of racial classifications."[103] This is a narrower and more restrictive view than saying that there is no compelling interest in remedying "societal" discrimination, *i.e.*, discrimination by non-state actors.[104] The latter would allow race-conscious governmental action to remedy the racial discrimination of other state actors and of private actors significantly involved with the state. The former would not.

Justice O'Connor rejected the narrower position. In *Wygant v. Jackson Board of Education*, she observed that "contemporaneous findings of actual discrimination" should not be required "[s]o long as the public actor has a firm basis for believing that remedial action is required" and that "a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored.'"[105] She worried there that Justice Powell's requirement would be unreasonable because a governmental unit might be unwilling to admit that it had discriminated.[106] In *Croson*, Justice O'Connor said that evidence that private white contractors were systematically excluding minorities could provide a basis for "racial preference . . . to break

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[102] *Id.* at 504. Section 5 says, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. In *Adarand Constructors*, however, she seems to backtrack from the position that Congress has special powers under § 5, as discussed below. *See infra* notes 138–39, 143 and accompanying text.

[103] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986) (emphasis added).

[104] *See Bakke*, 438 U.S. at 307–08 (opinion of Powell, J.).

[105] *Wygant*, 476 U.S. at 286–87.

[106] *See id.* at 290–91 (If such findings "were *required* . . . in every case . . . , the relative value of these evidentiary advantages would diminish. . . . [The requirement] would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.").

down patterns of deliberate exclusion"[107] and even that a "significant statistical disparity between the number of qualified minority contractors" and contracts awarded could license "an inference of discriminatory exclusion."[108]

The narrow tailoring condition for an acceptable racial preference received little elucidation in *Croson* because Justice O'Connor found no compelling interest to which the MBE program could have been narrowly tailored.[109] But she suggested a number of points that a narrowly tailored plan should satisfy under her strict scrutiny test. First, race-neutral alternatives must be considered and shown to be inferior to a racial preference program.[110] Second, any targets must be tied to attaining the compelling interest. Richmond's 30% minority set-aside, she thought, was either arbitrary or involved the impermissible goal of attaining racial proportionality in each trade based on the "completely unrealistic" assumption that members of different races would, *ceteris paribus*, participate proportionally to their percentage in the population.[111] More helpfully, she suggested that a narrowly tailored program should make provision for individualized treatment. The federal set-aside approved in *Fullilove* had a waiver when a minority contractor's higher price was not attributable to effects of discrimination, but the Richmond program made no inquiry as to whether a particular minority contractor seeking a racial preference had suffered from discrimination.[112] Finally, she noted that a narrowly tailored plan should not be overinclusive. Copying the language of the program approved in *Fullilove*, Richmond had defined "minority" to include Eskimos or Aleut persons. As Justice O'Connor noted, there was no evidence

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[107] *Croson*, 488 U.S. at 509.

[108] *Id.*

[109] *See id.* at 507.

[110] *See id.*

[111] *Id.* This objection involves an unproductively atomistic approach to the effects of racial discrimination. Surely Justice O'Connor cannot mean that a goal or target must identify the proportion in each field in which minorities would be represented absent discrimination. There is simply no way to guess what that might be. In a nonracist society Blacks might be disproportionately concentrated in, say, electrical contracting over plumbing or law over medicine. But in a racially discriminatory one, the problem is that they are disproportionately globally excluded from most opportunities and advantages available to whites. If our goal is to overcome this global disadvantage, then something like rough proportionality is not unreasonable on the plausible assumption that minorities and whites as individuals are not inherently dissimilar, so that in a nonracist society, any deviation from proportionality would be adventitious.

[112] *See id.* at 508. This tracks Justice Powell's insistence on individualized treatment in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (Taking race as only a "plus" factor among others in university admissions "treats each applicant as an individual.").

of discrimination against these groups: "It may well be that Richmond has never had an Aleut or Eskimo citizen. . . . If [the program] was 'narrowly tailored' to compensate black[s] . . . for past discrimination, . . . why [are] they . . . forced to share this 'remedial relief' with an Aleut citizen who moves to Richmond tomorrow?"[113]

This examination of *Croson* should make it evident that Justice O'Connor's "newest" equal protection jurisprudence is anything but color-blind. Although more rigorous than the theory urged by Justice Brennan and more demanding in its application than that used by the Burger and early Rehnquist Courts, it is, in fact, less strict than Justice Powell's version of the strict scrutiny standard for remedial racial preferences in its requirements for findings and its allowance of some private discrimination as a basis for race-conscious remedies. Far from offering any endorsement of Justice Scalia's austere denunciation of almost any racial preference, most of Justice O'Connor's analysis in *Croson* involved detailed directions about how to design an acceptable state or local racial preference program in circumstances where governmental involvement in discrimination can be shown.

2. Adarand Constructors *and Federal Racial Classifications*

In *Croson*, Justice O'Connor offered only a brief defense of the adoption of the strict scrutiny standard.[114] In *Adarand Constructors*, she offered a more elaborated explanation of its basis and meaning. Here Justice O'Connor explicitly addressed the concern, raised by Justice Stevens in his dissent, that the new strict scrutiny standard, despite her protestations, effectively adopts a color-blind interpretation of the Constitution that leaves no room for noninvidious racial preferences.[115] Justice O'Connor replied:

> [W]e wish to dispel the notion that strict scrutiny is 'strict in theory but fatal in fact.' . . . The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups is an unfortunate reality, and government is not disqualified from acting in response to it.[116]

Lest it be thought that the government may only act when Justice Scalia

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[113] *Croson*, 488 U.S. at 506.

[114] *See id.* at 493–95.

[115] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 242–48 (1995); *see also supra* notes 51–52 and accompanying text. The program considered here was not invalidated, but the case was remanded for further consistent proceedings. *See id.* at 238–39.

[116] *Id.* at 228 (citation omitted). The example she gave is *United States v. Paradise*, 480 U.S. 149 (1987), in which she dissented. *See supra* note 80 and accompanying text.

might approve, Justice O'Connor explained that while strict scrutiny involves searching judicial inquiry into the proffered justification for a racial classification, it does not mean treating as equivalent those classifications that benefit and those that burden minorities. The point of the single high standard is mainly to ensure that the recitations of benign purpose are genuine and justified:

> [Justice Stevens] . . . allows that 'nothing is inherently wrong in applying a single standard to fundamentally different situations [that is, invidious discrimination versus racial preference that promotes equality] as long as that standard takes relevant differences into account.'. . . [But] strict scrutiny *does* take 'relevant differences' into account—indeed that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking.[117]

Therefore, government is not disqualified from acting in response to the practice and the lingering effects of racial discrimination, and there are legitimate uses of race in governmental decisionmaking.

In her dissent in *Metro Broadcasting*, Justice O'Connor did say, "'[b]enign' racial classification is a contradiction in terms."[118] But her point there is that the lower standard of review authorized lends itself to improper politicization, not that all such classifications are equally invidious. She said:

> Untethered to narrowly confined remedial notions, "benign" carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens because of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent."[119]

The objection seems to be to the use of the word "benign" rather than to remedial use of racial preference per se. Justice O'Connor's point was not that there is no such thing as noninvidious racial classification, as Justices Scalia or Thomas would say, but first, that for such a classification to be acceptable, it must normally be tied to narrowly confined remedial notions (at least outside higher education); and second, that there must be clear standards for what counts as a "benevolent" classification, or at least a nonbenevolent one.

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[117] *Adarand Constructors*, 515 U.S. at 237.

[118] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 609 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[119] *Id.* at 609–10.

What, however, is the rationale for adopting the new standard? Justice O'Connor said in *Adarand Constructors* that the strictness of the scrutiny for all racial classifications derives from two concerns, one epistemological and the other methodological, neither of which are substantive views about the supposedly color-blind content of equal protection. Whatever the merits of and problems created by Justice O'Connor's particular arguments for the new standard, these sources of the new doctrine underline that the new strict scrutiny standard is not motivated by a view that racial preference is per se morally wrong or even constitutionally problematic, but rather is motivated, at least in part, by rather abstract considerations about constitutional interpretation.

a. *Skepticism*

Justice O'Connor called the epistemological concern "skepticism."[120] The question is how to tell whether a racial classification in fact serves a legitimate purpose. It descends from Justice Powell's observation in *Bakke* that "'it may not always be so clear that a so-called preference is in fact benign.'"[121] "Absent searching judicial inquiry," said Justice O'Connor, "there is simply no way of determining what classifications are 'benign' . . . and what classifications are . . . motivated by illegitimate notions of racial inferiority or racial politics."[122] She was unwilling to credit "mere recitation of a benign compensatory purpose" or allow that to protect "against any inquiry into the actual purposes underlying a statutory scheme."[123]

Although it is not my purpose to criticize the new standard nor to argue for its replacement with intermediate review, it may be observed that this argument is not strong, at least with respect to the concern that the kinds of racial preference policies involved in *Adarand Constructors* and *Croson* might conceal views that whites are inferior to minorities. It is not hard to discern that minority racial preferences reflect neither prejudice against whites nor are meant to impose any stigma of inferiority or degradation upon them, nor is it obvious that the high hurdle of strict scrutiny is necessary to determine the purpose behind a minority preference program. As Justice Stevens plausibly argued, it cannot be harder to tell when a classification fails to be benevolent than when some behavior is "intentionally" discriminatory as opposed to merely having a discriminatory effect—the standard in determining whether

[120] *Adarand Constructors*, 515 U.S. at 223.

[121] *Id.* at 226 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

[122] Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[123] *Id.* at 495 (quoting Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975)).

discrimination is invidious at all.[124] Simply from a logical point of view, the epistemological concern about smoking out hidden racial prejudice only calls for intermediate scrutiny.

Justice O'Connor further displayed an odd solicitousness about the dangers of stigmatization of the beneficiaries of racial preference programs,[125] a concern that no minority plaintiff has ever raised, while comparatively slighting the harmful effects in terms of opportunities denied to minorities by historical and ongoing discrimination in which government has been significantly implicated. As Justice Stevens remarked in *Adarand Constructors*, "[T]his is not an argument that petitioner [Adarand Constructors, a white-owned business] has standing to advance. No beneficiaries of the specific program under attack today [a minority set-aside in government contracting] have challenged its constitutionality—perhaps because they do not find it stigmatizing . . . ."[126] This is a signal point of fundamental importance which should entirely undermine the legal status of the stigma argument against minority racial preference unless advanced by a minority beneficiary of such a program.

Theoretical issues aside, Justice O'Connor's application of "skepticism" in both *Croson* and *Adarand Constructors* is quite troubling. In *Croson*, Justice O'Connor worried that a municipal set-aside designed for a majority-Black city where Blacks held a majority of Council seats might be a form of "racial politics," in which Blacks were attempting to "negotiate 'a piece of the action'" for their own group.[127] As Justice Marshall observed in his dissent, this concern pales beside Richmond's sordid history of official discrimination, attempts to frustrate *Brown*, and to deny Blacks political representation.[128] How racial politics might have operated in the overwhelmingly white United States Congress, which approved the program considered in *Adarand Constructors*, Justice O'Connor did not explain. Apart from this, there is Justice O'Connor's curious substitution of groundless speculation that racial politics *might* have been at work in *Croson* for searching judicial inquiry into whether it was *in fact* at work. If it had been, that would be problematic, but we have no reason to think that it was. One would have hoped for more in the way of careful examination of the asserted interest.

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124 *See Adarand Constructors*, 515 U.S. at 245–46 (Stevens, J., dissenting).

125 *See Croson*, 488 U.S. at 493–94 (citing *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)).

126 *Adarand Constructors*, 515 U.S. at 248 n.5 (Stevens, J., dissenting).

127 *Croson*, 488 U.S. at 510–11.

128 *See id.* at 544 (Marshall, J., dissenting).

b. *Consistency*

The methodological as well as the epistemological concerns behind the new strict scrutiny standard also descend from Justice Powell. They turn on his conviction that "constitutional standards [must] be applied consistently: Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant."[129] Justice O'Connor termed the related concerns "consistency," the idea that there is a single standard of review independent of the race of the person burdened, and "congruence," that equal protection is the same under the Fifth as under the Fourteenth Amendment.[130] Equal protection applies equally and in the same way to all races.[131] This suggests that Justice O'Connor's concern was that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[132] This might square with Justice Blackmun's observation in *Bakke* that, "[I]n order to treat some persons equally, we must treat them differently."[133] In any event, Justice O'Connor insisted that consistency "says nothing about the ultimate validity of any particular law."[134]

The argument from consistency provides a far better rationale for a strict scrutiny standard for all racial classifications than does the argument from skepticism. Clearly strict scrutiny is in order for invidious racial classifications meant to burden minorities. If equal protection should mean the same thing

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[129] *Bakke*, 438 U.S. at 299 (opinion of Powell, J.) (citation omitted).

[130] *Adarand Constructors*, 515 U.S. at 224.

[131] *See id.* The Fourteenth Amendment applies only to the states. Equal protection was extended to apply to the federal government in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the companion case to *Brown* desegregating the District of Columbia public schools. In that case, the Court in effect implied an equal protection requirement into the Due Process Clause of the Fifth Amendment, which constrains the federal government. *See also* Weinberger v. Weisenfeld, 420 U.S. 636, 638 (1975) (holding that § 402(g) of the Social Security Act violated due process because it unjustifiably provided widowers less protection than widows).

[132] *Bakke*, 438 U.S. at 289-90 (opinion of Powell, J.).

[133] *Id.* at 407 (Blackmun, J., concurring in part and dissenting in part). The appearance of paradox in this statement will be dispelled by reflection on Professor Dworkin's distinction between equal treatment and treatment as an equal. *See supra* note 54 and accompanying text. As Aristotle remarked, we do not give a trained athlete and a beginner the same food: what is neither "too much nor too little" relative to us "is not one, nor the same for all." ARISTOTLE, NICOMACHEAN ETHICS ii.6, 1106a31-1106b5 (W.D. Ross trans.), *in* THE BASIC WORKS OF ARISTOTLE (Richard McKeon ed. 1941).

[134] *Adarand Constructors*, 515 U.S. at 230.

when applied to anyone, a plausible if not unquestionable proposition,[135] then strict scrutiny should be applied whenever anyone is classified by race for whatever reason. This does not require equal treatment of all persons, *pace* Justice Scalia: Justice O'Connor was quite clear that relevant differences are to be taken into account. Strict scrutiny is flexible enough to allow this if we can take Justice O'Connor at her word that the new standard is not "strict in theory but fatal in fact."[136]

Justice Stevens objected that Justice O'Connor's approach implied that "'strict scrutiny' means something different—something less than strict—when applied to benign racial classifications."[137] This is argumentative. The same standard can pass a benevolent classification because it is benevolent and flunk an invidious one because it is invidious. The point of applying the standard is to distinguish one from the other. Justice Stevens may be right that "there is a danger that the fatal language of 'strict scrutiny' may skew the analysis and place well-crafted benign programs at unnecessary risk."[138] Arguably it did so in *Adarand Constructors*. If this danger is to be avoided, Justice O'Connor must make it even more clear than she has, in application as well as in representation, that the notion of strict scrutiny has been redefined.

c. *Congruence*

The argument from congruence is far more problematic, both in terms of Justice O'Connor's own reasoning in *Croson* and in terms of the language of the Fourteenth Amendment itself. She distinguished the invalid municipal minority set-asides in *Croson* from the federal ones upheld in *Fullilove* by the argument that Section 5 of the Fourteenth Amendment gives Congress "unique powers" to enforce the Equal Protection Clause,[139] which are not granted to state and local governments.[140] As Justice O'Connor acknowledged in her discussion of stare decisis in *Adarand Constructors*, this creates some tension with the *Adarand Constructors*-imposed "congruence" between the equal

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[135] The arguments against it were extensively presented by the losing side in the standards of review debate, *e.g.*, in the opinions of the Brennan group in *Bakke*, *see supra* note 59 and accompanying text, as well as in the literature of legal scholarship during that period, *see e.g.*, Ely, *Constitutionality*, *supra* note 36; ELY, DEMOCRACY *supra* note 36; TRIBE, *supra* note 55.

[136] *Adarand Constructors*, 515 U.S. at 237.

[137] *Id.* at 243 n.1 (Stevens, J. dissenting).

[138] *Id.*

[139] *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 488, 490 (1989).

[140] *See id.* at 490–91.

protection standards under the Fifth and the Fourteenth Amendments.[141] Her argument that the Court is only correcting a recent error, not digging out a "long-established precedent that has become integrated into the fabric of the law,"[142] when it overruled *Metro Broadcasting* and its intermediate review for federal racial preferences is doubly doubtful.

First, there is the precedent of *Fullilove* itself, which, while it did not turn on any clearly stated traditional standard of review, cannot be easily distinguished from the set-aside challenged in *Adarand Constructors*. Justice O'Connor did not attempt to distinguish them. She said only, "[T]o the extent that *Fullilove* held federal racial classifications to be subject to a less rigorous standard [than strict scrutiny], it is no longer controlling. But we need not decide today whether the program upheld in *Fullilove* would survive."[143] Second, it is unclear under Justice O'Connor's "congruence" doctrine, what remains of Congress's "unique powers" to enforce equal protection under Section 5 of the Fourteenth Amendment. This is a matter of some consequence, given the weight of precedent—*United States v. Guest*, *Katzenbach v. Morgan*, and *Oregon v. Mitchell*, among other cases—supporting the idea that Congress may act under Section 5 to do things it could not do under Section 1 of the Fourteenth Amendment standing alone.[144] Surely Justice O'Connor did not intend *Adarand Constructors* to overrule this line of cases. But their status is now unclear, as is the meaning of Section 5.[145]

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[141] *See Adarand Constructors*, 515 U.S. at 229–35.

[142] *Id.* at 233.

[143] *Id.* at 235.

[144] *The Civil Rights Cases*, 109 U.S. 3 (1883), restricted congressional powers under § 5 to the reach of § 1 of the Fourteenth Amendment standing alone. In *United States v. Guest*, 383 U.S. 745, 762, 782 (1966), six Justices agreed that Congress could go beyond that. In *Katzenbach v. Morgan*, 384 U.S. 641 (1966), the Court held that § 5 granted Congress "the same broad powers expressed in the Necessary and Proper Clause." *Id.* at 650. This doctrine was restricted in *Oregon v. Mitchell*, 400 U.S. 112 (1970), only to the extent of reserving to the courts the power to determine the boundaries of equal protection. *See id.* at 240, 280–81.

[145] Neither are they much illuminated by the Court's recent pronouncement in a case concerning the Free Exercise Clause of the First Amendment, *City of Boerne v. Flores*, 117 S. Ct. 2157, 2164 (1997), that under § 5, Congress "has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* Justice O'Connor, dissenting in that case, nonetheless agreed with this somewhat opaque formula. *See id.* at 2176. Absent an explanation of what counts as "enforcement" and what as "determination," it offers Congress little guidance as to the scope and limits of its powers under § 5, except that these are merely "remedial" and not "substantive." *Id.* at 2167. Two things appear clear after *Flores*, however: *Katzenbach* and the related cases are left undisturbed as legitimate

Whatever the merits and problems of Justice O'Connor's particular arguments for the new standard, their thrust is clear. The new standard does not mean that equal protection is color-blind. On the contrary, it represents an attempt to ensure that a consistently high but not fatal degree of scrutiny is applied in all cases to determine whether a given racial preference program can avoid the problems that invalidate invidious discrimination. That some such programs could in principle do so is beyond question.

3. *Personal Rights*

A comment is in order on Justice O'Connor's idea that equal protection is primarily a "personal" right, a notion more closely aligned with the color-blind view than with the modern tradition, and which may help explain some of the tensions in Justice O'Connor's articulation and application of the new standard. Her invocation of the "personal rights" notion shows that the moral theory underlying the color-blindness she rejects nonetheless exerts a certain pull on her views. Like Justice Powell, she thought that "[t]he rights created by the . . . Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[146] The Fourteenth Amendment "protect[s] *persons*, not *groups*."[147] This is a rather puzzling claim.

First, while the Fourteenth Amendment, does by its plain language protect individual persons, the object of equal protection analysis is the legitimacy of a proposed group classification and only derivatively the rights of the person to whom the classification is applied. The basic issue is whether some classification to which an individual is subject satisfies the appropriate standard of review. If it does, then that person's rights have been respected, and if it does not, then they have not. But the very starting point is the individual as *a member of the group*. Consider in contrast our privacy rights under the Fourth

"enforcement" of Fourteenth Amendment rights, *id.* at 2166–67, but Congress is said to have no power to "'expand[ ]' the rights contained in § 1," *id.* at 2168. A plausible guess at what this means is that at least outside the voting rights sphere and almost certainly with regard to affirmative action and racial preference generally, Congress will be found to lack the power to act where the Court has not determined beforehand that a right exists. Had *Flores* been decided before *Adarand Constructors*, though, Congress might have pointed to *Fullilove* as an *ex ante* basis approved by the Court for a legislative power to act. Therefore, Congress might well worry that even with such a basis it might be found afterwards to have exceeded its powers if it relies on § 5 of the Fourteenth Amendment.

[146] Shelley v. Kraemer, 334 U.S. 1, 22 (1948) (*quoted in* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978) (opinion of Powell, J.), and *in* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)).

[147] *Adarand Constructors*, 515 U.S. at 227.

Amendment, where the issue is whether *this person* has been subject to an unreasonable search. Fourth Amendment privacy is a genuinely personal right. Equal protection, on the other hand, means treating those similarly situated alike,[148] which requires attention to their group characteristics. If those are ignored, we have the color-blind notion that all persons should be treated exactly alike, or at any rate without taking into account whether race makes them dissimilarly situated.

Second, if the worry is Justice Powell's concern that an acceptable race-conscious classification "treats each [person] as an individual" so that he is "not foreclosed from all consideration . . . simply because he was not the right color,"[149] we face the problem that it is impossible to treat people "as individuals" regardless of their group characteristics. Purely merit-based university admissions as traditionally conceived, for instance, involve differential treatment by intellectual ability. Justice O'Connor's demand in *Croson* for evidence of discrimination against *qualified* minority contractors[150] referred to another group characteristic. If the problem is that race, unlike intellectual ability or construction skills, is an impermissible basis for differential treatment, it must be asked why that is. Discrimination on the basis of race from prejudice or to convey stigmatic harm is wrong and illegal, but why is racial differentiation directed at overcoming such prejudice and stigma problematic?

The "personal rights" conception is an individualistic reading of equal protection that is at odds with the "similarly situated" notion implicit in the modern tradition. It is linked to the color-blind ideal that individuals should be regarded as such without concern for their race, regardless of whether race makes them dissimilarly situated. The gravitational attraction of this theory, which Justice O'Connor rejected when she reflected on it, emerges, for example, in her rejection of proportionality as a goal, discussed above, and in her animadversions on "minority perspectives" addressed below. It may account for her tendency to apply her own standard more restrictively than the standard itself demands. Of course, rejecting this notion does not mean that attention to individuals does not matter. It is individuals who are entitled to be

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[148] *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985) (stating, in a case involving retarded and nonretarded persons, that "the Equal Protection Clause . . . is essentially a direction that all persons similarly situated should be treated alike"); *accord* Plyler v. Doe, 457 U.S. 202, 216 (1982) (stating the same in a case involving children of U.S. citizens and of illegal aliens).

[149] *Bakke*, 438 U.S. at 318.

[150] *See supra* notes 100, 107 and accompanying text.

treated with "equal dignity and respect."[151] But the point of the modern tradition is that such treatment of individuals requires attention to their group characteristics, treating those similarly situated similarly and those dissimilarly situated, dissimilarly.

C. *The* Metro Broadcasting *Dissent and the Status of* Bakke

The emphasis on narrowly remedial purposes in Justice O'Connor's opinions raises questions about the status of racial preferences in higher education.[152] As currently understood, these depend on the racial "diversity" rationale in *Bakke*, which Justice Powell found to be "compelling" enough to pass strict scrutiny.[153] Has Justice O'Connor in fact adopted the view that only remedial purposes can be compelling and that forward-looking, non-remedial rationales like diversity cannot? The answer is unclear. In *Wygant*, Justice O'Connor said, "[A] state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support use of racial considerations in furthering that interest."[154] But there is harsh language in her *Metro Broadcasting* dissent savaging diversity in telecommunications: "Modern equal protection doctrine has recognized only one [compelling state] interest: remedying the effects of racial discrimination. [I]ncreasing the diversity of broadcasts is clearly not a compelling interest."[155] On the other hand, *Bakke* is absolutely central to Justice O'Connor's thinking about equal protection and racial preference. Her theory is essentially a development of Justice Powell's opinion in that case. It would be dissonant for her to adhere to the theory but reject its application there.

To determine whether diversity in higher education might survive as a compelling interest under her "newest" equal protection jurisprudence requires analysis of the nature of the interest in diversity in a university setting to see whether it can be distinguished from settings where Justice O'Connor rejected diversity and other nonremedial interests. Justice Powell's analysis of diversity in *Bakke* emphasized three crucial aspects of that interest in higher education. First, Justice Powell emphasized the special connection of diversity to academic

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[151] *Croson*, 488 U.S. at 493.

[152] The *Hopwood* court, in denying the viability of *Bakke*, made much of Justice O'Connor's statements that racial classifications should be "'reserved for remedial settings.'" Hopwood v. Texas, 78 F.3d 932, 947 (5th Cir. 1996) (quoting *Croson*, 488 U.S. at 493).

[153] *See Bakke*, 438 U.S. at 314.

[154] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986).

[155] Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 612 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

freedom and the aims of higher education. The interest in a diverse student body was permissible because it was connected with academic freedom which "long has been viewed as a special concern of the First Amendment."[156] Second, he emphasized that racial diversity is linked with vigorous debate. Universities have "the right to select those students who will contribute the most to the 'robust exchange of ideas,' . . . a goal that is of paramount importance in the fulfillment of [their] mission."[157] Third, Justice Powell emphasized that the notion that racial diversity can only be part of a general concern with diversity of all sorts. Diversity "encompasses a far broader array of qualifications and characteristics of which [race] . . . is but a single though important element."[158] The program struck down in *Bakke* was defective because it "focused *solely* on ethnic diversity."[159] An acceptable racial preference program aimed at the goal of diversity would have to be "flexible enough to consider all pertinent elements of diversity . . . and to place them on the same footing for consideration."[160] The Harvard Plan that makes race a "plus" factor is his example.[161]

The only subsequent Supreme Court decisionmaking use of the interest in diversity was *Metro Broadcasting*, which extended Justice Powell's diversity rationale to telecommunications.[162] In her dissent in that case, joined by Justices

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[156] *Bakke*, 438 U.S. at 312.

[157] *Id.* at 313.

[158] *Id.* at 315.

[159] *Id.*

[160] *Id.* at 317.

[161] *See id.* at 316. The Harvard Plan rejects set target quotas for race. Rather, race may help "tip the balance in [an applicant's] favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases." *Id.*

[162] *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 572 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). The Court has since agreed to consider affirmative action for diversity in employment. *See* Taxman v. Board of Educ., 91 F.3d 1547, 1553 (3rd Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997). In *Taxman*, as in *Wygant*, a public school board laid off a white teacher before a Black one solely to promote "cultural divers[ity]." *Id.* at 1552. The Third Circuit treated *Taxman* as a Title VII rather than a constitutional case. The Board's policy flunked the *Weber* requirement that a Title VII affirmative action policy must be purely remedial. *See id.* at 1563. Affirmative action in layoffs also violated the *Weber-Wygant* requirement of not unnecessarily trammeling nonminority interests. *See id.* at 1564. The Third Circuit rejected the applicability of the *Bakke* diversity rationale in employment contexts, *see id.* at 1561–63, and refused to import equal protection standards into a Title VII analysis, *see id.* at 1560. It cited somewhat favorably to *Hopwood* on the status of *Bakke*, *see id.* at 1562 n.13, but noted that Justice O'Connor "refer[s] favorably to *Bakke*," *id.* at 1563. On appeal, the plaintiff will almost certainly win, and under the law as it stands, should win. How sweeping the Supreme Court's holding will be is the question. Will it merely address the Title VII issues of statutory

Kennedy and Scalia, Justice O'Connor strenuously objected that in the telecommunications context the diversity rationale implied "generalizations impermissibly equating race with thoughts and behavior."[163] She rejected the idea that race is tied to a "'distinct perspective'"[164] or that there is a single "'minority viewpoint.'"[165] Justice O'Connor explained, "[i]ndividuals of unfavored racial and ethnic backgrounds are unlikely to possess the unique experiences that contribute to viewpoint diversity."[166] This seems to strike at the heart of the idea that racial diversity can contribute "to the 'robust exchange of ideas,'"[167] and in a context where the First Amendment, if not academic freedom, is clearly relevant. But it need not be so construed.

First, no one arguing for diversity-promoting racial preference before Justice O'Connor should start from the premise that there are distinctive minority "viewpoints" or "perspectives." But the inclusion of race as an element in diversity need not "rest on impermissible stereotyping," as the *Metro Broadcasting* majority argued.[168] Surely Justice Powell, of all people, intended no such thing in *Bakke*. Neither he nor the *Metro Broadcasting* Court expressed the rationale very clearly, but it might be framed as follows.

There is no such thing as a minority viewpoint on anything, but traditionally disfavored minorities have a broad common background of experience with invidious discrimination that informs their views, whatever the substantive content of those views. "Minority perspectives" on racial preference range from Justice Marshall's to Justice Thomas's. However, it means something quite different when Justice Marshall dismisses the stigma argument than, for instance, when Justice Stevens does, or when Justice Thomas asserts the stigma argument than when Justice Kennedy does. As Blacks, Justice Marshall and Justice Thomas are in a position to address these and other issues in ways that whites simply are not, whatever their conclusions. This is related

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interpretation—as the Court of Appeals framed it, whether Title VII allows an employer with a racially balanced work force to grant nonremedial racial preferences to promote racial diversity, *see id.* at 1549-50,—or will it reach the constitutional interest in diversity? If so, will the holding be restricted to employment contexts? These questions will be answered around the time this Comment is published.

[163] *Metro Broadcasting*, 497 U.S. at 615. It cannot be presumed that "persons think in a manner associated with their race." *Id.* at 618.

[164] *Id.* at 618 (quoting the Brief for the FCC at 17, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (No. 89-453)).

[165] *Id.* (quoting 68 F.C.C. 2d at 981 (1978 Policy Statement)).

[166] *Id.* at 619.

[167] *Metro Broadcasting*, 497 U.S. at 579 (citing Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)).

[168] *Id.*

to their first-hand experience of invidious racial discrimination.[169] There is no stereotyping here because this argument does not associate race with particular attitudes. It simply says that race informs the whole range of attitudes. The inclusion of persons with the experiences of minorities is therefore an acceptable element in diversity.

Given the vehemence of her rejection of the idea of any connection of race with attitudes, Justice O'Connor is unlikely to be moved by such considerations. She might, however, accept an argument that the context of higher education is different from telecommunications. The First Amendment issues in higher education are tied to academic freedom and a university's right to select its own student body, as Justice Powell commented.[170] There is no corresponding right in telecommunications. First, nothing in telecommunications corresponds to a university's selection of its own students, and certainly not the FCC's selection of whom to grant broadcast licenses. The FCC (unlike the media) has no First Amendment rights. This is because it is a government agency—individuals have rights against the government, but the government does not have rights against itself—or more narrowly, because its activities involve the expenditure of federal funds under federally-sponsored programs.[171]

Second, it is not the position of the courts that telecommunications inherently involves "robust debate" in the way that it has held that such debate is inherent to the academic mission.[172] This is reflected in their upholding the constitutionality of the FCC's elimination of the "fairness doctrine" in broadcasting. That doctrine, requiring broadcasters to allow free equal time in response to persons attacked in the broadcast media, was upheld as constitutional under the First Amendment.[173] But the "essential basis" of the fairness doctrine was not diversity but that the American public not be uninformed.[174] Unlike the First Amendment issue involved in a university's

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[169] For some of Justice Marshall's experiences, see KLUGER, *supra* note 22, at 223-26, *passim*. For Justice Thomas's experiences, see John Lancaster & Sharon LaFraniere, *Thomas: Growing Up Black in a White World*, WASH. POST, Sept. 8, 1991, at A1, and Sharon LaFraniere, *Despite Achievement, Thomas Felt Isolated: Rebuffs Stung Emerging Conservative*, WASH. POST, Sept. 9, 1991, at A1.

[170] *See Bakke*, 438 U.S. 265, 312 (1978).

[171] *See* Rust v. Sullivan, 500 U.S. 173, 178 (1991) (upholding legislative restrictions on abortion advice in federally-funded family planning).

[172] *See* Keyishan v. Board of Regents, 385 U.S. 589, 603 (1967); *Bakke*, 438 U.S. at 312 (citing Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (opinion of Frankfurter, J.)).

[173] *See* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400-01 (1969).

[174] *See* Green v. FCC, 447 F.2d 323, 333 (D.C. Cir. 1971).

right to select its own students to further robust debate, the right of reply under the Fairness Doctrine was an administrative rather than a constitutional right. This was made clear in *CBS v. Democratic National Committee*,[175] where the Court held that there is no constitutional right of access to broadcasting. Thus there was no constitutional question when the FCC abolished that doctrine.[176] One might debate whether it would be a good thing were the Court to extend the principle, and so the diversity rationale, to telecommunications, but its refusal to do so does not threaten that rationale in higher education.

Third, the FCC policies Justice O'Connor attacked in *Metro Broadcasting* did not respect Justice Powell's concern for individualized attention and taking race into account only as one factor among many, a point on which Justice O'Connor remarked in arguing that the FCC's minority set-aside and "fire sale" policies were not narrowly tailored to the end of diversity.[177] She showed her agreement with Justice Powell when she observed that "the FCC has failed to implement a case-by-case determination and that failure is particularly unjustified when individualized hearings already occur."[178] The law school affirmative action program challenged in *Hopwood v. Texas* failed to respect these concerns in having a separate admissions process for minorities that did not allow them to be compared with all other applicants. It accordingly failed under *Bakke*, but a "Harvard Plan" program that took race into account as a "plus factor" would respect them and would survive under *Bakke*.[179]

Unlike the situation with remedial racial preference in employment and government contracting, then, the status of nonremedial affirmative action in higher education is at least in some doubt under Justice O'Connor's equal protection jurisprudence. It is reasonable to surmise that her hint in *Wygant* that "the Court may find other [nonremedial] governmental interests [than diversity] which have been relied on by the lower courts but which have not been passed on here to be sufficiently . . . 'compelling'"[180] is stillborn. She is unlikely to allow any such interests. Whether she will continue to maintain that diversity is a compelling enough interest for affirmative action in university admissions to survive depends on whether she can be persuaded that the university context is distinct from telecommunications, where she rejected that rationale, and from other situations where she concluded that only remedial interests are

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[175] 412 U.S. 94 (1973).

[176] *See* Arkansas AFL-CIO v. FCC, 11 F.3d 1430 (8th Cir. 1993).

[177] *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 621 (1990) (citing *Bakke*, 438 U.S. at 314), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

[178] *Id.* at 621–22.

[179] *See* Hopwood v. Texas, 861 F. Supp. 551, 578–79 (W.D. Tex. 1994).

[180] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986).

compelling. In *Wygant*, she suggested that she accepts such a distinction.[181] Given the importance of *Bakke* in her thinking on this topic and of Justice Powell's equal protection jurisprudence as a precursor of her own, it is not unlikely that she will do so when confronted with a case. The outcome is a close call, but a firm basis exists for the distinction.

D. Shaw v. Reno *and Heightened Strict Scrutiny in Voting Contexts*

It might seem that Justice O'Connor's views on race-consciousness in voter districting add little to the equal protection doctrine discussed thus far. In *Shaw v. Reno* (*Shaw I*), Justice O'Connor, writing for the majority, held that a North Carolina voter districting plan, designed to concentrate Black voters in a "bizarre"[182] and irregularly shaped district which tracked the path of an interstate highway across the state classified citizens for no other reason but their race.[183] As noted, however, she expressly rejected any claim of a "constitutional right to participate in a 'color-blind' electoral process." She says, "[R]ace-conscious redistricting is not always unconstitutional." [184] Why then does the voting context present any special question about the nature of her equal protection jurisprudence, as opposed to concerns about whether she has correctly applied her own standard to the cases before the Court?

The issue arises because in this case Justice O'Connor acknowledged the bare fact of racial classification as a form of cognizable injury on which voters

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[181] *See id.* ("[D]iversity has been found sufficiently 'compelling,' at least in . . . higher education . . . ."); *see also* Taxman v. Board of Educ., 91 F.3d 1547, 1553 (3rd Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506 (1997) (posing the question of nonremedial interests in diversity in the context of employment). Given the lack of First Amendment concerns in employment contexts, Justice O'Connor is unlikely to find diversity in educational employment to be a compelling constitutional interest or in accord with Title VII, given the admitted lack of legislative history or case law supporting such interests. *See id.* at 1558.

[182] 509 U.S. 630, 644 (1993). It should be said at once that the interpretation that Justice O'Connor invoked some sort of a constitutional right to a "non-bizarre," aesthetically satisfying district shape is clearly mistaken. The "bizarre" shape matters only insofar as it creates an inference of race-conscious classification. *See* Bush v. Vera, 116 S. Ct. 1941, 1961–62 (1996) (plurality opinion of O'Connor, J.) (citing Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (opinion of Kennedy, J.)).

[183] *See Shaw I*, 509 U.S. at 644. Strictly speaking, the holding in the case is not that the plan is invalid but that the appellants stated a cognizable claim. The case was remanded to the district court for further proceedings consistent with Justice O'Connor's majority opinion. *See id.* at 658. The North Carolina plan was invalidated in *Shaw v. Hunt*, 116 S. Ct. 1894, 1899 (1996) (*Shaw II*) (opinion of Rehnquist, C.J.).

[184] *Shaw I*, 509 U.S. at 641–42.

of any race may sue. In particular, she distinguishes *Shaw I* from the Court's main precedent on race-conscious remedial districting, *United Jewish Organizations v. Carey* (*UJO*).[185] In *UJO*, the Court treated the Brooklyn Hassidic community's challenge to a race-conscious plan designed to maximize Black voting strength as a vote dilution claim. It rejected the claim that the plan diluted any group's vote, with three Justices remarking that the plan "represented no . . . stigma with respect to whites or any other race"[186] and two holding that it involved no "invidious purpose of discriminating against white voters."[187] These are the traditional grounds for invalidating racial classifications.

Justice O'Connor, however, did not treat the plan challenged in *Shaw I* as even potentially involving vote dilution, intentional stigmatization, or invidious discrimination. Rather, she framed it as involving "separat[ion of] voters . . . on the basis of race"[188] and for that reason presumptively improper, since no other harm than having been classified according to race was alleged. This might seem to skate close to the color-blind view that Justice O'Connor expressly rejected in her opinion and which I have argued she does not hold, on which racial classification is per se wrong merely because it classifies by race.[189]

It is unlikely that *Shaw I* represents a temporary switch to a color-blind view from *Croson* and then back again in *Adarand Constructors*. *Shaw I*, in fact, offers Justice O'Connor's most unambiguous rejection of that doctrine. Rather, a careful examination of her opinion suggests rather that for her the voting context was different from that of employment, government contracting, or (perhaps) education. Her reasoning was that in this area, as opposed to those, race neutrality has a special symbolic or "expressive"[190] significance. She said, "[W]e believe that reapportionment is one area in which appearances do matter."[191] Her usual concerns about racial stereotyping, the worry that racial classifications will further the idea that members of the same race "think alike, share the same political interests, and will prefer the same candidates at

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[185] 430 U.S. 144 (1977).

[186] *Id.* at 165.

[187] *Id.* at 180 (Stewart, J., joined by Powell, J., concurring in the judgment).

[188] *Shaw I*, 509 U.S. at 649.

[189] *See* Robert A. Curtis, Note, *Race-Based Equal Protection Claims After* Shaw v. Reno, 44 DUKE L.J. 298, 308 (1994). "The unique contribution of *Shaw* is that it makes racial classification in itself a personal, individualized injury." *Id.*

[190] *Id.* at 304.

[191] *Shaw I*, 509 U.S. at 647.

the polls,"[192] take on a special salience in a political context. She worried that racial "gerrymander[ing]"[193] "bears an uncomfortable resemblance to political apartheid."[194] Finally, she thought that race-based apportionments might tempt elected officials "to believe that their primary obligation is to represent only the members of [their own] group, rather than their constituency as a whole."[195]

Accordingly, the strict scrutiny for all racial classifications was effectively heightened for voting contexts. Justice Souter seemed to think that Justice O'Connor *rejected* the idea of having "two distinct approaches to equal protection analysis, one for cases of electoral districting and one for most other types of . . . governmental decisions."[196] He would invoke a lower degree of scrutiny, whether intermediate or a lowered strict scrutiny, in voting cases.[197] But Justice O'Connor did have two distinct approaches. She said that a "racial gerrymander . . . should [not] receive *less* scrutiny . . . than [any] other state legislation classifying citizens by race."[198] This, however, does not mean that they get the same scrutiny. Having lowered strict scrutiny to non-fatal intensity in the employment and contracting contexts, she raised it to a higher but still theoretically non-fatal level in apportionment cases.

Justice O'Connor emphasized that the mere taking of race into account, or its playing a motivating role in a districting decision is not by itself enough to trigger this heightened strict scrutiny, much less to fail it.[199] The more intensive review is called for when "the State has relied on race in substantial disregard of customary and traditional districting practices."[200] It would not be in order "if race-neutral . . . considerations predominated over racial ones."[201] In a lone concurrence to her plurality opinion in *Bush v. Vera*, she said that as long as race is not used "for its own sake or as a proxy [for political characteristics, which would involve stereotyping], States may intentionally create majority-minority districts and may otherwise take race into consideration, without

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[192] *Id.*

[193] *Id.* at 648. Professor Guinier objected to the term "gerrymandering" because the North Carolina plan did not "arbitrarily allocate disproportionate political power to any group." GUINIER, *supra* note 20, at 264 n.11 (citing *Shaw I*, 509 U.S. at 656–57).

[194] *Shaw I*, 509 U.S. at 647.

[195] *Id.* at 648.

[196] *Id.* at 684–85 (Souter, J., dissenting).

[197] *See id.*

[198] *Id.* at 646 (emphasis added).

[199] *See* Bush v. Vera, 116 S. Ct. 1941, 1951 (1996) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). In this regard, Justice O'Connor said that she differs with Justice Thomas. *See id.* at 1952.

[200] Miller v. Johnson, 115 S. Ct. 2475, 2497 (1995) (O'Connor, J., concurring).

[201] *Vera*, 116 S. Ct. at 1954.

coming under strict scrutiny."[202] It underlined her rejection of color-blindness that race may be a factor without even triggering strict scrutiny. But if racial considerations predominate, strict scrutiny applies, and in the particularly intensive form Justice O'Connor deems appropriate for voting contexts.

Justice O'Connor's reasons for this heightened strict scrutiny are not particularly satisfactory. First, stereotyping is not applicable here. If "shar[ing] the same political interests"[203] is a legitimate basis for voter districting, persons who share such interests need not for that reason be presumed to think alike or even to prefer the same candidates. They may differ on what policies or candidates will further their shared interests. But to deny that racial minority status, particularly in North Carolina,[204] may be one factor in constituting a shared political interest, fails to exhibit Justice O'Connor's usual sensitivity to racial realities.

Second, as Professor Guinier noted, Justice O'Connor's strictures about political apartheid are inapposite because the challenged district was the most racially integrated in the state.[205] Additionally, South African Apartheid was invidious, designed to deprive disenfranchised minorities of political power, while race-conscious districting plans, by contrast, have the opposite purpose and so are noninvidious. The "resembl[ance]" between the North Carolina plan, designed to enhance minority voting power without diluting white votes, and "the most egregious racial gerrymanders of the past,"[206] designed to ensure that only white votes counted at all, is hard to discern.

Third, the concern about the behavior of elected officials is related to her worry about "racial politics" in *Croson*,[207] and suffers from similar defects.[208] Justice O'Connor surely did not entertain the unworthy suspicion that elected minority officials would disregard the interests of white constituents. That the concern is baseless should be evident even from the merely prudential need of elected minority officials to maintain interracial electoral support to win contested elections. At any rate, strict scrutiny should involve inquiry into

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[202] *Id.* at 1969. This statement did not gain the support of the plurality.

[203] *Shaw I*, 509 U.S. at 647.

[204] Justice O'Connor herself remarked on the "Attorney General's imposition of the [Voting Rights Act] § 5 preclearance requirement [for voter district changes] on 40 North Carolina counties [imposed where minorities have been subject to discrimination in the exercise of the franchise], and [on] the *Gingles* District Court's findings of a long history of official racial discrimination . . . and of pervasive racial bloc voting." *Id.* at 656. Similar observations apply to Georgia (*Miller*) and Texas (*Vera*).

[205] *See* GUINIER, *supra* note 20, at 265 n.11.

[206] *Shaw I*, 509 U.S. at 641.

[207] Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989).

[208] *See supra* notes 127–28 and accompanying text.

whether this worry is justified. Merely raising the possibility is not applying "the same close scrutiny that we give other state laws that classify citizens by race."[209]

Justice O'Connor's best reason was that there is a symbolic value to a strong presumption of race neutrality in voting apportionment. This is undoubtedly true. Still, it is hard to see why this gives rise to a heightened strict scrutiny as opposed to the same strict scrutiny that applies in all other cases of racial classification or why in the voting context the bare fact of racial classification should be a cognizable harm without evidence of animus, stigmatization, or vote dilution.

Does Justice O'Connor hold that the symbolic importance of race neutrality in politics is so important that in voting apportionment a rule of color-blindness must be adopted here, even if it is rejected in other contexts? Her acceptance of racial classification itself as a presumptive harm might suggest this. And she said, "Racial gerrymandering, *even for remedial purposes*, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."[210] It might be inferred that in voting apportionment, unlike in employment or government contracting, not even clearly remedial purposes will constitute a compelling interest that would justify a racial classification. This would be a misreading of her views.

First, Justice O'Connor took care to distinguish the facts and appellants' claim in *Shaw I* from those in *UJO*, noting that the latter was a vote dilution case and the former, as she reads it, was not. She did not attack the holding of *UJO*, which remains good law.[211] If a race-based reapportionment is meant to correct a Voting Rights Act violation, it should withstand even the heightened strict scrutiny that Justice O'Connor applied in voting cases. In reply to Justice Souter's objection in *Shaw I* that taking race into account is appropriate in voting reapportionment because "racial bloc voting . . . dilut[es] minority voting strength,"[212] Justice O'Connor said that "racial bloc voting and

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[209] *Shaw I*, 509 U.S. at 644.

[210] *Id.* at 657 (emphasis added).

[211] It is unclear, though, whether she regards the plan approved in *UJO* as race-conscious at all. She said that it "could [not] be understood only as an effort to segregate voters by race," *id.* at 651, and noted that in that case three Justices approved it "in part, precisely because it adhered to traditional districting principles," *id.* (citing United Jewish Organizations v. Carey, 430 U.S. 144, 168 (1977) (opinion of White, J., joined by Stevens & Rehnquist, JJ.)). Of course a race-conscious remedial districting plan is not "only . . . an effort to segregate voters by race," but one that tries, among other things, to remedy historical disproportions of political power, so these statements are consistent with regarding the plan in *UJO* as race-conscious.

[212] *Id.* at 680 (Souter, J., dissenting).

minority-group political cohesion can never be assumed, but specifically must be proved in each case" in order to establish illegal vote dilution.[213] Without such specific proof, "'there neither has been a wrong nor can be a remedy.'"[214] With such proof, race-conscious remedies may be appropriate. Vote dilution may provide grounds for creation of a majority-minority district if certain conditions, including minority political cohesion and white bloc voting are proven.[215] Nor is vote dilution the only permissible basis for taking race into account. A race-conscious districting plan may not go "beyond what [is] reasonably necessary to avoid retrogression" of the position of minorities with respect to effective exercise of the franchise,[216] but it may go as far as reasonably necessary.

Justice O'Connor's demand for specific proof in each case is merely an instance of her general insistence on particularized findings as a condition of any race-conscious remedies. The requirements of proof impose an additional, but not insuperable, burden on the legislature in its reapportionment planning. The requirements prevent racial redistricting based on the mere assumption that minorities in a geographical area are politically cohesive and that white voters engage in racial bloc voting. However, the required proof does not prohibit taking race into account in redistricting as a remedy when these predicates are shown to be satisfied. The question remains open, however, what Justice O'Connor would consider as an adequate showing that the predicates are satisfied.

In particular, it is unsettled whether Justice O'Connor regarded it as a further necessary predicate of permissible race-conscious voter districting that taking race into account is only permissible to remedy a prima facie violation of the Voting Rights Act or the Fourteenth or Fifteenth Amendments, as opposed to merely remedying an unfortunate but not illegal disvaluing of minority voting strength. On the former view, the heightened strict scrutiny she applied to voter apportionment would approach the demand of the color-blind theory that the only legitimate basis for taking race into account is to remedy a constitutional or statutory violation, a very stringent standard indeed. This is not required by the

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[213] *Id.* at 653.

[214] *Id.* at 655 (quoting Growe v. Emison, 507 U.S. 25, 41 (1993)).

[215] *See id.* at 655 (citing Thornburg v. Gingles, 478 U.S. 30 (1986), and Voinovich v. Quilter, 507 U.S. 146 (1993)). Subsequently, Justice O'Connor explicitly said that race-conscious districting might be justified to cure a violation of § 2 of the Voting Rights Act. *See* Bush v. Vera, 116 S. Ct. 1941, 1960-61 (1996).

[216] Shaw I, 509 U.S. 630, 655 (1993) (citing Beer v. United States, 425 U.S. 130, 141 (1976) (approving the creation of a majority-minority district designed to improve the voting position of racial minorities)).

tough but lower standard of a showing of political cohesion and racial bloc voting. On the latter view, remedial race-conscious districting is permissible even without a finding of a prima facie violation of the law, as with racial preference in employment.[217]

Justice O'Connor did not hold in any express way that a finding of illegal vote dilution or retrogression is necessary. But she did treat the mere fact of racial classification as a cognizable injury if done without "sufficient justification."[218] The examples of sufficient justification she considers are all Voting Rights Act or constitutional violations.[219] It is simply unclear whether she would regard anything less as sufficient. Indeed, it appears that she has not made up her mind. She said that "only three Justices in *UJO* were prepared to say that States have a significant interest in minimizing the consequences of racial bloc voting apart from the requirements of the Voting Rights Act."[220] She declined to say here whether she agrees with them or not.

The upshot is that *Shaw I* is a refinement in Justice O'Connor's equal protection jurisprudence of race, not a departure from it. In even more unambiguous terms than in *Croson* and *Adarand Constructors*, she rejected color-blindness as an interpretation of equal protection. She indicated that voting is a special context where symbolic appearances require an especially strong justification to overcome a presumption of governmental race-neutrality, more even than to overcome the strict scrutiny to which other sorts of governmental action are subject. But it may be overcome, at the minimum by a particularized showing of minority group political cohesion and white racial bloc voting; at the maximum, by a showing of a Voting Rights Act or constitutional voting rights violation. Remedial racial classifications even in voting will pass Justice O'Connor's heightened strict scrutiny if properly justified.

IV. CONCLUSION: THE FUTURE OF RACIAL PREFERENCE PROGRAMS

Justice O'Connor's signal contribution to equal protection jurisprudence of

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[217] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286, 290–91 (1986) (O'Connor, J. concurring).

[218] *Shaw I*, 509 U.S. at 649, 652.

[219] *See id.* at 653–57; *Vera*, 116 S. Ct. at 1960–63. Speaking only for herself, Justice O'Connor said that "the state interest in avoiding liability under Voting Rights Act § 2 [for vote dilution] is compelling" and that creation of a district that "'substantially addresses'" that liability will satisfy narrow tailoring. *Id.* at 1970.

[220] *Shaw I*, 509 U.S. at 657 (citing United Jewish Organizations v. Carey, 430 U.S. 144, 167–68 (1977) (opinion of White, J., joined by Stevens & Rehnquist, JJ.)).

race has been the establishment of a minimum strict scrutiny standard (somewhat heightened in the case of voting apportionment) for all racial classifications, remedial or otherwise, invidious or not. This is not tantamount to a color-blind interpretation of the Constitution. Indeed, it contradicts a color-blind interpretation. Justice O'Connor's doctrine may be best understood as "not quite color-blind," acknowledging the aspiration towards a society in which "race no longer matters,"[221] but also recognizing that we are not there yet. She sees that the equal dignity and respect that all persons are guaranteed under the Equal Protection Clause may allow at least remedial use of racial classifications to correct for historical and ongoing governmental racial discrimination.

She has not addressed their nonremedial uses in educational contexts, but while her view of the diversity rationale outside such contexts is dim, she may hew to Justice Powell's finding that in such contexts the interest in diversity is compelling. Her view is within the spirit of the modern tradition, as the color-blind theory is not, both in her analysis of the immorality of racism and in her conception of the sorts of remedies that government may invoke to address it. One might argue that a two-standard view of the Justice Brennan sort is more in keeping with that tradition, but such a debate would be rather scholastic. The single standard is law and will remain so for the foreseeable future, largely due to Justice O'Connor's efforts.

Justice O'Connor does not always apply her own standard with the degree of generosity and concern for the plight of racial minorities her language sometimes suggests. *Richmond v. J.A. Croson Co.* was rightly decided under the new standard, given the lack of particularized findings of racial discrimination in the Richmond construction industry. But *Adarand Constructors, Inc. v. Pena* should arguably have been decided in the same way as Justice Powell's concurrence in *Fullilove v. Klutznick*, approving the challenged plan under strict scrutiny. Concern about precedent and Congressional powers under Section 5 of the Fourteenth Amendment should have further tilted the balance towards this result. In *Shaw v. Reno* (*Shaw I*), after insisting that a race-conscious apportionment plan must be justified by evidence of minority cohesion and racial bloc voting, and then providing that evidence, she proceeded to ignore it.[222] Justice O'Connor's own standard might have been perhaps more consistently and correctly applied to give different results in these cases. Practically speaking, litigators on both sides must be aware of Justice O'Connor's tendency to apply her own test more stringently than it demands, and legislators designing such programs would do well to pay

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[221] *Shaw I*, 509 U.S. at 657.

[222] *See supra* notes 212-15 and accompanying text.

close attention to the requirements she imposes on the justification of such programs, especially in regard to detailed findings of discrimination in the appropriate jurisdiction.

Racial preference programs, then, have a constitutional place.[223] In

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[223] The California "Civil Rights Initiative" proposed an amendment to the state constitution, approved in November 1996, reading in relevant part, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." CAL. CONST. Art. 1, § 31(a) (West 1997). The Ninth Circuit upheld the amendment. *See* Coalition for Economic Equity v. Wilson, 110 F.3d 1431, 1440, 1448 (9th. Cir. 1997). The case is likely to reach the Supreme Court. How might Justice O'Connor decide this case?

Justice O'Connor is very much in favor of federalism and states rights. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (opinion of O'Connor, J.) (finding a violation of the Tenth Amendment). But she says, "[T]he Fourteenth Amendment is an explicit *constraint* on state power." Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989). While Justice O'Connor holds that racial preferences may be constitutional, she remarked, "[i]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits and what it requires." *Shaw I*, 509 U.S. at 654. Would she say that a state may prohibit any governmental unit in its jurisdiction from doing something it is constitutionally permitted but not constitutionally required to do?

Perhaps the best hint is to be found in her joining the majority opinion in *Romer v. Evans*, 116 S. Ct. 1620 (1996) (opinion of Kennedy, J.). There the Court, using a heightened rational basis test, struck down an amendment to the Colorado state constitution, also passed by referendum, that forbade any governmental unit in the state from extending protection against discrimination on the basis of sexual orientation. The amendment "impos[es] a broad and undifferentiated disability on a single named group" in a way "inexplicable by anything [except] animus." *Id.* at 1627. The disability is to forbid homosexuals the safeguards "that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the state constitution." *Id*; *cf.* Reitman v. Mulkey, 387 U.S. 369 (1967) (invalidating a state constitutional amendment that prohibited any governmental unit in the state from interfering with a private individual's right to discriminate in the sale or lease of housing).

The California Civil Rights Amendment may be motivated not by a desire to discriminate, unlike that in *Reitman*, or by animus against a named group, unlike that in *Romer*, but by a sincere adherence to the color-blind theory of equal protection. So the question may be framed: is *simply* burdening minority groups by preventing them from seeking this sort of protection in state and local law, without that burden being motivated by racial animus, sufficient for a violation of the Fourteenth Amendment? The answer probably depends on how much weight Justice O'Connor placed, in joining the *Romer* majority, on the issue of animus rather than on that of special burden. And this we do not know. But nothing in her theory of equal protection as regards racial preference requires her to vote to uphold the amendment or prohibits her from voting to strike it down.

employment and government contracting, there can be no doubt that a properly justified and narrowly tailored remedial program should withstand an equal protection challenge. In higher education, there is more doubt about *Bakke*, but at present that case remains law at least outside the Fifth Circuit. In voting apportionment, a race-conscious plan designed to address a prima facie constitutional or Voting Rights Act violation should survive, and one designed to overcome white racial bloc voting might well do so if the facts about discrimination are fully documented.

Reports of the death of racial preference programs are therefore much exaggerated. Neither the current nor any future Court applying Justice O'Connor's strict scrutiny test will be able to find that racial preference programs are per se unconstitutional without overruling the line of opinions I have discussed. A future Court might use her test to approve such programs in a spirit more like that of the Burger and early Rehnquist Courts, although in a more constrained way. The result of Justice O'Connor's jurisprudence has been to secure their constitutional status in a strong but limited way, and not to undermine it.