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Private Problem, Public Solution: Affirmative Action in the 21st Century

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by

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> [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 in this country is an unfortunate reality, and government is not disqualified from acting in response to it.[1]

I. INTRODUCTION

At some point during the ninety-nine years between the United States Supreme Court's decision in *Plessy v. Ferguson*[2] and its decision in *Adarand Constructors, Inc. v. Pena*,[3] the concepts of race, color and ethnicity were eradicated as constitutionally relevant factors in the Equal Protection paradigm, or so the argument goes.[4] Clearly,

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[1] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995)(O'Connor, J.).

[2] Plessy v. Ferguson, 163 U.S. 537 (1896), *overruled by* 347 U.S. 483 (1954).

[3] *Adarand Constructors, Inc.*, 515 U.S. at 200.

[4] *See generally* Sean M. Scott, *Justice Redefined: Minority-Targeted Scholarships and the Struggle Against Racial Oppression*, 62 UMKC L.REV. 651 (1994). In this article Professor Scott argues that the Supreme Court's color-blind interpretation of the Equal Protection Clause "perpetuates a concept of racial justice that is defined by the dominant, not the outside, group and leads to the continued racial oppression of African-Americans." *Id.* at 668. He similarly argues that a race-neutral constitutional paradigm is both judicially and socially misleading. He notes that:

> The strategy of color blindness is being questioned as is the assumption that a color-blind society will be the equivalent of a racially equal and just society. Those professing color-blindness confuse the recognition of race, and the difference that race makes, with racism. There is an increased rejection of the concept that to recognize race is the equivalent of being a racist. This presumption is being stood on its head by outsiders and whites who have begun to listen to the stories of outsiders; we posit that not to recognize and acknowledge race is to deny the positive value of being African-American or non-white.
>
> Race-consciousness rejects the assimilationist model inherent to color-blindness and instead argues for acculturation and recognition of the

immutable characteristics such as race, color and ethnicity continue to play important roles not only in the American jurisprudential landscape, but in all facets of American society. However, the concept of a color-blind society,[5] as first articulated by Justice Harlan in his dissenting opinion in *Plessy*,[6] has become a popular justification for

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> value of being racially different. It treats difference respectfully and recognizes that race plays a critical role in developing perspectives. It advocates the telling of outsider narratives by the oppressed group and the hearing of these stories by the privileged group. It suggests that our societal goal should not necessarily be to move beyond race but instead to come to value the difference that race makes.

Id. at 693-94.

[5] For a discussion of the merits of the color-blind constitution *see generally*, Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind*, N.Y. TIMES, Feb. 22, 1998, § 6 (Magazine) at 42.

> More recently, however, a majority has edged toward pronouncing the Constitution "color blind," coming close to holding legislation that uses any racial classification unconstitutional. Reading the Equal Protection Clause to protect whites as well as blacks from racial classification is to focus upon a situation that does not and never has existed in our society. Unfortunately, it casts doubt upon all forms of racial classification, however benign and however focused upon promoting integration. If such a reading is finally adopted by a majority of the Court, it would put a constitutional pall over all governmental affirmative action programs and even put similar private programs in danger of being labeled "discriminatory" against whites and therefore in violation of existing civil rights legislation – perhaps the ultimate stupidity.

Id.

But see Marquez Lundin, *The Call for a Color-Blind Law*, 30 COLUM. J. L. & SOC. PROBS. 407 (1997). Marquez rejects the use of the strict scrutiny analysis to determine the constitutional validity of race-based preferences, and instead argues that "governmental race-based action should always be impermissible." *Id*. at 408. He notes that:

> A color-blind law will not only heal our racial divide, it is also the surest protection for the rights of all minority groups. One need look no further than *Korematsu* to see that as long as race can be used at all, it can be used for ill. It is tragic that the search for racial equality has turned into a battle for racial classification and the division of rights and benefits on that basis.

Id. at 456.

[6] *See Plessy*, 163 U.S. at 559.

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.

attacking remedial efforts that seek to eliminate the continuing effects of discrimination on racial and ethnic minority groups.[7]

Although the concept of race neutrality is implicit in the Court's interpretation of a color-blind constitution, it does not mean however, that race or ethnicity cannot be used as a constitutionally permissible criterion in the allocation of resources[8]. On the contrary, it means that if used, race-based classifications must be able to withstand the strict constitutional scrutiny that is the cornerstone of the Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment.[9] This analytical paradigm

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Id.

[7] *See generally* Wooden v. Board of Regents of Univ. Sys., *et*, 32 F. Supp.2d 1370 (S.D. Ga. 1999); Gratz v. Bollinger, *et al*., 183 F.R.D. 209 (E.D. Mich. 1998); Grutter v. Bollinger, 16 F. Supp.2d 797 (E.D Mich. 1998); Smith v. University of Washington Law School, 2 F. Supp.2d 1324 (W.D. Wash. 1998); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994); Hopwood v. State of Tex., 78 F.3d 932 (5th Cir. 1996); DeRonde v. Regents of Univ. of Cal., 625 P.2d 220 (Cal. 1981); Regents of University of Cal. v. Bakke, 438 U.S. 265 (1978); DeFunis v. Odegaard, 416 U.S. 312 (1974). *See also* Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind*, N.Y. TIMES, Feb. 22, 1998, § 6 (Magazine) at 42:

> Affirmative action programs, whether to avoid present bias or to remedy the effects of three centuries of discrimination against African-Americans, are race-based. The problems they seek to cure are and have been race-based. They stem from history–the political, economic and social domination of blacks by a white majority that regarded blacks as inferior. Undoubtedly there are blacks who are biased against whites and who, given the power to do so, would discriminate against them. Of course, given the power, it would be as morally wrong for them to do so as it has been for whites. But discrimination by blacks against whites is not America's problem. It is not the problem that predominantly white legislatures, businesses and universities seek to solve through affirmative action programs.

Id.

[8] The modern origin of a color-blind society can be traced to the "I Have a Dream" speech delivered by Dr. Martin Luther King, Jr on August 28, 1963 at the Lincoln Memorial in Washington, D.C. He stated that "I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but the content of their character." DEBORAH GILLAN STRAUB, AFRICAN AMERICAN VOICES 211 (1996). Dr. King's words continue to resonate throughout American society, but the color-blind society envisioned by Dr. King could not have included a nation where the vestiges of racial discrimination were eliminated without a simultaneous recognition of the impact that racial discrimination had on the African American society.

[9] U.S. CONST. amend. XIV, § 1.

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to

requires an initial finding of a constitutionally compelling justification for the use of the race-based criterion. Supreme Court case law is clear - the goal of eliminating discrimination or remedying the present effects of past discriminatory practices can serve as a compelling justification for the use of race-based classifications.[10] Proof of broad societal discrimination will not withstand constitutional scrutiny. Additionally, the discriminatory conduct must have been performed by the party implementing the race-based remedy. Strict scrutiny also mandates that the race-based remedy be narrowly tailored to address the harm resultant from such past discriminatory conduct.

Notwithstanding the scope and breadth of conflicting views generated by this paradigm, the Court has clearly embraced this racially neutral interpretation of the strict scrutiny test, and incorporated it into the Equal Protection paradigm. The goal of this Article is not to enter into that debate, but to work within the analytical parameters currently established by the Court to address unresolved issues. For example, is the racially neutral interpretation of the strict scrutiny test so strict that most, if not all, race-based criteria will be stricken? If so, is the Court willing to recognize a broader range of constitutionally permissible justifications for the use of race-based classifications?[11] This Article embraces the Court's color-blind interpretation of the Equal Protection Clause as the standard against which race-based affirmative action preferences will be measured, and proposes strategies aimed at satisfying this heightened constitutional standard.

The Court's racially neutral interpretation of the Fourteenth Amendment has given opponents of race-based preferences significant ammunition in their efforts to eliminate affirmative action programs. Although the attack on race-based affirmative action has occurred on many fronts, this Article will focus on the field on higher education.[12] Recent judicial and legislative attacks on race-based affirmative action

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any person within its jurisdiction the equal protection of the laws.

[10] Pursuant to Justice Powell's opinion in *Regents of University of California v. Bakke*, 438 U.S. 265 an unresolved question remains regarding the continued permissibility of diversity as a compelling justification for the use of race-based criteria. *Id.*

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

> And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.

Id.

[12] Also note that others have limited their analysis of affirmative action programs to the field of higher education. *See generally*, WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS xxv (1998).

> This study is limited in several important respects. First, we are concerned

preferences by colleges and universities across the country are beginning to take their toll. During the past few years, there has been a tremendous decrease in the number of racial and ethnic minority students enrolling in and successfully completing college and professional schools.[13] In addition, the challenge to race-based affirmative action programs is being systematically spearheaded by well-funded, conservative public interest groups who are underwriting legal efforts to eliminate race-based affirmative

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> solely with higher education. In our view, one problem with much of the debate over affirmative action is that it lumps together a large number of highly disparate areas and programs, ranging from the awarding of contracts to minority-owned businesses to policies governing hiring and promotion to the admissions policies of colleges and universities. The arguments that pertain to one area may or may not apply in other areas. It is noteworthy, for example, that the plaintiffs in the *Piscataway* case, which centered on the layoff of a white secondary school teacher, took pains in their final brief to ask the Supreme Court not to confuse the job-specific issues that confronted the plaintiff with the much broader, and rather different, sets of considerations that face educational institutions in deciding whom to admit.

Id.

[13] *See generally, The Declining Enrollments of Blacks in Schools of Architecture*, 23 J. BLACKS HIGHER ED. 35 (1999);Adam Cohen/Irvine,*"When the Field is Level in California, Minority Students are "Cascading out of Top Schools and into the Second Tier. Is This Good For Them?"*, TIME, July 5, 1999, at 30; Nancy Cantor, *Affirmative Action: What Michigan can really learn from California, Opinion*, Det. News, May 17, 1999, at A10; *Black Enrollments Drop at Harvard Law School*, 23 J. BLACKS HIGHER ED. 135 (1999); *Minority Entrants to California Med Schools Down 32 Percent*, MED. & HEALTH, Apr. 26, 1999, available in 1999 WL 10391837; Kenneth R. Weiss, *Minority Admissions at UC Almost at 1997 Level Education: Sharp Drop had followed end of affirmative action last year. Top campuses have not fully rebounded*, L.A. TIMES, Apr. 3, 1999, at A1; Kenneth R. Weiss, *UC Board Expected to Ok Davis Plan to Admit Top 4% Education: Another 3,600 students a year would be eligible to attend. Davis has said minority enrollment would increase, but officials say impact would be minimal*, L.A. TIMES, Mar. 19, 1999 at A1; Karen Brown, *Students protest UMass shift on admissions*, BOSTON GLOBE, Apr. 4, 1999, at B2; Mary Ann Roser, *College Admission law has mixed results*, AUSTIN AM.-STATESMAN, Dec. 28, 1998, at A1; Jayne Noble Suhler, *Minority enrollment increases at Texas universities But schools still show diversity disparities, state report says*, DALLAS MORNING NEWS, Oct. 23, 1998, at 1A; Linda Wertheimer & Claudio Sanchez, *The growth in the number of blacks, Latinos and other minorities at U.S. colleges and universities has been declining for nearly a decade. A new report released today says that lower academic achievement and graduation rates from high school are partly responsible. The study also concludes that the roll back in Affirmative Action in some states is having a chilling effect across the nation*, ALL THINGS CONSIDERED, Sept. 24, 1998, available in 1998 WL 3646569; Kenneth Weiss, *Fewer Blacks and Latinos Enroll at UC Education: Declines are sharpest at top campuses, while numbers increase at Irvine, Riverside and Santa Cruz*, L.A. TIMES, May 21, 1998, at A3.

action programs from the landscape of the American college and university system.[14] In response to these well organized legal and political challenges to affirmative action, this Article attempts to re-introduce an important player into the equation - the federal government. In an area as vital to the political and social advancement of racial and ethnic minorities as education, we must shift our emphasis from fighting individual battles to preserve these programs, and instead look to Congress for remedial measures that seek to eradicate a problem that is of national importance.[15]

This Article will explore the origins of the Court's color-blind interpretation of the Fourteenth Amendment, and the role that this interpretation plays in the development of new barriers against challenges to race-based affirmative action programs. Part II of this Article traces the development and application of the strict scrutiny test to evaluate the constitutionality of both invidious and benign racial classifications. Part III

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[14] At the forefront of the battle challenging race-based affirmative action programs is The Center for Individual Rights ("CIR"). CIR is a non-for-profit public interest law firm that draws support from a number of attorneys who work for CIR on a pro bono basis. The mission of this law firm is to defend "individual rights, with particular emphasis on civil rights, freedom of speech, the free exercise of religion, and sexual harassment law. CIR provides free legal representation to deserving clients who cannot otherwise obtain or afford legal counsel and whose individual rights are threatened." CIR (last modified Sept. 9, 1999) <http://www.cir-usa.org/mission.htm>.

For a critical evaluation of the goals of this organization, *see* Theodore Cross, *African-American Opportunities in Higher Education: What Are the Racial Goals for The Center for Individual Rights*?, 23 J. BLACKS HIGHER ED. 94 (1999).

[15] *See* Dr. A'lelia Robinson Henry, *Perpetuating Inequality:* Plessy v. Ferguson *and the Dilemma of Black Access to Public and Higher Education, 27* J.L. & EDUC. 47 (1998).

> In the time since the *Brown* decision called upon the states to dismantle their segregationist systems of public and higher education, the educational gains of African Americans have been nothing short of monumental. In 1994, African Americans received more undergraduate and graduate degrees than at any time history, and most of these individuals were the products of TWIs. The TWIs are now the major producers of black professionals and doctorates. In 1994, approximately 834,000 African Americans were enrolled in 4-year undergraduate institutions, and 615,000 in community colleges. 111,000 African Americans were enrolled in graduate school, which represented a 66 percent increase over the previous decade. Over this same period, the number of blacks in professional school rose from 13,000 to 22,000. In the years between years of 1985 and 1993, the number of African Americans who received the bachelor's degrees increased by 8 percent, and those who received the master's degree by 42 percent. In 1995, the number of doctoral degrees awarded to African Americans reached an all-time high, rising 17 percent over the previous year, from 1095 to 1,287.

Id. at 62-63.

examines Justice Powell's position that racial classifications used as remedial measures may overcome the presumption of constitutional invalidity associated with the use of race-based classifications. In this context, the Court recognizes that the continued impact of past and present discriminatory practices serves as a barrier to the ability of racial and ethnic minorities to equally participate in the American social, political, and economic process.

Part IV of this Article focuses on whether the strict scrutiny test may be satisfied by implementation of Congressionally mandated race-based remedial programs. By distinguishing the application of the strict scrutiny test used to evaluate municipal and state remedial efforts from the more deferential standard used to evaluate Congressionally mandated programs, I argue that §5[16] of the Fourteenth Amendment, in concert with the enforcement powers set forth in Title VI of the Civil Rights Act of 1964 (hereinafter referred to as Title VI),[17] authorizes Congress to determine whether discrimination or the effects of past discrimination continue to influence the racial and ethnic composition of educational institutions within the field of higher education. If convincing proof of discrimination is found, Congress may implement remedial race-based programs to increase the number of racial and ethnic minority group members within both public and private educational institutions that receive federal funding.

II. THE COLOR-BLIND CONSTITUTION - DEVELOPMENT OF THE STRICT SCRUTINY TEST

The guarantees of the Equal Protection Clause[18] serve as the foundation upon which the Court evaluates the role that racial classifications play in the allocation of societal rights and privileges.[19] This Clause provides, in pertinent part, that "[n]o State

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[16] U.S. CONST. amend. XIV, § 5. ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.")

[17] Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C §2000d (1964).

[18] The Supreme Court does not look upon race-based classifications with favor. *See* Shaw v. Reno, 509 U.S. 630, 643 (1993)("[c]lassifications of citizens solely on the basis of race are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.")

[19] *See also* Nicholas deB. Katzenbach & Burke Marshall, *Not Color Blind: Just Blind*, N.Y. TIMES, Feb. 22, 1998, § 6 (Magazine) at 42.

> If problems of race are to be solved, they must be seen as the race-based problems they are. It is this aspect of the controversy that recent decisions of the Supreme Court have brought into question. The Equal Protection Clause of the 14th Amendment was designed to insure that former slaves and their descendants were entitled to the same legal

shall . . . deny to any person within its jurisdiction the equal protection of the laws."[20] To effectuate the protections afforded by the Fourteenth Amendment, the use of race-based classifications, although not expressly prohibited, "must be analyzed by a reviewing court under strict scrutiny."[21] This heightened level of scrutiny did not always exist. Although the language of the Fourteenth Amendment represented a significant evolution in the legal protection afforded initially to African Americans,[22] the Supreme Court's initial interpretation of these rights was not consistent with the Amendment's facial guarantees of equal protection.

Former Chief Justice Earl Warren characterized the Supreme Court's early interpretation of the Fourteenth Amendment as flawed and without foresight.[23] In

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> protection as white citizens. Like the 13th Amendment abolishing slavery and the 15th guaranteeing the right to vote regardless of race, it was clearly and unequivocally aimed at racial problems – in today's terminology "race based." The Equal Protection Clause has never been viewed as preventing classification of citizens for governmental reasons as long as the legislative classification was "reasonable" in terms of its purpose.

Id.

[20] U.S. CONST. amend. XIV.

[21] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Reliance on a strict constitutional evaluation of racial classifications originates with language from Supreme Court opinions in *Hirabayashi v. U.S.*, and *Korematsu v. U.S.*:

> [I]t should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Korematsu v. U.S., 323 U.S. 214, 216 (1994).

[22] Prior to the ratification of the Fourteenth Amendment in 1868, the rights of black Americans, although freed from slavery by the Thirteenth Amendment in 1865, were severely limited. For example, "'[l]iberty' in the Fourteenth Amendment, for which the States were to ensure equal protection was, for Black Americans, primarily a freedom from slavery and all the common incidents of slavery. Slaves had been denied freedom of movement and now, with the Equal Protection Clause, this aspect of liberty was to be accorded to Black Americans everywhere in the land." CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 254 (1997). *See also* JAMES E. BOND, NO EASY WALK TO FREEDOM (1997); JOSEPH B. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT (1984).

[23] EARL WARREN, *Fourteenth Amendment: Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 212 (Bernard Schwartz, ed., 1970). *See also* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 118 (1996)("Although the Court's erroneous construction of the Fourteenth Amendment prevailed for over a half-century, the overwhelming consensus today is that *Plessy* was an untenable statement of the law that set in motion an era of oppression

reflecting on the historic role of the Court, he concluded that:

> the court's fundamental error was in denying Congress a meaningful role in Fourteenth Amendment enforcement. The Negro faced a variety of barriers - some obvious and some quite subtle - in his struggle to become a full and equal member of American society, and the federal courts were simply not equipped to undertake the broad range of programs necessary to tear down those barriers. Those courts could proceed only on a case-by-case basis in their efforts to relate abstract notions of equality with the real world of racial prejudice, discrimination and distrust. The judicial conclusion in *Plessy v. Ferguson* that separation of the races satisfied the constitutional command of equality dramatically illustrated that abstract judicial concepts will not necessarily reflect the real world.[24]

Characterizing the *Plessy* decision as a judicial example of "fundamental error" does not do justice to the six decades of oppressive constitutional jurisprudence that it spawned.[25] In *Plessy*[26] the Court refused to invalidate state legislation that required

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from which our nation still has not fully recovered.")

[24] EARL WARREN, *Fourteenth Amendment: Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 212, 225 (Bernard Schwartz, ed., 1970)

> The remarkable feature of the Supreme Court's Fourteenth Amendment decisions in the late nineteenth and early twentieth centuries is that they failed to grasp the importance of the nation's commitment to equality and the increasingly desperate plight of the Negro. Perhaps this failing is particularly apparent to us at this period in history when racial problems seem to dominate our national life.

Id. at 224-225.

[25] A. Leon Higginbotham, Jr., *The Life of the Law: Values, Commitment, and Craftsmanship*, 100 HARV. L.REV. 795 (1987).

> The Supreme Court in *Plessy* placed its imprimatur on state-imposed racial segregation and left to the "large discretion . . . of the legislature" the determination whether the state would separate and treat black people differently than it did any other group-- majority or minority--in American society. In the context of the times, the Court's reference to the "established usages, customs and traditions of the people" was nothing less than a mandate for states to revert to the past biases, prejudices, and discrimination that had provided the rationale for slavery and America's earlier legitimization of racism--the very racism that was the target of the thirteenth, fourteenth, and fifteenth amendments. The majority's thinly veiled reversion to a slavery-type jurisprudence, despite its invocation of the fourteenth amendment, was revealed by its frequent citations to and reliance upon many cases that predated the enactment of the fourteenth

separate accommodations based on racial distinction. Specifically, the Court upheld a Louisiana statute, passed in 1890, which provided for "separate railway carriages for the white and colored races."[27] The mere fact that the Court permitted Homer Plessy[28] to assert a judicial challenge to this statute evidenced an evolution in the American legal system's recognition of African Americans as citizens of the United States, and therefore entitled them to equal application of the privileges and immunities arising therefrom.[29] However, equal access to the judicial system did not guarantee equal

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amendment.

> Although many lower courts had explicitly endorsed "Jim Crow segregation" prior to *Plessy*, the significance of the Supreme Court's affirmation of the doctrine of 'separate but equal' in 1896 cannot be underestimated. The Court's approval was the final and therefore the most devastating judicial step in the legitimization of racism under state law. In numerous subsequent school cases, state and federal courts continued to approve racial discrimination and segregation; most of those courts or counsel of record cited or relied upon *Plessy* as support for expansive endorsements of racial subjugation.

Id. at 805-7.

[26] Plessy v. Ferguson, 163 U.S. 537 (1896) *overruled by* 347 U.S. 483 (1954).

[27] *Plessy*, 163 U.S. at 540. Plessy argued that:

> he was entitled to every right, privilege, and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate said coach, and take a seat in another, assigned to persons of the colored race, and, having refused to comply with such demand, he was forcibly ejected, with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

Id. at 541-42.

[28] *Plessy*, 163 U.S. at 541. This was not a typical case, but one specifically designed to test the constitutionality of this statute. *See* ELLIS COSE, COLOR-BLIND (1997)

> As a test of Louisiana's Separate Car Act, Homer Adolph Plessy provoked a prearranged confrontation by sitting in the first-class "white" section of a train on the East Louisiana Railway. Plessy's blood was, by his own reckoning, only one-eighth "African." And as the Court noted in its decision, 'the mixture of colored blood was not discernible in him.

Id. at 17.

[29] Prior to *Plessy*, Scott v. Sanford, 60 U.S. 393, 404 (1856) governed the ability of African Americans to participate in the American judicial process. ("We think they [African Americans] are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States.") *See also* BRYAN K. FAIR, *NOTES OF A RACIAL CASTE BABY* 95 (1997), which discusses the

treatment within its boundaries.

The court viewed the concept of equality as contemplated by the Fourteenth Amendment *in Plessy* as a way to "enforce the absolute equality of the two races before the law,"[30] but not, as Justice Brown noted, "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[31] This ruling evidenced an important distinction between legal and social equality that continues to permeate all facets of American society.[32] This distinction also served as the framework for the 'separate but

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continuing impact of the *Dred Scott* decision. Professor Fair writes that "Taney's opinion in *Dred Scott* was one of the most decisive moments in the nationalization of white supremacy in America, as his opinion gave judicial sanction to the commodification and subordination of all blacks, whether slave or free, to exclude them from the federal courts. This decision shows that the malign racial attitudes of whites toward blacks changed very little between the seventeenth and nineteenth centuries. Even today, one sees evidence of Taney's beliefs. For example, many whites still live away from blacks as if Blacks were unfit to associate with. Many whites continue to enroll their children at schools and universities with virtually no black students or teachers. Many whites refuse to support black political candidates, especially in statewide or national elections." *Id*. at 95.

[30] *Plessy*, 163 U.S. at 544.

[31] *Id*.

[32] *See* Shelley Ross Saxer, Shelley v. Kraemer's *Fiftieth Anniversary: "A Time for Keeping;A Time for Throwing Away?,"* 47 U. KAN. L. REV. 61, 77-78, (1998):

> In 1896, the Court, in *Plessy v. Ferguson*, justified segregation by interpreting the Fourteenth Amendment as enforcing civil and political equality, but not social equality. Faced with legislative and judicial commands to equalize civil and political rights, "states seeking to disenfranchise African-Americans successively experimented with the grandfather clause, residency and literacy requirements, and 'privatization' through the white primary, as well as the familiar tactics of racist intimidation and discriminatory administration of facially neutral registration statutes." Overt race-based distinctions continued to appear in the "sphere of so- called social rights" such as "marriage, education, public transportation, and accommodation." In fact, beginning in the 1880s and "gathering steam after *Plessy v. Ferguson* was decided, the Southern states passed laws that not only authorized exclusion and segregation of customers on the basis of race, but in fact required such discriminatory practices." Additionally, from about 1890 until 1970, other methods of subordinating African-Americans were used including social pressure, violence, and other wrongful conduct against these citizens.
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> It was not until 1954 that the Court in *Brown v. Board of Education* recognized social equality by striking down the concept of segregation as inconsistent with educational equality and declaring that the "separate but equal" doctrine adopted in *Plessy* had no place in the

equal' doctrine that was upheld by the Court in *Plessy*.[33] Justice Brown noted that:

> field of public education. Yet, it took another thirteen years after *Brown* before the Court in *Loving v. Virginia* definitively "adopted a categorical presumption against race-based regulation" by declaring that statutes prohibiting interracial marriages violated the Equal Protection Clause of the Fourteenth Amendment. Just before the Court decided *Loving*, Congress enacted the Civil Rights Act of 1964, which "ban[s] 'discrimination or segregation' in the provision of goods and services, even by private entities, on the basis of 'race, color, religion, or national origin,' and outlaw[s] discrimination or segregation in employment because of a person's 'race, color, religion, sex, or national origin.'" This Act was possible because of the civil rights movement and the persistent activities of Dr. Martin Luther King, Jr. and his followers from 1954 to 1964, which kept the issue of racial inequality before the eyes of the American public. Although the Civil Rights Act of 1964 did not end discrimination or racism, it represented an "important statutory embodiment of the ideal of racial justice" and helped establish a "framework for the resolution of issues of race."

Id.

[33] Charles E. Ross, *Symposium: The Role of the United States Court of Appeals for the Fifth Circuit in the Civil Rights Movement, Experience is the Life of the Law*, 16 MISS. C. L. REV. 347, 350-351 (1996):

> With regard to the Fourteenth Amendment argument, the *Plessy* Court also rejected Plessy's claim by first reasoning that, though the Fourteenth Amendment was designed to enforce the "absolute equality of the two races before the law," the equality mandated was only "political equality" and did not extend to "social equality." To illustrate the difference, the Court cited prior precedent holding that a state could not prohibit people of the "colored race" from sitting on a jury because such a prohibition "implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility." The Court rejected this implication with regard to the use of railroad cars by passengers, however, on the basis that the exercise of the police power to provide separate but equal railroad cars was reasonable in that it promoted the public good and was not intended for the oppression of a particular class. To buttress its "reasonable" argument, the Court noted that even the Congress of the United States required separate schools for colored children in the District of Columbia.
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> The Court further reasoned that the state of Louisiana, through the enforced separation of the two races, was not stamping the colored race with a "badge of inferiority," but instead, if members of the colored race felt such a stamp, it was they themselves as opposed to the state of Louisiana that was imposing the stamp. The Court flatly rejected the argument that "equal [social] rights cannot be secured to the negro except

> [l]aws permitting, and even requiring, their separation, in places where they are liable to be brought into contact, do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.[34]

The only limitation, if you will, on the Court's approval of the 'separate but equal' doctrine was the requirement that in order to be a valid exercise of police power, it "must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[35] This decision and the resulting 'separate but equal' doctrine set the country upon a social[36] and jurisprudential course that was prophetically described by Justice

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> by an enforced commingling of the two races." *Plessy* came to stand for the proposition that a state could segregate school children according to race as long as the facilities in question being provided by the state were provided to both races equally.

Id.

[34] *Plessy*, 163 U.S. at 544. ("[T]he enforced separation of the races, as applied to the internal commerce of the state, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the fourteenth amendment. . . . ").

[35] *Plessy*, 163 U.S. at 550.

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it.

Id. at 551. *But see* Justice Harlan's dissenting opinion in which he argued that "[t]he arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds." *Id*. at 562.

[36] *See* CARL T. ROWAN, *DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARHSALL* 7, n. 7 (1993)("'Jim Crow' describes a practice or policy of segregation or discrimination against Negroes in public places, public vehicles, employment, schools, etc. The term derives from a song sung by Thomas Rice in a mid-1800s Negro minstrel show."); RALPH E. LUKER, HISTORICAL DICTIONARY OF THE CIVIL RIGHTS MOVEMENT 133-34 (1997)

> Jim Crow. A term which refers to a wide variety of legal and extralegal practices of racial discrimination in the United States in the nineteenth and first half of the twentieth centuries. The term had its origin in a white minstrel show popular across the North in the 1830s. In it, Thomas Dartmouth "Daddy" Rice, appearing in blackface, danced and sang a number called "Jump Jim Crow." Later, the white South reacted to emancipation and the end of Reconstruction by enacting laws separating

Harlan as "pernicious."[37]

> the races, restricting the franchise of African Americans and confirming social mores that discriminated against them. These laws and mores were called "Jim Crow." In law, they banned intermarriage, disfranchised African Americans by a variety of provisions and mandated separate housing, public accommodations, schools, and transportation.

Id. See also, HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 332-33 (7th ed. 1998)

> The Court's position, as noted earlier . . . , was that the Fourteenth Amendment did not place under federal protection "the entire domain of civil rights heretofore belonging exclusively to the states," and that the protection offered by the Fourteenth and Fifteenth Amendments was against state action only, not against private action. And in 1896 the Court upheld the convenient discriminatory concept of "separate but equal" in the case of *Plessy v. Ferguson*. To all intents and purposes the black was at the mercy of the states-there was no Warren Court to redress grievances. Indeed, until World War II the federal government assumed at most a highly limited role in the protection of civil rights on the state level.
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> Before 1910 almost 90 percent of America's blacks lived in the South and the Border . . . . the core of racial discrimination was naturally found there, on both the public and the private level. Thus public authorities at the state and local levels, usually under the guise of the Court-upheld separate but equal concept, enacted measures (sometimes taking the form of a constitutional provision) permitting or even requiring segregation of buses, streetcars, taxicabs, railroads, waiting rooms, comfort stations, drinking fountains, state and local schools, state colleges and universities, hospitals, jails, cemeteries, sport facilities, beaches, bath houses, swimming pools, parks, golf courses, courthouse cafeterias, libraries, dwellings, theaters, hotels, restaurants, and other similar facilities-be these public, quasi-public, or private in nature; and interracial marriages were widely proscribed. Private individuals and groups, on their own initiative, and not infrequently encouraged by state authorities, acted to deny blacks, and often other non-Caucasians as well, access to social clubs, fraternities and sororities, private schools, colleges, universities, churches, cemeteries, funeral parlors, hospitals, hotels, dwellings, restaurants, movies, bowling alleys, swimming pools, bath houses . . . . There was nothing particularly secretive about either public or private discrimination; it was simply an accepted way of life-accepted by many blacks as well as by almost all whites.

Id. at 333.

[37] *Plessy*, 163 U.S. at 559. Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV. 151, 155 (1996) ("Harlan's opinion also reflected a deserved confidence in the power of his analysis; even in 1896, even writing alone, he correctly

Justice Harlan attacked the majority decision in *Plessy* on several fronts.[38] In addition to predicting continued racial strife,[39] he focused on the interplay between the use of invidious racial classifications and the language of the then recently ratified constitutional amendments. He argued that the Thirteenth,[40] Fourteenth,[41] and Fifteenth[42] Amendments were intended to remove "the race line from our governmental systems."[43] Citing the Court's previous conclusion that race could not be used to

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predicted that judicial fiat could not forever impose a policy that was fundamentally wrong." citing Harlan, *Plessy* Dissent p. 559 ("[T]he judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case.").

[38] *Plessy*, 163 U.S. at 559 (Harlan, J.) ("[t]he law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.").

[39] Plessy, 163 U.S. at 562 (Harlan, J. dissenting).

> If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow citizens,–our equals before the law.

Id. at 562.

[40] U.S. CONST. amend. XIII, § 1. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

[41] U.S. CONST. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[42] U.S. CONST. amend. XV, §1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

[43] *Plessy*, 163 U.S. at 555. *See* ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

> [S]tate legislation "conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race" must be "hostile to both the spirit and letter of the Constitution of the United

disqualify potential jurors, Justice Harlan articulated a more expansive reading of these constitutional provisions. In assessing the rights and immunities afforded to African Americans, he concluded that "the constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the general government or the states against any citizen because of his race. All citizens are equal before the law."[44]

Justice Harlan's color-blind interpretation of the constitution is facially supportive of the struggle of African Americans. However, the concept of the 'color-blind' constitution has shortcomings that modern jurists and constitutional scholars have seized upon.[45] Justice Harlan's oft-quoted language is a very powerful entreaty

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> States." This is a better explanation of the illegality of racial segregation than has yet appeared in any opinion for a majority of the Supreme Court. It is not, of course, an argument for a color-blind Constitution. Racially discriminatory legislation may be neither conceived in hostility to, nor enacted for the purpose of humiliating, citizens of the United States of a particular race. Alternatively, Jim Crow laws might be rejected on the ground that they impose an unreasonable classification, without implying any broader rule of antidiscrimination. Harlan consciously went further: he developed an argument for a color-blind Constitution because he was unwilling to rely on judges to distinguish a good racial classification from a bad one.

Id. at 121. EARL WARREN, *Fourteenth Amendment: Retrospect and Prospect*, *in* THE FOURTEENTH AMENDMENT: CENTENNIAL VOLUME 212 (Bernard Schwartz, ed., 1970).

> The work of reconstructing the divided and battlescarred nation after the Civil War took many forms. Most relevant for our purposes were the basis for the nation's commitment to the concept of equality. Within five years after the guns of the Civil War had been silenced, Congress had proposed and the country had ratified three amendments which purported to give the newly freed slaves civil and political equality with all other Americans. The Thirteenth Amendment told the Negro that slavery could have no place in this nation and that he could no longer be treated as chattel, to be bought and sold at the caprice of his white master. The Fourteenth Amendment conferred national citizenship on the Negro and told him that he could expect due process and equal protection before the law. The Fifteenth Amendment gave the Negro the most potent weapon in the democratic arsenal - the vote - and promised him the he could participate fully in the American political process. The three amendments had a common feature - they designated the Congress as the governmental body that would take action to ensure that the new commitment to equality would be fulfilled.

Id. at 215.

[44] *Plessy*, 163 U.S. at 556.

[45] *See* BRYAN K. FAIR, *NOTES OF A RACIAL CASTE BABY* (1997).

> What did Harlan mean by his dissent in *Plessy*? What was the context for his insistence that the American Constitution is color blind? Harlan's primary concern in *Plessy* was undoing black caste. He understood the implicit message behind segregation statutes: that blacks are inferior, unfit to associate with whites. Harlan did not pronounce his color blindness principle in an equal society but, rather, in one in which race was a benchmark for status. He considered the Louisiana law unconstitutional because it implied the inferiority of blacks and the superiority of whites. However, some commentators have made elaborate arguments that Harlan intended that the government never be able to use race as a criterion in its decision making, including when the government sought to remedy past discrimination or eliminate current caste. But these arguments take Harlan's statements out of context and turn his color blindness principle on its head. Justice William Brennan observed how Justice Brown's opinion in *Plessy* turned the equal protection clause against those whom it was intended to set free, condemning them to a "separate but equal" status before the law, a status always separate but seldom equal. And now some people want to recast Harlan's dissent *against* blacks, condemning them to racial caste.

Id. at 102; Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification,* 29 TEX. TECH. L. REV. 1, 7 (1998).

> The ongoing debate regarding the constitutionality of racial preferences for purposes of affirmative action often focuses on whether the reasons for being especially suspicious of invidious racial discrimination are equally applicable to "benign" preferences. To a large extent, contemporary disputes over racial preferences tend to pit two different conceptions of equal protection in the context of race against each other. The *Hopwood* majority, as well as Justice Scalia, essentially rely on the "colorblind principle," which holds that any consideration of race in governmental decision making, other than for strictly remedial purposes, is presumptively unconstitutional. This conclusion may arise for some or all of the following reasons: such consideration of race is inconsistent with the original understanding of equal protection, is premised on assumptions of racial inferiority, denigrates the individual through the use of irrelevant and racially based stereotypes, is immoral, is stigmatizing, or leads to enduring racialism. Arguably, Justice Powell applied a softer version of the colorblind principle in *Bakke*, concluding that all racial classifications must be strictly scrutinized, but that the non-remedial interest of diversity in education could justify a limited use of racial preferences. A competing approach favored by many academics, and partially reflected in the opinion of Justice Marshall in *Bakke*, is known as the "anti-subordination principle," which holds that the use of race by the government is wrong only when it subordinates any racial group. The colorblind principle exalts the rights of the individual, while the anti-subordination principle

for the Court to recognize the equal constitutional rights of all people on a race neutral basis. He writes that:

> [T]here is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil-rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guarantied by the supreme law of the land are involved.[46]

Notwithstanding this entreaty, Justice Harlan did not abandon notions of racial superiority with respect to societal interaction between the races. With the simultaneous granting of equal constitutional rights, Justice Harlan did not fail to pay homage to the continued dominance of the white race.[47] He reassures both himself and

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> emphasizes the rights of racial groups. Both of these principles usually lead to similar results in cases of classic invidious discrimination; however, they tend to produce diametrically opposite conclusions in the context of affirmative action. The anti-subordination approach has been definitively rejected by the courts. Thus, the judicial debate, as reflected by *Hopwood*, has focused on whether the pure colorblind approach of Justice Scalia or the more moderate colorblind approach of Justice Powell in *Bakke* should prevail.

Id. at 5-7; Chris K. Iijima, *Swimming From the Island of the Colorblind: Deserting an ill-conceived Constitutional Metaphor, in Symposium Using Law and Identity to Script Cultural Production*, 17 LOY. L.A. ENT. L. J. 583 (1997):

> Unfortunately, the colorblind myth of racial vision confuses the ideological end to racial hierarchy with what already exists. That is, the prescriptive ideal of a "colorblind" society, in which racism and White supremacy are eradicated, has been transformed by judicial fiat into "a condition of societal denial," creating the illusion that racial hierarchy has been eliminated. Indeed, "denial is a pervasive symptom of contemporary American racism." And, of course, the denial of reality merely perpetuates the condition of racial subordination.

Id. at 591. *See also* other discussions of constitutional color-blindness, REVA B. SIEGEL, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of* Hopwood v. Texas, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29 (Robert Post & Michael Rogin, eds., 1998); CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 67-87 (1997); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 51 U. MIAMI L. REV. 191 (1997); JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996); ANDREW KULL, THE COLOR-BLIND CONSTITUTION (1992).

[46] *Plessy*, 163 U.S. at 559.

[47] Gabriel J. Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 IOWA L. REV.

his constituency that

> [t]he white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.[48]

After 58 years the Court abandoned *Plessy's* 'separate but equal' doctrine with its landmark desegregation decision in *Brown v. Board of Education.*[49] *Brown* represented a clear departure from the Court's prior interpretation of the constitutional validity of state-sponsored segregation.[50] The Court decisively rejected 'separate but

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151, 157 (1996).

> Harlan's comments about the Chinese in the *Plessy* dissent strike the modern ear as racist. Harlan, of course, was well aware of the discrimination imposed upon Chinese by the national government; they could neither immigrate nor become citizens, disadvantages imposed on no other race at that time. Harlan must also have known that this federal discrimination perpetuated a system of disadvantage imposed by the states. Aliens "ineligible to citizenship," a category that was essentially limited to Asians, were subject to various legal disabilities, such as prohibitions on entering licensed professions and owning real property. However, Harlan's reaction to disadvantages imposed on Chinese by law was not that they should be invalidated according to his color-blindness principle. In this respect, Harlan's response not only failed to comport with modern arguments about the anti-subordination purpose of the Fourteenth Amendment, it did not even satisfy the notion of simple formal equality. Instead, Harlan made what seems to have been an early "underinclusiveness" argument similar to that found in modern equal protection analysis: the law was irrational because it burdened one despised minority but not another, and the one that was not burdened was even more worthy of segregation from Caucasians.

Id. at 157-158.

[48] *Plessy*, 163 U.S. at 559.

[49] Brown v. Board of Education, 347 U.S. 483 (1954).

[50] This departure was not totally unexpected. During the 18 years preceding the *Brown* decision, the NAACP Legal Defense Fund systematically litigated graduate school desegregation cases. *See* State of Missouri v. Gaines, 305 U.S. 337 (1938)(Furthering of the 'separate but equal' doctrine, the Court ordered the State of Missouri to either admit Lloyd Gaines to its School of Law or provide an equivalent facility within the State. Unfortunately, Gaines' mysterious disappearance mooted any further action in this case); Pearson v. Murray, 182 Atl. Rpt. 590 (1936)(ordering the admission of Donald Murray to the University of Maryland Law School because there were no other equal educational opportunities for Murray within the State); Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631

equal' doctrine of *Plessy*. Chief Justice Warren's renunciation of *Plessy* in this context was clear. He wrote that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[51] But, the *Brown* court only discussed the psychological harm that African Americans suffered as a result of segregation.[52] The *Brown* court failed to expressly repudiate the discussion in *Plessy* regarding the constitutional rights and privileges afforded to African Americans in the post-war amendments.[53] Nor did the *Brown* court entertain Justice

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(1948)(ordering the admission of Ada Lois Sipuel to the University of Oklahoma School of Law); McLaurin v. Okla. St. Regents for Higher Ed., 339 U.S. 637 (1950)(prohibiting the University of Oklahoma from imposing segregatist conditions on McLaurin's admission, such as requiring him to "sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from other students in the school cafeteria); Sweatt v. Painter, 339 U.S. 629(1950)(holding that the new law school the State of Texas established for blacks was unequal to the legal educational facilities and opportunities available to white students, and as a result compelled Sweatt's admission to the University of Texas Law School). *See also* JACK GREENBERG, CRUSADERS IN THE COURT 62-79, 85-91(1994):

> But while *Sweatt* had appeared to offer a way of winning without ruling on the constitutionality of segregation, *McLaurin* had seemed to present the issue of segregation and nothing else. Nevertheless, saying that McLaurin was being treated unequally was not the same as deciding the issue of segregation. Of course, that might mean that all segregation amounted to inequality, which the Court carefully avoided saying.

Id. at 77-78; CARL T. ROWAN, DREAM MAKERS, DREAM BREAKERS: THE WORLD OF JUSTICE THURGOOD MARSHALL (1993):

> There was Marshall the sagacious strategist. Few of his cases tell more about the skills, the personal dedication, the wit and sarcasm of Marshall than this broadside attack on Jim Crow in higher education in Oklahoma . . . . On January 14, 1946, Ada Sipuel applied for admission [to the University of Oklahoma]. Marshall knew that an awful lot was at stake. He still fumed over winning a trailblazing case, the *Gaines* lawsuit in Missouri, only to have Gaines vanish. In the case of *Sipuel*, Marshall, Hall, and the other NAACP lawyers intended to go far beyond Gaines and try to use the Fourteenth Amendment as a basis for wiping out not only "We'll give you tuition to go to school in a northern state," or "We'll set up a separate law school for you," but all forms of racial discrimination in graduate and professional education.

Id. at 145-146.

[51] *Brown*, 347 U.S. at 495.

[52] *Id*. at 494 ("To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.")

[53] DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL

Harlan's concept of the color-blind constitution, although various manifestations of this concept were being incorporated into the American social fabric at the time.[54]

Although dormant for 58 years, the theory of the color-blind constitution re-

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ORDER, 1776 TO THE PRESENT (1991):

> While Warren had no doubt about the proper outcome, he was determined to avoid "precipitous action that would inflame [the white South] more than necessary." This concern rather than abstract legal principles shaped his opinion in the Brown case, which was announced on May 17, 1954. To avoid antagonizing whites, Warren refrained from attacking segregation as part of a caste system that was designed to preserve white supremacy and that was on its face a denial of equal protection. Rather than suggesting that *Plessy* had been wrongly decided and that southerners had supported a blatantly unconstitutional institution for more than a half century, he contended that recent developments had made segregation incompatible with the guarantees of equal protection. In recent years public education had become far more important than it had been when the Fourteenth Amendment had been adopted or when *Plessy* had been decided. In fact, it now was "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment." Citing recent social science research, Warren argued that segregation denied black children the full benefit of education and thus put them at a considerable disadvantage.

Id. at 749.

[54] *See* RICHARD KLUGER, discusses the relevance of the *Brown* decision in SIMPLE JUSTICE 749 (1976)("Did not mean he would be invited to lunch at the Rotary the following week. It meant something more basic and important. It meant that black rights had suddenly been redefined; black bodies had suddenly been reborn under a new law. Blacks' value as human beings had changed overnight by the declaration of the nation's highest court. At a stroke, the Justices had severed the remaining cords of de facto slavery. The Negro could no longer be fastened with the status of official pariah. He was both thrilled that the signal for the demise of his caste status had come from on high and angry that it had taken so long and first exacted so steep a price in suffering"). *See also* JACK GREENBERG, CRUSADERS IN THE COURTS 116 (1994):

> Nominally, the Court's only legal directive in Brown was that states might no longer segregate the races in schools. But in fact the decision destroyed the edifice of legitimacy upon which *Plessy* had placed segregation, laid the foundation for the civil rights movement, and revolutionized the notions of what courts, lawyers, and the law might do to expand racial justice. And much more, including setting in motion consequences for other minorities and disadvantaged groups besides blacks, as well as suggesting how the law might be used to advance and secure human rights in other countries.

Id. at 116.

emerged in American jurisprudence and sensibilities after the *Brown* decision.[55] The Supreme Court had not ignored Justice Harlan's theory of constitutional color-blindness. In fact, Civil Rights activists and members of the NAACP's Legal Defense and Education Fund embraced the concept as an effective method of eliminating invidious racial discrimination from society, but did not fully address its long term consequences.[56] In the years following *Brown*, the Justices grappled with the constitutional dilemma underlying the implementation of race-based remedial measures, while simultaneously fostering race neutrality in the Court's interpretation of the Equal Protection Clause. Justice Powell and Justice O'Connor were at the forefront of this judicial struggle, and both adopted the concept of the color-blind constitution in various contexts.[57] Justice Powell's consistent support for this principle can be seen in his

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[55] *See* STEPHAN THERNSTROM & ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE: ONE NATION INDIVISIBLE 101 (1997).

> *Brown* remains the most important Supreme Court decision in this century. It marked the beginning of the end of the Jim Crow South. But it was not the end of all laws separating the races, and indeed the Court was clearly aware of the limits of its power. To have barred racial classifications as a basis for governmental action - as the NAACP had urged - would have meant, for instance, that state laws forbidding interracial marriages were also unconstitutional. Neither in 1954, nor for thirteen years thereafter, was that an issue the Court was willing to take on. *Brown* was ahead of the public opinion curve, but not way ahead. . . . Declaring the Constitution "color-blind" would likely have had another long-term effect: later race-conscious policies would have run into constitutional trouble. No court could have approved race-based hiring at the Kaiser Aluminum & Chemical Corporation; in Boston, Judge Arthur Garrity could not have ordered busing to achieve racial balance in public schools. Both involved racial classifications, of which Justice Harlan (it seems safe to say) would not have approved.

Id.

[56] *See generally*, DONALD G. NIEMAN, PROMISES TO KEEP: AFRICAN-AMERICANS AND THE CONSTITUTIONAL ORDER, 1776 TO THE PRESENT (1991); HENRY J. ABRAHAM & BARBARA A. PERRY, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES 384-389 (7th ed. 1998)(discussing non-violent methods used by civil right advocates by eradicate insidious forms of racial discrimination); HOWELL RAINES, MY SOUL IS RESTED: MOVEMENT DAYS IN THE DEEP SOUTH REMEMBERED (1977)(discussing a collection of interviews with people who experienced various facets of the Civil Rights Movement, including politicians, grass roots civil rights workers, educators, lawyers and policemen); MICHAEL L. LEVINE, AFRICAN AMERICANS AND CIVIL RIGHTS: FROM 1619 TO THE PRESENT 166-208 (1996).

[57] Koteles Alexander, *Essay, Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW.L.J. 367, 376 (1995).

> Presumably, Justices Powell and O'Connor's attraction to a colorblind Constitution is grounded in the idea that it implies both legal and value neutrality, and creates a symbolic appearance of inescapable logic. In a

plurality opinion in *Regents of the University of California v. Bakke,*[58] and his concurring opinion in *Fullilove v. Klutznick*.[59]

The concept of constitutional color-blindness was resurrected in Supreme Court jurisprudence by Justice Powell in his opinion in *Bakke.*[60] In *Bakke,* the University of California, when faced with a challenge to its race-based medical school admissions program, argued that the strict scrutiny analysis was inapplicable because claims of "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as 'benign.'"[61] Justice Powell rejected this argument. In order to justify the use of a race-based classification, Justice Powell concluded that the strict scrutiny test demands a "judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."[62]

> vacuum, a colorblind Constitution is precisely what many would want in any governing document, particularly with respect to the Equal Protection Clause. Yet, the Court's sudden rush to a colorblind principle, after over two hundred years of ignoring such an egalitarian ideal, misses the mark. The resolution of legal issues involving race cannot be confined to the realm of ideas.

Id.

[58] Regents of the Univ. Cal. v. Bakke, 438 U.S. 265 (1978).

[59] Fullilove v. Klutznick, 448 U.S. 448 (1980), *overruled by* Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995)("Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling").

[60] *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. THE ERA OF JUDICIAL BALANCE 469 (1994).

> On the one hand, Powell concluded, it was simply "too late in the day" to forbid all racial preferences. Outlawing affirmative action would be a "disaster for the country." Even if he were driven into an intellectual corner, Powell would find a way to allow some affirmative action, under some circumstances, at least for the time being. On the other hand, said Powell, it would be equally disastrous to give carte blanche for racial preferences. Public institutions would be vulnerable to the demands of special interests. Benefits would be carved up among competing minorities in an ugly game of racial politics. Powell wanted to allow some affirmative action, but also to constrain it, to keep it in check so that race-consciousness would not become the norm. He wanted to preserve for the future the ideal of a color-blind society.

Id.

[61] *Bakke,* 438 U.S. at 294. *See also* Justice Powell's plurality opinion in *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986) ("The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination.")

[62] *Bakke,* 438 U.S. at 299 ("We have held that in 'order to justify the use of a suspect

In addition to recognizing the administrative difficulty inherent in "varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority,"[63] he noted that identification of members of "majority and 'minority' necessarily reflect temporary arrangements and political judgments."[64] He concluded that the guarantees of the Equal Protection Clause are available to "every person regardless of his background."[65]

There are two themes in Justice Powell's plurality opinion that serve as the underlying basis for his decision to apply the strict scrutiny analysis to evaluate the constitutionality of race-based classifications. He initially recognized the individualized nature of the rights guaranteed by the Equal Protection Clause.[66] The embodiment of Justice Powell's neutral interpretation of the post-war constitutional amendments was forcefully articulated in *Bakke*:

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classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest.").

[63] *Id*. at 295.

[64] *Id*. at 295.

> By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them. [citation omitted] Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation.

Id. at 298-99.

[65] *Id*. at 299.

[66] *But see* Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

> In my view, government can never have a "compelling interest" in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction. [citation omitted] Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, . . . and its rejection of dispositions based on race, . . . or based on blood, ... To pursue the concept of racial entitlement - even for the most admirable and benign of purposes - is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id. at 239.

> If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, *Korematsu v. United States*, 323 U.S. 214 (1944), but the standard of justification will remain constant.[67]

Consistent with the Supreme Court's post-*Brown* interpretation, Justice Powell argued that the rights afforded by the Equal Protection Clause are "guaranteed to the individual. The rights established are personal rights."[68] To preserve their meaning, each individual, regardless of race or ethnicity, must have an equal opportunity to assert these rights and privileges.[69] This theme is consistent in post-*Brown* decisions.[70]

Similar themes are also apparent from Justice Powell's concurring opinion in *Fullilove*. In *Fullilove*, Justice Powell applied the strict scrutiny test to evaluate the constitutionality of a minority set-aside program. Pursuant to an amendment to the Public Works Employment Act of 1977, the statute required that "at least 10 per

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[67] *Bakke*, 438 U.S. at 299.

[68] *Id*. *See also* Missouri v. Jenkins, 515 U.S. 70, 120-21 (1995) (Thomas, J., concurring).

> Indeed, *Brown I* itself did not need to rely upon any psychological or social-science research in order to announce the simple, yet fundamental, truth that the government cannot discriminate among its citizens on the basis of race. . . . As the Court's unanimous opinion indicated: "[I]n the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." (citation omitted) At the heart of this interpretation of the Equal Protection Clause lies the principle that the government must treat citizens as individuals, and not as members of racial, ethnic, or religious groups. It is for this reason that we must subject all racial classifications to the strictest of scrutiny, which (aside from two decisions rendered in the midst of wartime, [*Hirabayashi v. United States*, 320 U.S. 81(1943); *Korematsu v. United States*, 323 U.S. 214(1944)] has proven automatically fatal.

Id.

[69] *Bakke*, 438 U.S. at 289-90. ("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. If both are not accorded the same protection, then it is not equal").

[70] *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., with C.J. Rehnquist, Justice Scalia and Justice Kennedy, dissenting)("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class'").

centum of the amount of each grant shall be expended for minority business enterprises."[71] The Plaintiffs, who were heating and cooling construction contractors, filed an Equal Protection action challenging the facial validity of the minority set-aside provision.[72] The majority upheld the facial validity of the statute by applying a hybrid equal protection analysis which was influenced by the Court's deference to Congressional decision-making authority.[73] The Court described its analytical reasoning as a two-step process which focused on

> whether the objectives of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.[74]

Consistent with his opinion in *Bakke*, in *Fullilove* Justice Powell reiterated his

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[71] Fullilove v. Klutznick, 448 U.S. 448, 454 (1980).

[72] *Id*. at 455.

[73] The Supreme Court in Metro Broadcasting v. FCC, 497 U.S. 547 (1990), used a similar analysis when evaluating the constitutionality of a FCC program that used racial preferences in the assignment of broadcast licenses. Justice Brennan's opinion set forth an intermediate scrutiny test to evaluate the constitutionality of this race-based preference with added deference afforded to the validity of the legislation because of its Congressional origin. In *Metro Broadcasting* the Court concluded that:

> benign race-conscious measures mandated by Congress – even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination - are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

Id. at 548. The Supreme Court in *Adarand* overturned both of these decisions to the extent that they were based on the application of an erroneous constitutional standard. In *Adarand*, the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only is they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. 200, 227 (1995).

[74] *Fullilove*, 448 U.S. at 473. The Supreme Court has stated that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975). *See also Fullilove*, 448 U.S. 448, 496 (Powell, J. concurring) ("The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable.")

commitment to a racially neutral interpretation of the constitution.[75] He stressed that "[r]acial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision."[76] In this regard, the presumption of constitutional invalidity inherent in the use of racial classifications was rebutted by the justification of "eradicating the continuing effects of past discrimination identified by Congress."[77] Notwithstanding his firm belief in the racial neutrality of the Constitution, Justice Powell also acknowledged the necessity for recognition of "narrowly defined circumstances"[78] to defeat the argument that the strict scrutiny test is "strict in theory, but fatal in fact."[79]

The second theme apparent from Justice Powell's plurality opinion in *Bakke* is found in his interpretation of the plain meaning of the language of the Equal Protection Clause.[80] First, he noted that the meaning of "'equal protection of the law,' is susceptible of varying interpretations."[81] Citing Justice Holmes, Powell argues for the use of 'parol evidence' such as "circumstances and the time"[82] to assist in his interpretation of this phrase.[83] However, defined by words such as "fair, just"[84] or "equal in status, achievement, or a particular quality,"[85] the term equal does not have the

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[75] Note that the *Adarand* decision overruled *Fullilove* ("Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling") *Adarand*, 515 U.S. at 235.

[76] *Fullilove*, 448 U.S. at 496.

[77] *Id*. at 496. Although Justice Powell noted that "this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations," unquestionably Congress "has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects." *Id*. at 497, 502.

[78] *Id*. at 496, n. 1.

[79] *Fullilove*, 448 U.S. at 507.

[80] *See also* Hirabayashi v. U.S., 320 U.S. 81, 100 (1943)("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.").

[81] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 284 (1978).

[82] *Id*. at 284.

[83] When interpreting the definition of the word 'discrimination' as used in §601 of Title VI, Justice Powell cited Justice Holmes' proposition that "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Id*. at 284.

[84] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 766 (1986).

[85] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 767 (1986). But see the term 'equality' as interpreted by Aldous Huxley (1894-

interpretative elasticity to incorporate group characteristics into its parameters.[86] The implication is that the equal protection afforded by the Fourteenth Amendment is neutral and "framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude."[87]

The origin of Justice Powell's definition of equality can be traced to the natural rights philosophy espoused by the framers of America's most cherished documents. The natural rights theorists look to the language of the Declaration of Independence as one of the first articulations of this principle.

> On July 4, 1776, the Congress unanimously adopted the Declaration of Independence drafted by Thomas Jefferson, with a newly recognized principle that was to revolutionize the United States in the years 1865-68, that 'all men are created equal,' and with a solemn recognition of the natural rights basis of our fundamental rights. 'All men,' wrote Jefferson, 'are endowed by their Creator with certain

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1963), who wrote that "[t]hat all men are equal is a proposition to which, at ordinary times, no sane human being has ever given his assent." *The Idea of Equality*, PROPER STUDIES (1927), *reprinted in* THE OXFORD DICTIONARY OF MODERN QUOTATIONS 109 n. 10 (ed. Tony Augarde 1991).

[86] *See* Statement by State Representative W.P. Jencks from Clarion and Jefferson Counties to the Pennsylvania Legislature on January 23, 1876 urging ratification of the Fourteenth Amendment:

> By the first section it is intended to destroy every distinction founded upon a difference in the caste, nationality, race or color or persons who have been or may be born in and subject to the jurisdiction of the United States, which had found its way into the laws of the Federal or State Governments which regulate the civil relations or rights of the people. No law shall be made or executed which does not secure equal civil rights to all. In all matters of civil legislation and administration there shall be perfect legal equality in the advantages and securities guaranteed by each State to every one here declared a citizen, without distinction of race or color, every one being equally entitled to demand from the States and State authorities full security in the enjoyment of such advantages and securities. . . . the first section declares the civil rights of the black to be equal to those of the white. . . .

CHESTER JAMES ANTIEAU, THE ORIGINAL UNDERSTANDING OF THE FOURTEENTH AMENDMENT 19 (1981).

[87] *Bakke*, 438 U.S. at 293. *See* Hirabayshi v. United States, 320 U.S. 81, 100 (1943)("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.").

> unalienable Rights, that among them are Life, Liberty and the Pursuit of Happiness.'[88]

Professor Chester J. Antieau argues that "the emphasis upon equality of right provided the basis in 1866-68 for the Equal Protection Clause of the Fourteenth Amendment."[89] For example, Professor Antieau cites commentary from the debates held on this matter during the Thirty-Ninth Congress to substantiate this position. "On January 10, 1866, Representative John F. Farnsworth, a Republican from Illinois, told the House: 'When our Fathers, when they framed the Declaration of Independence, declared that all men inherited the same rights' it meant that 'so far as these natural rights were concerned, that one man was equal to any other man.'"[90] During the debates on the Fourteenth Amendment, Senator Charles Sumner of Massachusetts articulated the normalizing component of the principle of equality. His definition of equality leaves no room for doubt regarding its scope:

> These are no vain words. Within the sphere of their influence no person can be created, no person can be born, with civil or political privileges not equally enjoyed by all his fellow citizens; nor can any institution be established recognizing distinction of birth. Here is the great charter of every human being drawing vital breath upon this soil, whatever may be his condition and whoever may be his parents. He may be poor, weak, humble or black; he may be Caucasian, Jewish, Indian or Ethiopian race; he may be of French, German, English, or Irish extraction; but before the constitution all these distinctions

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[88] CHESTER JAMES ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 70-71 (1997)

> The natural, fundamental rights belonging to citizens by the Privileges and Immunities Clause of the Fourteenth Amendment were implicitly to be equally shared and enjoyed. Since at least Cicero, it has been understood that equality of natural rights is of the essence of a shared humanity. This was well understood by America's Founding Fathers. James Wilson ... wrote: "The natural rights of man belong equally to all." It is clear that the Republican leaders in the Thirty-Ninth Congress were committed, by the Privileges and Immunities Clause, not only to protecting natural, fundamental rights, but also to ensure thereby the traditional equality of such rights. The First Section of the Fourteenth Amendment was almost entirely (except for the first sentence) the product of Representative John Bingham of Ohio. In 1857 Bingham had assured Congress that the "natural or inherent rights which belong to all men irrespective of all constitutional regulations, are by the Constitution guaranteed.

Id. at 243.

[89] *Id*. at 71.

[90] *Id*.

> disappear. He is not poor, weak, humble or Black; nor is he Caucasian, Indian or Ethiopian; nor is he French, German, English or Irish. He is Man, the equal of all his fellow men. He is one of the children of the State, which, like an impartial parent, regards all its offsprings with an equal care. To some it may justly allot higher duties according to higher capacities; but it welcomes all in its equal, hospitable board. The State, imitating the Divine justice, is no respecter of persons.[91]

The Supreme Court's rejection of benign and invidious uses of racial classifications is consistent with this narrow definition of 'equality.' The Court has noted that constitutional equality mandates neutral application of the rights afforded thereunder. Such decisions lead to arbitrary application of constitutional rights which is contrary to the basic goal of encouraging certainty through a racially neutral interpretation of the constitution.[92] Justice O'Connor noted that

> [a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.[93]

Similarly, Justice O'Connor has been a consistent supporter of constitutional color-blindness. Her majority opinion in *City of Richmond v. Croson*,[94] her majority opinion in *Adarand*,[95] and her dissent in *Metro Broadcasting, Inc. v. FCC*[96] reflect this

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[91] *Id*. at 239-40.

[92] *See* Adarand Constructors, Inc. v. Pena 515 U.S. 200, 227 (1995). ("These ideas have long been central to this Court's understanding of equal protection, and holding 'benign' state and federal racial classifications to different standards does not square with them. '[A] free people whose institutions are founded upon the doctrine of equality,' *ibid*., should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.")

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

[94] *J.A. Croson Co*., 488 U.S. 469 (1989).

[95] *Adarand*, 515 U.S. at 227

> The three propositions undermined by Metro Broadcasting all derive from the basic principle that the Fifth and Fourteenth Amendments

philosophy. For example, Justice O'Connor echoes Justice Powell's views on the individualized nature of the rights guaranteed by the Fourteenth Amendment in the majority opinion she authored in *Croson.* Justice O'Connor notes in *Croson* that "[t]o whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."[97] Subsequently, in her dissent in *Metro Broadcasting*, she rejects the use of group characteristics to determine the applicability of constitutional rights and privileges. She argues that in

> the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as individuals, not 'as simply components of a racial, religious, sexual or national class . . . . Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.[98]

> to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race - a group classification long recognized as "in most circumstances irrelevant and therefore prohibited," (citation omitted) - should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.

Id. See also Koteles Alexander, Essay, *Adarand: Brute Political Force Concealed as a Constitutional Colorblind Principle*, 39 HOW. L.J. 367, 376 (Fall 1995):

> Justice O'Connor's attempt in *Adarand* to advance a colorblind notion of the Constitution betrays the Court's impartiality. History is minimized. Slavery and segregation are disregarded. American legal history and precedent is dis missed. The tensions inherent in the political process, particularly in the context of race, are forgotten. By failing to consider these fundamental historical facts, a colorblind application of equal protection will not promote the venerable idea that all men be treated equally before the law, but will perpetuate the status quo. In other words, Justices Powell and O'Connor's rush to a colorblind principle at this juncture in history, accomplishes the same objective that the "all deliberate speed" concept was intended to accomplish in *Brown II* – to keep the burden of achieving racial harmony or equality on the victims (political minority) and not the perpetrators (political majority).

Id.

[96] Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990) (O'Connor, J., dissenting), *overruled in part by* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

[97] *See J.A. Croson Co.*, 488 U.S. at 493.

[98] *Metro Broad. Inc.*, 497 U.S. at 602.

Justice O'Connor's color-blind interpretation of the Equal Protection Clause also reflects the second theme advanced by Justice Powell which focuses on the plain meaning of constitutional equality.[99] In *Croson*, she adopted Justice Powell's argument in *Bakke* that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[100] Justice O'Connor reiterated her commitment to race-neutral constitutional equality in the dissenting opinion she authored in *Metro Broadcasting*. Joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy, Justice O'Connor's continued advocation of a color-blind interpretation of the constitution would not allow the Court to abandon strict scrutiny in favor of a lesser standard of review when evaluating race-based classifications implemented pursuant to Congressional mandate. She argued that

> Social scientists may debate how peoples' thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think. To uphold the challenged programs, the Court departs from these fundamental principles and from our traditional requirement that racial classifications are permissible only if necessary and narrowly tailored to achieve a compelling interest. This departure marks a renewed toleration of racial classifications and a repudiation of our recent affirmation that the Constitution's equal protection guarantees extend equally to all citizens.[101]

When evaluating the justifications for the use of any race-based classifications, regardless of whether such classifications disadvantage minority group members or members of dominant racial groups, Justice O'Connor argues that such inquiry must be governed by strict scrutiny.[102] By refusing to recognize a distinction between

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[99] Justice O'Connor's view of color-blindness extends beyond mere constitutional protections. In her dissenting opinion in *Metro Broad. Inc.*, she writes that "[a]s a Nation we aspire to create a society untouched by that history of [racial and ethnic] exclusion, and to ensure that equality defines all citizens' daily experience and opportunities as well as the protection afforded to them under law." *Metro Broad. Inc.*, 497 U.S. at 611.

[100] *J.A. Croson Co.*, 488 U.S. at 494.

[101] *Metro Broad. Inc.*, 497 U.S. at 602 (O'Connor, J., dissenting).

[102] In his dissent, Justice Marshall argued for a application of a "relaxed" standard of review of "race-conscious classifications designed to further remedial goals." *J.A. Croson Co.*, 488 U.S. at 535. In response, Justice O'Connor noted that

> [e]ven were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability

benign[103] and invidious forms of racial discrimination,[104] Justice O'Connor argued that

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> of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case. One on the central arguments for applying a less exacting standard to 'benign' racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference, [citation omitted] ... some maintain that these concerns are not implicated when the 'white majority' places burdens upon itself. (citation omitted) The concern that the political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case.

Id. at 495-96.

[103] In her dissent in *Metro Broad. Inc.*, Justice O'Connor rejects the concept of 'benign racial classifications.' *Metro Broad. Inc.*, 497 U.S. at 609-10. She noted that

> '[b]enign racial classification' is a contradiction in terms. Governmental distinctions among citizens based on race or ethnicity, even in the rare circumstances permitted by our cases, exact costs and carry with them substantial dangers. To the person denied an opportunity or right based on race, the classification is hardly benign. The right to equal protection of the laws is a personal right, see *Shelley v. Kraemer,* 334 U.S. 1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948), securing to each individual an immunity from treatment predicated simply on membership in a particular racial or ethnic group. The Court's emphasis on "benign racial classifications" suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater humility. 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 on the basis of race, is reasonable. The Court provides no basis for determining when a racial classification fails to be "benevolent." By expressly distinguishing "benign" from remedial race-conscious measures, the Court leaves the distinct possibility that any racial measure found to be substantially related to an important governmental objective is also, by definition, "benign." Depending on the preference of the moment, those racial distinctions might be directed expressly or in practice at any racial or ethnic group. We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals. Upon that basis, we are governed by one Constitution, providing a single guarantee of equal protection, one that extends equally to all citizens.

the constitutional "standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification."[105]

In *Adarand*, Justice O'Connor recognized 'three general propositions' that serve as the evolutionary framework for the Court's equal protection paradigm.[106] Of primary importance to her adoption of a color-blind constitutional interpretation is the second proposition which recognizes the Court's desire for jurisprudential consistency[107] in its interpretation of the Equal Protection Clause. Justice O'Connor argues that constitutional consistency requires that "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification,' [citations omitted] i.e., all racial classifications reviewable

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Id.

[104] *J.A. Croson Co*., 488 U.S. at 493("Absent searching judicial inquiry in to the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.")

[105] *J.A. Croson Co*., 488 U.S. at 494.

[106] Adarand Constructors v. Pena, 515 U.S. 200, 223 (1995). Skepticism is the first proposition identified by Justice O'Connor. Citing a number of opinions, including Justice Powell's plurality in *Wygant*, Justice Burger's opinion and Justice Stewart's dissent in *Fullilove.* This proposition is defined as " '[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.'" *Id*. at 223. The second proposition, as discussed in the text is consistency. *Id.* Finally, the third proposition is congruence which requires the Court to conduct the "[e]qual protection analysis in the Fifth Amendment area . . . the same as that under the Fourteenth Amendment." *Id*. at 224.

In *Adarand*, Justice O'Connor noted that the anomalous holding of the Court in *Metro Broad. Inc.*, rejected these three general propositions. This inconsistency between *Metro Broad. Inc.'s* application of an intermediate level of scrutiny to evaluate race-based classifications, and the Court's reliance on the strict scrutiny test serves as the basis for the Court's decision to overrule *Metro Broad. Inc. See id*. at 227.

[107] *Adarand*, 515 U.S. at 229-30.

> The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.
>
> Consistency does recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.

Id.

under the Equal Protection Clause must be strictly scrutinized."[108] Ultimately, Justice O'Connor recognized the synergistic relationship between the individualized nature of constitutional rights and the necessity for removal of racial and ethnic distinctions between such individuals in order to enforce those rights using a neutral yardstick. She concluded that

> The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups. It follows from that principle that all governmental action based on race--a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited,' *Hirabayashi*, [citation omitted]--should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection, and holding 'benign' state and federal racial classifications to different standards does not square with them. '[A] free people whose institutions are founded upon the doctrine of equality,' [citation omitted], should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons.[109]

The strict scrutiny test -- which requires the Court to find that the racial classification is narrowly tailored in furtherance of a compelling state interest -- is the constitutional yardstick the Court relies upon to equalize the scope of Fourteenth Amendment protections. Constitutional race neutrality requires that racial classifications trigger strict scrutiny notwithstanding their either punitive, beneficial, or remedial impact on a particular group. To function as an effective measure of constitutional equality, the Court's race neutral constitutional interpretation removed the vagaries of judicial interpretation by incorporating a bright line standard into the equal protection paradigm.[110]

The Supreme Court's acceptance of a racially neutral interpretation of the Equal Protection Clause has not gone unchallenged.[111] The most ardent opponent of

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[108] *Adarand*, 515 U.S. at 224.

[109] *Id*. at 227.

[110] By eliminating race as a determining factor in the equal protection paradigm the Court, however, also disregards any comparative value judgment between unequal treatment imposed on majority and minority group members without regard to the historic or social antecedents of such conduct.

[111] *Bakke*, 438 U.S. at 327 (Brennan, J., White, J., Marshall, J., and Blackmun, J., concurring)("claims that law must be 'colorblind' or that the datum of race is no longer

this philosophy was Justice Thurgood Marshall whose advocacy of an integrated society was tempered by knowledge that continuing vestiges of slavery were operating to prevent African Americans from realizing social, political, and economic gains.[112] At

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relevant to public policy must be seen as aspiration . . . . for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities.")
See also Keith E. Sealing, *The Myth of a Color-Blind Constitution*, 54 WASH. UNIV. J. OF URBAN AND CONTEMPORARY LAW 157, 198-99 (1998).

> If the Constitution is to be viewed as color-blind, as Justices Thomas and Scalia and the *Podberesky* and *Hopwood* panels would have it, the debate ends at that point. A color-blind Constitution would require us to solve the problems of a color-conscious society with color-blind solutions. Undergraduate and graduate admissions programs would, thus, be totally precluded from considering race as a "plus" or otherwise. However, the Constitution as drafted and amended by the Bill of Rights, and as interpreted by early case law such as the *Dredd Scott* decision, was not a color-blind document. Instead, it saw Eighteenth Century America in colors of white, black, red, and yellow, denying citizenship to all but the white. Indeed, it protected and guaranteed the institution of slavery into the nineteenth century without actually using the term "slave" or "black." Despite occasional exceptions, such as *Yick Wo v. Hopkins*, this Constitution gave minorities none of the protections one would expect from a color-blind document.
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> With the Reconstruction Amendments, Congress had a clear opportunity to make the Constitution truly color-blind. Congress could have included color-blind language, mandating that "no discrimination shall be made on account of race or color." Such color-blind language was presented and debated, but eventually rejected on the grounds of political expediency. Congress instead substituted an ambiguous standard –equal protection--that would be continuously debated, but would have the immediate advantage of attacking the South's Black Codes without putting at risk segregated schools or bans on interracial marriages.
>
> Progress came in the form of affirmative action programs designed to remedy the present effects of discrimination in a wide range of contexts, and in a manner that could not be color-blind.

Id.

[112] Thurgood Marshall contemplating his decision in *Bakke*.

> The dream of America as the melting pot has not been realized by Negroes - either the Negroes did not get into the pot, or he did not get melted down. The statistics on unemployment and other statistics quoted in the briefs ... document the vast gulf between White and Black America. That gulf was brought about by centuries of slavery and then by another century in which, with the approval of this Court, states were permitted to treat Negroes 'specially.'

PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 16 (1995)

no time was the need for judicial intervention into the desperate situation faced by African Americans more apparent than in the fight to preserve race-based affirmative action programs. The *Bakke* case represented the turning point in the Court's utilization of the Equal Protection Clause to remedy impact of years of segregation by adopting a color-blind interpretation of the constitution.

Justice Marshall voiced his opposition to the Court's color-blind interpretation of the constitution. He argued that

> If only the principle of color-blindness had been accepted by the majority in *Plessy* in 1896, we would not be faced with this problem in 1978. We must remember, however, that this principle appeared only in the dissent. In the 60 years from *Plessy* to *Brown*, ours was a Nation where, by law, individuals could be given 'special' treatment based on race. For us now to say that the principle of color-blindness prevents the University from giving 'special' consideration to race when this Court, in 1896 licensed the states to continue to consider race, is to make a mockery of the principle of 'equal justice under law.'[113]

In addition to attacking the Court's disregard for the desperate plight of African Americans, Justice Marshall also attacked the notion that 'equality' can only be achieved by ignoring group characteristics that result in unequal treatment. Although Justice Marshall agreed that group characteristics "were neither significant nor relevant to the way in which persons should be treated,"[114] he argued that "[w]e are not yet all equals, in large part because of the refusal of the *Plessy* Court to adopt the principle of color-blindness. It would be cruelest irony for this court to adopt the dissent in *Plessy* now and hold that the University must use color-blind admissions."[115] The irony that Justice Marshall recognized has its origin in the Court's incorporation of race neutrality into the Equal Protection Clause. The Equal Protection Clause was specifically adopted to provide a constitutional barrier against state action that maintained the denigrated status of African Americans following the Civil War.

Justice Marshall's advocacy of racial inclusion within constitutional decision-

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(citing Thurgood Marshall, Memorandum to the Conference, April 13, 1978, Brennan Papers, Box 465, p. 2-3).

[113] *Id.* (citing Thurgood Marshall, Memorandum to the Conference, April 13, 1978, Brennan Papers, Box 465, pp.1-2).

[114] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 355 (1978).

[115] PHILLIP J. COOPER, BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT 17 (1995) (citing Thurgood Marshall, Memorandum to the Conference, April 13, 1978, Brennan Papers, Box 465 pp. 2-3).

making is consistent with his support of remedial affirmative action programs. He noted that

> [i]t is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.[116]

A review of current members of the Court reveals that several notable Justices have adopted a strict concept of constitutional race neutrality when interpreting the protections afforded by the Fourteenth Amendment. For example, Justice Clarence Thomas stridently opposes the use of racial classifications by state actors.[117] He argues

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[116] *Bakke*, 438 U.S. at 401-02.

[117] *See* Samuel Marcosson, *Colorizing the Constitution of Originalism: Clarence Thomas at the Rubicon*, 16 LAW & INEQ. J. 429, 482 (1998)

> The issues become real when posed to Thomas, an African-American, an originalist and a miscegenist. And we hear those issues differently when discussed in his voice. Hence, a deep irony: the very act of Justice Thomas proclaiming the color-blindness ideal demonstrates the flaw in the principle, itself. In his capacity as a Supreme Court Justice, Thomas constitutes the ultimate representation of the law he urges must be color-blind. Yet, the vastly different voice with which he speaks about the Fourteenth Amendment demonstrates conclusively that, at some level, he is not blind to color. I am amazed Thomas can be deaf to the difference race produces in his own judicial voice. Thomas' color-blindness it appears, must be accompanied by an equally potent color-deafness.
>
> But if we remain oblivious to the difference Clarence Thomas' color makes, we impoverish our understanding of the issue. In the same way, any law professing to be 'blind' to the reality of color – Clarence Thomas' law – is also impoverished. The impoverishment of the law, however, is only part of the harm of color-blindness; color-blindness also reinforces the foundational premises of assumed white supremacy. As discussed, originalism perpetuates racism by taking race into account in the wrong way: it actually reflects and places primary emphasis on the Framers' white supremacist racism. Though non-originalist, color-blindness also perpetuates racism but in a different way: by failing to account for race a race-conscious society.

that

> these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.[118]

Justice Scalia is also an advocate of a strict concept of constitutional color-blindness that presumptively rejects all justifications for the use of race-based classifications as illegitimate. With his characterization of a racially conscious society as one which fosters the creation of a "creditor or a debtor race,"[119] Justice Scalia rejects the argument that there could be any constitutionally compelling justification for the use of race-based classifications. Justice Scalia argues that "[i]n my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction."[120]

Id.

[118] *Adarand*, 515 U.S. at 240 (Thomas, J., concurring).

[119] *Id*. at 239 (Scalia, J., concurring).

> Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution's focus upon the individual, see Amdt. 14, §1 ("[N]or shall any State ... deny to any person" the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see Amdt. 15, §1 (prohibiting abridgment of the right to vote "on account of race"), or based on blood, see Art. III, §3 ("[N]o Attainder of Treason shall work Corruption of Blood"); Art. I, §9, cl. 8 ("No Title of Nobility shall be granted by the United States"). To pursue the concept of racial entitlement--even for the most admirable and benign of purposes--is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

Id.

[120] *Id*. at 239 (Scalia, J., concurring in part and concurring in judgment). *See also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 520-21 (1989)(Scalia, J., concurring in the judgement).

> The difficulty of overcoming the effects of past discrimination is as nothing compared with the difficulty of eradicating from our society the

III. REBUTTING THE PRESUMPTION OF CONSTITUTIONAL INVALIDITY

The color-blind constitutional paradigm requires an initial finding of a constitutionally compelling justification for the use of race-based criteria. Supreme Court case law is clear - the goal of remedying present discrimination or the effects of past discriminatory practices can serve as a basis for use of race-based classifications.[121] Proof of broad societal discrimination will not withstand constitutional scrutiny. The discriminatory conduct must have been performed by the party implementing the race-based remedy. Additionally, strict scrutiny mandates that the race-based remedy be narrowly tailored to address the harm resulting from such past discriminatory conduct.

The origin of this analytical paradigm can be traced to Justice Powell's plurality opinion in *Bakke*. In his opinion Justice Powell recognized the racially neutral character of the Equal Protection Clause, but also acknowledged that compelling justifications for the use of racial classifications may be raised. After rejecting three of the University's justifications as inconsistent with the guarantees of the Equal Protection Clause,[122]

> source of those effects, which is the tendency--fatal to a Nation such as ours--to classify and judge men and women on the basis of their country of origin or the color of their skin. A solution to the first problem that aggravates the second is no solution at all. I share the view expressed by Alexander Bickel that '[t]he lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation: discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society.'

Id.; A. BICKEL, THE MORALITY OF CONSENT 133 (1975). At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb--for example, a prison race riot, requiring temporary segregation of inmates,[citation omitted]--can justify an exception to the principle embodied in the Fourteenth Amendment that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896)(Harlan, J., dissenting)(citations omitted).

[121] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986)(O'Connor, J., concurring in part and concurring in judgment). ("The Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.") Pursuant to Justice Powell's opinion in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) an unresolved question remains regarding the continued permissibility of diversity is a compelling justification for the use of race-based criteria.

[122] *Bakke*, 438 U.S. at 305-311. Justice Powell decisively rejected the University's use of race-based preferences to reduce "the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession." *Id.* at 306. He concluded that the Constitution prohibits "[p]referring members of any one group for no reason other than race

Justice Powell concluded that the University's use of racial preferences in *Bakke* was justified by its attempt to attain a diverse student body.[123] Justice Powell noted that the use of race in this context was "a constitutionally permissible goal for an institution of higher learning."[124] A majority of Court has not, however, adopted this rationale.[125]

Justice Powell also addressed a justification for the use of race-based classifications that has been more readily accepted by members of the Court. He recognized that racial classifications used as remedial measures may overcome the

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or ethnic origin . . ." *Id.* at 307. He also found that the University could not justify its program by its efforts to eliminate the effects of societal discrimination. Justice Powell argued that in the absence of "constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another." *Id.* at 308-09. Finally, Justice Powell did not find any correlation between the University's race-based admissions program and its goal of increasing the number of physicians willing to practice in underserved communities. *Id*. at 310.

[123] *Bakke*, 438 U.S. at 311-12. See discussion regarding the importance of diversity within the academic environment, *Bakke*, 438 U.S. at 311-15 ("The forth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.")

[124] *Id*. at 311-12. Note that the university could not satisfy the additional requirement of the standard.

[125] *See generally* Hopwood v. State of Texas, 78 F.3d 932, 944 (5th Cir. 1996)

> We agree with the plaintiffs that any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment. Justice Powell's argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications. Finally, the classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.
>
> Justice Powell's view in *Bakke* is not binding precedent on this issue. While he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale. In *Bakke*, the word "diversity" is mentioned nowhere except in Justice Powell's single-Justice opinion. In fact, the four-Justice opinion, which would have upheld the special admissions program under intermediate scrutiny, implicitly rejected Justice Powell's position. (citations omitted) Thus, only one Justice concluded that race could be used solely for the reason of obtaining a heterogenous student body. As the *Adarand* Court states, the *Bakke* Court did not express a majority view and is questionable as binding precedent.

Id.

presumption of constitutional invalidity associated with the use of race-based classifications.[126] To serve as constitutionally permissible justification, such use must be limited to remedial efforts developed "to redress the wrongs worked by specific instances of racial discrimination."[127] Justice Powell noted that "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination."[128] This extremely narrow exception to the strict scrutiny analysis is a more widely accepted justification for the use of race-based classifications than the diversity rationale.[129]

In *Bakke*, Justice Powell relied upon this limited exception to the color-blind interpretation of the Equal Protection Clause to reject the University's argument that racial classifications may be used to remedy societal discrimination.[130] He cites several

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[126] A state actor may overcome the presumption of invalidity by presenting a "strong basis in the evidence for its conclusion that remedial action was necessary." *J.A. Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

[127] *Bakke*, 438 U.S. at 307. *But see* Professor Donald E. Lively, *Equal Protection and Moral Circumstance: Accounting for Constitutional Basics*, 59 FORDHAM L.REV. 485, 518 (1991)

> Current equal protection doctrine actually may be more pernicious than the discredited jurisprudence of *Plessy*. Unlike that decision, which accommodated dominant convention at the expense of minority interests, current fourteenth amendment jurisprudence impedes a political majority, or collective bargaining process, when it attempts to cure its own past wrongs through remedial legislation. The notion that race presumptively cannot be a factor in official action may represent a desirable ideal, but it frustrates any constitutional remediation of present inequities. By making race unmentionable, even though its presence and implications are pervasive, contemporary equal protection doctrine seriously confounds even the most limited aims of the fourteenth amendment. Moreover, equal protection jurisprudence not only fails to vindicate, but actually impairs, minority interests.

Id.

[128] *Bakke*, 438 U.S. at 307.

[129] There is one primary distinction between the constitutional color-blindness theorized by Justice O'Connor and the doctrine advocated by Justice Powell - the extent to which the presumption of constitutional invalidity may be rebutted. Justice O'Connor rejects the argument that diversity can serve as a justification for the use of racial classifications. She supports the use of racial classifications in the limited context of remedying particularized acts of past discriminatory conduct. "Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination." Metro Broad., Inc. v. FCC, 497 U.S. 547, 612 (1990). *But see* Adarand Constructors v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment). ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past discrimination in the opposite direction.")

[130] The University argued that one goal of its race-based admissions program was to

problems associated with efforts to remedy this type of societal injury. He initially notes that a societal remedy would impose a burden on innocent individuals in favor of "persons perceived as members of relatively victimized groups."[131] Such a burden, Powell argues, cannot be imposed "in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[132] He also places a continuing obligation on the judiciary to monitor the remedy to avoid a remedy that is both "ageless" in its application and overly broad in scope.[133] "After such findings are made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated."[134]

Justice Powell reiterated this view eight years later in *Wygant v. Jackson Bd. of Educ.*,[135] finding that racial classifications used to remedy societal discrimination are too "amorphous a basis"[136] for overcoming the constitutional presumption of invalidity.[137] He noted in *Wygant* that

> [n]o one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory legal remedies that work against innocent people, societal discrimination is insufficient and over expansive. In the absence of particularized

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"counter[ing] the effects of societal discrimination." *Bakke*, 438 U.S. at 306.

[131] *Bakke*, 438 U.S. at 307. ("To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights int o a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination.")

[132] *Id*. at 307.

[133] *Id.* ("Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit.")

[134] *Id*. at 307.

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

[136] "[S]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276. *See also Bakke*, 438 U.S. at 307 ("In the school [desegregation] cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of 'societal discrimination,' an amorphous concept of injury that may br ageless in its reach into the past.")

[137] *See also* Justice Powell's concurring opinion in *Fullilove v. Klutnick* 448 U.S. 448 (1980) in which he argued that a Congressionally mandated race-based 'set aside' program was justified by Congressional efforts to remedy past discrimination in the area of public contracting. Notwithstanding the absence of Congressional, administrative or judicial findings of past discrimination, Justice Powell concluded that "Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination." *Fullilove,* 448 U.S. at 497 (Powell, J., concurring).

> findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.[138]

Although the body of law in this area continues to develop, Supreme Court precedent does offer meaningful guidance for the development and implementation of voluntary race-based affirmative action programs aimed at remedying specific acts of past discrimination. Although decided on other grounds,[139] the Court in *Wygant* began to narrow the parameters of this exception to the general constitutional standard. The *Wygant* decision resolved a dispute in Jackson, Michigan between the Jackson Board of Education and the Jackson Education Association, a teachers union, regarding a provision in a collective agreement. The disputed provision which was developed to address "racial tension in the community"[140] provided that in the event layoffs became necessary, the Board of Education would attempt to achieve a situation in which "at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."[141] Subsequently, non-minority teachers, with seniority, who were laid off filed an action alleging among other violations, a violation of the Equal Protection Clause.[142]

Justice Powell authored the plurality opinion in *Wygant* in which he rejected the School Board's argument that the layoff provision was justified to "remedy prior discrimination against minorities by the Jackson School District in hiring teachers."[143] He concluded, in opposition to a strong dissent authored by Justice Marshall,[144] that in the absence of a factual predicate for a finding of past discrimination, such voluntary conduct violated the Equal Protection Clause. Justice Powell concluded that "a public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior

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[138] *Wygant*, 476 U.S. at 276.

[139] In prior litigation, "[b]oth courts concluded that any statistical disparities were the result of general societal discrimination, not of prior discrimination by the Board. The Board now contends that, given another opportunity, it could establish the existence of prior discrimination. Although this argument seems belated at this point in the proceedings, we need not consider the question since we conclude below that the layoff provision was not a legally appropriate means of achieving even a compelling purpose." *Wygant*, 476 U.S. at 278.

[140] *Id*. at 270.

[141] *Id*. at 270.

[142] *Id*. at 272.

[143] *Id*. at 277.

[144] *Id*. at 295-97. Justice Marshall, joined in his dissent by Justices Brennan and Blackmun, argued that "[t]he record and extra-record materials that we have before us persuasively suggest that the plurality has too quickly assumed the absence of a legitimate factual predicate, even under the plurality's own view, for affirmative action in the Jackson schools." *Id*. at 297.

discrimination."[145]

As a result, the plurality's position was that "the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary."[146] Justice O'Connor, in her concurrence, refined the plurality's test for evaluating the factual predicate for the use of a voluntary affirmative action program by noting that the program may be implemented prior to a judicial determination of past discrimination. She noted "that a contemporaneous or antecedent finding of past discrimination by a court or other competent body is not a constitutional prerequisite to a public employer's voluntary agreement to an affirmative action program."[147] The only prerequisite to the implementation of a voluntary program is that "the public actor has a firm basis for believing that remedial action is required."[148]

Justice O'Connor argued that there was merit in the factual predicate set forth by the School Board for the imposition of the remedial program. She noted that "remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."[149] The School Board asserted that the purpose underlying the remedial program was its "desire to correct apparent prior employment discrimination against minorities while avoiding further litigation."[150] Although the Court encourages voluntary[151] efforts to bring state action into compliance with constitutional and

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[145] *Wygant*, 476 U.S. at 277.

[146] *Id*. at 277.

[147] *Id*. at 289 "A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed. Contemporaneous findings serve solely as a means by which it can be made absolutely certain that the governmental actor truly is attempting to remedy its own unlawful conduct when it adopts an affirmative action plan, rather than attempting to alleviate the wrongs suffered through general societal discrimination. (citations omitted) Such findings, when voluntarily made by a public employer, obviously are desirable in that they provide evidentiary safeguards of value both to nonminority emp loyees and to the public employer itself, should its affirmative action program be challenged in court. If contemporaneous findings were required of public employers in every case as a precondition to the constitutional validity of their affirmative action efforts, however, the relative value of these evidentiary advantages would diminish, for they could be secured only by the sacrifice of other vitally important values." *Id*. at 289-90.

[148] *Id*. at 286.

[149] *Id*.

[150] *Id*. at 287.

[151] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) ("And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law."); *Wygant*, 476 U.S. at 290 ("The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of

statutory mandates, both the District Court and Court of Appeals "did not make the proper inquiry into the legitimacy of the Board's asserted remedial purpose."[152]

The standard articulated by Justice Powell in *Bakke* for determining the constitutionality of a state actor's ability to implement voluntary race-based affirmative programs was later tested by the Court in *Croson.* The dispute in *Croson* originated with the implementation of a racial-preference government contracting program by the City of Richmond, Virginia. The program was designed to remedy past discrimination in the construction industry "for the purpose of promoting wider participation by minority business enterprises in the construction of public projects."[153] The Minority Business Utilization Plan (the "Plan") required general contractors to "subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBE's)."[154]

This case arose as a result of the City's rejection of Croson's bid for the "provision and installation of certain plumbing fixtures at the city jail."[155] Although Croson attempted at obtain a bid from Continental Metal Hose, a MBE, the MBE's bid was higher than those he obtained from other contractors. Acceptance of the MBE's bid would have raised the cost of the job by $7,663.16, and the City refused to increase the contract price to reflect this cost. Thereafter, the City refused to issue a waiver of the MBE requirement to Croson, and instead rebid the project. Croson filed an action under 42 U.S.C. §1983 challenging the constitutionality of the Plan "on its face and as applied in this case."[156]

The procedural history of this case reveals opposing schools of thought regarding the sufficiency of the City's justifications for its race-based remedial Plan. The District Court's conclusion was in accord with the City's position that "national findings of discrimination in the construction industry, when considered in conjunction with the statistical study concerning the awarding of prime contracts was due to past discrimination 'reasonable.'"[157] The District Court, relying on the deferential standard of review of Congressional decision-making established by the Court in *Fullilove,* upheld the validity of the Plan. The Fourth Circuit Court of Appeals affirmed the lower court's decision. The justifications articulated by the City were viewed as 'reasonable' by both courts.

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unique importance.").

[152] *Wygant*, 476 U.S. at 293.

[153] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989).

[154] *Id*. at 477.

[155] *Id*. at 481.

[156] *Id*. at 483.

[157] *Id*. at 484 (citing City of Richmond v. J.A. Croson Co., 779 F.2d 181, 190 and n.12 (4th Cir. 1985) [hereinafter *Croson I*]).

A subsequent appeal to the Supreme Court, together with the Court's intervening decision in *Wygant* established the basis for an opposing resolution of this case. The Supreme Court vacated the Fourth Circuit's decision, and remanded the case for further consideration. Upon a second review, the Fourth Circuit closely scrutinized the City's justifications in accordance with the *Wygant* decision, and ultimately found that the justifications could not withstand constitutional scrutiny. On remand, the Fourth Circuit concluded that voluntary race-based programs implemented to remedy societal discrimination cannot be justified by "broad-brush assumptions of historical discrimination."[158] Instead, the City was required to demonstrate "prior discrimination by the government unit involved."[159]

As a threshold matter, the Court concluded that the strict scrutiny test was the appropriate evaluative tool for determining the constitutionality of the Plan, notwithstanding its remedial purpose.[160] In accordance with the rationale of *Bakke*, Justice O'Connor's initial inquiry focused on whether the City engaged in "judicial, legislative, or administrative findings of constitutional or statutory violations"[161] that would warrant implementation of constitutionally permissible measures to remedy past discriminatory conduct. "Only then does the government have a compelling interest in favoring one race over another."[162]

The Court then engaged in a comprehensive analysis of each specific justification raised by the City.[163] To support its primary justification for the Plan, the

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[158] *Id.* at 485 (citing *City of Richmond v. J.A. Croson Co.*, 882 F.2d 1355, 1357 (4th Cir. 1987) [hereinafter *Croson II*]).

[159] *J.A. Croson Co.*, 488 U.S. at 485. ("In this case, the debate at the city council meeting 'revealed no record of prior discrimination by the by the city in awarding public contracts . . . . Moreover, the statistics comparing the minority population of Richmond to the percentage of prime contracts awarded to minority firms had little or no probative value in establishing prior discrimination in the relevant market, and actually suggested 'more of a political than a remedial basis for the racial preference. (citations omitted)").

[160] *J.A. Croson Co.*, 488 U.S. at 493. "Indeed, the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Id.*

[161] *J.A. Croson Co.*, 488 U.S. at 497.

[162] *Id.* (citing *Regents of the Univ. of Cal. V. Bakke*, 435 U.S. 265, 308-09 (1978).

[163] "The District Court relied upon five predicate 'facts' in reaching its conclusion that there was an adequate basis for the 30% quota: (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts form the city's population; (4) there were very few minority contractors in local and state

City argued that "there was racial discrimination in the construction industry 'in this area, and the State, and around the nation.'"[164] Justice O'Connor articulated an evaluative standard for assessing the underlying purpose of a voluntary affirmative action plan. She stressed that

> [t]he factfinding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary. (Citation omitted) But when a legislative body chooses to employ a suspect classification, it cannot rest upon a generalized assertion as to the classification's relevance to its goals. (Citation omitted) A governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists. (Citation omitted) The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis. (Citation omitted).[165]

The Court noted that statements of discrimination "are of little probative value in establishing identified discrimination in the Richmond construction industry."[166] In *Croson*, the underlying purpose of this Plan was not, however, evidenced by particularized past discriminatory conduct sufficient enough to withstand constitutional scrutiny.

The City also relied on statistical disparities between the number of minorities within the construction industry and the population of Richmond to justify its race-based preference program. It supported this justification with the Supreme Court's recognition that appropriate statistical evidence may be indicative of discriminatory conduct.[167] "In the employment context, we have recognized that for certain entry level positions requiring minimal training, statistical comparisons of the racial composition of an employer's work force to the racial composition of the relevant population may be probative of a pattern of discrimination."[168] There is, however, an

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contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally." *J.A. Croson Co*., 488 U.S. at 499.

[164] *Id*. at 500.

[165] *Id*. at 500-01.

[166] *Id*. at 500.

[167] *See* Eisenberg v. Montgomery County Public Schools, 19 F. Supp.2d 449, 454 (1998) ("Likewise, extremely low percentages of minorities, or non-minorities, in certain public schools might raise an inference of discrimination." (Citing *Swann v. Mecklenberg Bd. Of Ed*., 402 U.S. 1, 26 (1971)).

[168] *J.A. Croson Co*., 488 U.S. at 501.

exception to this rule.[169] Where "special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."[170] This exception proved fatal to the City's ability to justify its remedial program. The Court identified several deficiencies in the City's analysis. It noted that the City "does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects. ... Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city."[171]

The Court also noted the lack of evidentiary support for the City's assertion that the remedial program was necessary because "white prime contractors simply will not hire minority firms."[172] The Court's response was simply that "[w]ithout any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures."[173] The absence of evidentiary support was also apparent in the City's assertion that "MBE membership in local contractors' associations was extremely low."[174] The City failed to correlate these membership statistics with a pattern of racially discriminatory conduct by the City or any participant in Richmond's construction industry.

> For low minority membership in these associations to be relevant, the city would have to link it to number of local MBE's eligible for membership. If the statistical disparity between eligible MBE's and MBE membership were great enough, an inference of discriminatory exclusion could arise. In such case, the city would have a compelling interest in preventing its tax dollars from assisting these organizations in maintaining a racially segregated construction market.[175]

The final justification for Richmond's remedial plan was summarily dismissed by the Court. The Court stated that the "probative value" of the City's assertion that

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[169] *J.A. Croson Co.*, 488 U.S. at 501. ("There is no doubt that '[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination' under Title VII. (Citation omitted) But it is equally clear that '[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.")

[170] *J.A. Croson Co.*, 488 U.S. at 501-02.

[171] *Id.* at 502.

[172] *Id.*

[173] *Id.* at 502-03.

[174] *Id.* at 503.

[175] *Id.*

"there had been nationwide discrimination in the construction industry was extremely limited."[176] Justice O'Connor in *Croson* concluded that "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, public or private, with some specificity before they may use race-conscious relief."[177] In addition to not being narrowly tailored,[178] the Court held that

> none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry. We, therefore, hold that the city has failed to demonstrate a compelling interest in apportioning public contracting opportunities on the basis of race. To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs. 'Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications ....' (Citation omitted) We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality.[179]

The Court's willingness to recognize that remedying specific acts of past discrimination can serve as a constitutionally compelling justification for the use of race-based classifications was also addressed in *Adarand*. This case represents the culmination of 17 years of Supreme Court litigation on this issue. The judgment issue by the Court in this case represents one of few unified pronouncements from the Court on the standard of review required to evaluate equal protection challenges to race-based affirmative action programs.

In *Adarand*, the plaintiff submitted the lowest bid to supply guardrails on a federal highway construction project. The contract was instead awarded to a Hispanic contractor who was certified by the Small Business Administration as "socially and economically disadvantaged."[180] The subcontractor's certification made the prime

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[176] *J.A. Croson Co*., 488 U.S. at 504.
[177] *Id*.
[178] *Id*. at 507-08.
[179] *Id*. at 505-06.
[180] Adarand Constructors v. Pena, 515 U.S. 200, 205 (1995).

contractor eligible for a financial incentive program available only to general contractors who hired companies controlled by disadvantaged individuals. The equal protection challenge to the government's financial incentive program raised by the plaintiff was defeated on a motion for summary judgment. The Court of Appeals, relying on the lenient standard of review for federal race-based preferences established by the Court in *Metro Broadcasting* and *Fullilove*, affirmed the District Court's decision.[181]

On appeal, the Supreme Court finally reached a consensus regarding the standard of review appropriate for assessing the constitutionality of federally mandated racial classifications. Justice O'Connor initially rejected any language set forth in *Metro Broadcasting* or *Fullilove* that suggested that an intermediate level of scrutiny is the appropriate standard of review for evaluating the constitutionality of governmental racial classifications. The *Adarand* decision also broadened the holding in *Croson* by making strict scrutiny analysis applicable to classifications used by federal government actors.[182] In this regard, the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[183]

The Court further noted that the standard of review for equal protection claims was not dependent upon the identity of the governmental decision-maker. Specifically, the Court resolved the question that arose after *Fullilove* regarding whether the Court should afford judicial deference when reviewing the constitutionality of Congressionally mandated racial classifications. Justice O'Connor clarified the Court's position by concluding that "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling."[184]

The Court was also challenged to articulate circumstances in which it would

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[181] *Id*. at 210.

[182] *Id*. at 222.

> With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But *Croson* of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. *Croson* observed simply that the Court's 'treatment of an exercise of congressional power in *Fullilove* cannot be dispositive here,' because *Croson's* facts did not implicate Congress' broad power under §5 of the Fourteenth Amendment.

Id.

[183] *Id*. at 227.

[184] *Id*. at 235.

find a compelling justification for the use of race-based classification capable of falling within the exception to the concept of constitutional color-blindness that had permeated the Court's post-*Bakke* decisions on affirmative action. Justice O'Connor specifically responded to the complaint raised by Justice Marshall in *Fullilove* that "strict scrutiny is 'strict in theory, but fatal in fact.'"[185] Although a strong advocate of constitutional color-blindness, Justice O'Connor acknowledged that race neutrality has not fully integrated itself into the social fabric of American society. She noted that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."[186]

Unfortunately, the Court did not have an opportunity to fully address this issue in light of the lower courts' failure to apply a heightened standard of proof to evaluate the constitutionality of the race-based components of the SBA's government contracting program.[187] As a result of its decision to overrule *Metro Broadcasting* and *Fullilove*, Justice O'Connor remanded *Adarand* to the District Court for a determination of whether the government's use of racial classifications was justified by a compelling interest and narrowly tailored to achieve the goals articulated by the program in accordance with the strict scrutiny analysis.[188]

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[185] *Id*. at 237 (quoting *Fulllove v. Klutznick*, 448 U.S. 448, 519 (1980), *overruled by Adarand Constructors v. Pena*, 515 U.S. 200, (1995) (Marshall J., concurring)).

[186] *Adarand*, 515 U.S. at 237.

[187] *Id*. at 237.

> Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be 'narrowly tailored to achieve [their] significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises.' 16 F.3d, at 1547 (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as 'compelling.' It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting, *Croson*, *supra*, at 507, 109 S.Ct., at 729, or whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate,' *Fullilove*, *supra*, at 513, 100 S.Ct., at 2792-2793 (Powell, J., concurring).

[188] On remand, the District Court in *Adarand* concluded that although findings of past discrimination in the federal construction contracting industry served as a compelling

IV. CONGRESSIONALLY MANDATED AFFIRMATIVE ACTION PROGRAMS

Although few would argue that race discrimination or even the vestiges of past *de jure* discrimination have been eliminated from the American framework, the ability to substantiate such claims is increasingly difficult. We no longer live under a system of Jim Crow laws that clearly identify the players. In the absence of the proverbial smoking gun, the Court's color-blind interpretation of the equal protection paradigm serves as substantial barrier to the continued implementation of race-based remedial affirmative action programs. However, there are several ways to defeat the argument that strict scrutiny is "strict in theory, fatal in fact."

The first option available to race-based affirmative action proponents has little pragmatic appeal. Using a strategy reminiscent of the one utilized by the NAACP Legal Defense Fund during the 1940's to end school desegregation, public institutions of higher education could be encouraged to implement race-based remedial affirmative action programs in response to litigation challenging the validity of their existing admissions programs.[189] Similar legal challenges in the area of municipal hiring have

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justification for Congressional implementation of race-based set-asides, the program was not narrowly tailored enough to overcome the strict scrutiny analysis.

> I conclude that the statutes and regulations implicated in the SCC program, with respect to the races included as presumptively disadvantaged, do not provide a reasonable assurance that the application of racial criteria will be limited to accomplishing the remedial objectives of Congress.... As such, they are not narrowly tailored to serve the interest of eliminating discrimination in the construction industry.

Adarand Constructors v. Pena, 965 F.Supp. 1556, 1581 (1997). This decision was, however, vacated with directions to dismiss by the Tenth Circuit Court of Appeals, 169 F.3d 1292, 1299 (1999).

[189] *See generally,* Motion to Intervene filed on behalf of minority students and affirmative action proponents in the cases filed by Gratz and Grutter against the University of Michigan. Although the District Court denied their motions to intervene in the cases brought by Gratz and Grutter challenging the race-based admissions programs utilized by the University's College of Literature and Law School, the Sixth Circuit issued an opinion in which it consolidated these cases for the purpose of reversing the District Court's decision, and allowing the minority defendants to intervene in the action. The Sixth Circuit concluded that the intervention would permit the introduction of "evidence of past discrimination by the University itself or of the disparate impact of some current admissions criteria, and that these may be important and relevant factors in determining the legality of a race-conscious admissions policy." Grutter v. Bollinger 188 F.3d 394, 401 (6th Cir. 1999). *See also* action filed by civil rights groups on behalf of African American, Hispanic and Filipino students against the University of California at Berkeley on Feb. 2, 1999. The suit alleges that Berkeley's

resulted in voluntary race-based affirmative action programs sanctioned by the courts through consent decrees.[190] Unfortunately, the inefficiency of this strategy is readily apparent. In addition to being costly and time consuming, educational institutions are well aware of the judicial and statutory prohibitions on racially discriminatory practices. The least of which is Title VI of the Civil Rights Act of 1964,[191] which if violated may result in the elimination of much needed federal funding. In this regard, even if evidence of past discrimination existed, prudent educational institutions would be compelled to challenge every attempt at making such an admission in order to avoid liability.

As a result, the only remaining avenue for relief is to seek Congressional intervention and implementation of race-based remedial action for instances of discrimination and to eradicate the continuing effects past discrimination in both the public and private sectors of higher education.[192] The Court has previously recognized

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admissions policies violate Title VI of the Civil Rights Act of 1964 and have an unjustified disparate impact on minority applicants. Seth Rosenfeld, *UC-Berkeley sued over minority admissions*, San Francisco Examiner, February 3,1999, at A7; Sara Hebel, *Bias in admissions charged at Berkeley*, Chron. Of Higher Educ., February 12, 1999, at A37.

[190] *See generally*, Local No. 93, Intern. Ass'n of Firefighters, AFL-CIOC.L.C. v. City of Cleveland, 478 U.S. 501 (1986); Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13 (1st Cir. 1998); McNamara v. City of Chicago, 138 F.3d 1219 (7th Cir. 1998); United States v. City of Miami, 115 F.3d 870 (11th Cir. 1997).

[191] The provisions of Title VI are not all punitive. The regulations issued by the Department of Education governing the administration of Title VI provide that educational institutions may voluntarily implement affirmative action programs to either "overcome the effects of prior discrimination" due to "race, color, or national origin." "Even in the absence of past discrimination, Title VI provides that educational institutions may implement voluntary measures aimed at overcoming the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 CFR §100.3(b)(6)(i)-(iii) (1990).

[192] For a discussion of justifications for government mandated affirmative action program designed to address private discrimination in the area of government contracting, see Ian Ayres and Fredrick E. Vars, *When Does Private Discrimination Justify Public Affirmative Action*?, 98 COLUM. L. REV. 1577 (November, 1998). See also CHRISTOPHER EDLEY, JR., NOT ALL BLACK AND WHITE: AFFIRMATIVE ACTION, RACE, AND AMERICAN VALUES 177 (1996).

> A government-imposed preference might be thought more acceptable on the theory that, if the justification for a preference embodies important principles and aspirations, then government should lead; that regulating abuses is not enough. Moreover, the aspiration of inclusion . . . has most weight as regards public institutions where it is seen to be democratic and to promote civic community. On the other hand, given that preferences have a moral cost, some will argue that the moral injury is more grievous if inflicted by one's own government - by the power of the state. This latter

that race-based affirmative action programs implemented by State governments may withstand constitutional scrutiny if they are designed to remedy past discrimination or the present effects of specific acts of past discrimination.[193] If narrowly tailored, such

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> view is currently the law, because the constitutional scrutiny of government affirmative action is tougher than say, Title VII scrutiny of private employer efforts. This approach honors private autonomy, but also signals some moral ambivalence, making racial preferences wrong for one actor but acceptable for another - wrong when people act collectively through government, but acceptable when they act personally. ... This is unsatisfying. Surely if the state stands idly by while my neighbor injures me, I have strong grounds for complaint. The private-public distinction does not and cannot definitely resole the issue of our responsibilities to one another. What works, in my view, is to engage in the moral conversation about what those responsibilities are; then, having decided, ask what enforcement mechanisms are appropriate in light of a variety of considerations - practicality, ethics, custom. It may be that we decide to leave enforcement to social norms and informal community standards of civility, or to religious or other community institutions. Or we may decided that the state should be involved in a regulatory capacity. In race as in smoking, obscenity, abortion and elsewhere: we should not make the typical lawyer's error of confusing the question of what is right with the decision about the role of government.

Id. For an alternative avenue of redress which relies on the intervention of the Executive Branch of government, *see, How President Clinton Could Advance the Higher Educational Opportunities of Black Americans*, 16 JOURNAL OF BLACKS IN HIGHER EDUC. 50 (1997).

> If president Clinton is serious about retaining affirmative action in, as he says, a 'repaired' form, he has it within his powers to form a commission of highly respected citizens and legal advocates to make the most powerful possible case before the Supreme Court for the constitutionality of affirmative action procedures. Properly armed with facts and hard sociological data on the favorable impact of affirmative action on American society, these experts will make a compelling brief for the proposition that affirmative action is in the public interest.
>
> President Clinton could also instruct the Justice Department to use its huge legal resources to enter, on the side of black people and other racial minorities, every pending case raising the issue of the constitutionality of racial preferences.

Id.

[193] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (O'Connoe J., concurring in part and concurring in judgment).

> Indeed, our recognition of the responsible state actor's competency to take these steps is assumed in our recognition of the States' constitutional duty to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.

programs may rebut the presumption of constitutional infirmity inherent in the use of such an invidious classification as race. Although the Court has eliminated race from the equal protection paradigm, the Court is not foreclosed from utilizing race-based remedial measures to counter the effects of past discriminatory practices.[194]

A. Congressional Remedial Authority

A threshold question that must be resolved prior to the implementation of any Congressionally mandated race-based remedial affirmative action programs is whether the Constitution authorizes Congress to engage in efforts to ameliorate discriminatory practices in the private as well as the public sector of higher education. Although judicial inquiry into the extent of Congress' remedial powers is not novel, the issue remains unresolved by the Court. Questions regarding the extent of Congressional remedial powers were raised almost twenty years ago in *Fullilove.* In *Fullilove* the Court addressed the extent of Congressional authority to impose remedial measures designed to eliminate racial discrimination in federal contracting and procurement programs.[195] In the plurality opinion, Justice Burger concluded that

> [i]t is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct.[196]

Id.

[194] Fulllove v. Klutznick, 448 U.S. 448, 482 (1980), *overruled by Adarand Constructors v. Pena*, 515 U.S. 200, (1995) (Marshall J., concurring)). ("[W]e reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion" (quoting *Swann v. Charlotte-Mecklenburg Board of Education* 402 U.S. 1, 18-21, 91 S. Ct. R67 (1971)). *See also, Wygant*, 476 U.S. at 280-81. We have recognized, however, that in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy.

[195] *Fullilove*, 448 U.S. at 459. The stated objective of the minority set aside program at issue in *Fullilove* was "to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works program as then formulated." *Id*.

[196] *Id*. at 483-84.

Although the *Adarand* decision overturned *Fullilove* due to the Court's failure in *Fullilove* to apply strict scrutiny to evaluate the constitutionality of the minority set-aside program at issue in the case, the Court has never repudiated Justice Burger's interpretation of Congress's remedial authority in this area.[197] For example, Justice O'Connor echoed this Constitutional philosophy in *Croson.* She noted that

> Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.[198]

The origin of the Congressional authority referred to by Justices Burger and O'Connor is found in §5 of the Fourteenth Amendment which gives Congress the power to enforce its provisions "by appropriate legislation."[199] Justice Powell, in discussing the legislative history of the post-Civil War Amendments, noted specifically that "the Framers of the Fourteenth Amendment may have contemplated that Congress, rather than the federal courts, would be the prime force behind enforcement of the Fourteenth Amendment." To date, the Court has not articulated the scope of this power,[200] but it is clear that such Congressional power is reviewable by the judiciary,

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[197] Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995).

> Of course, it follows that to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide tody whether the program upheld in *Fullilove* would survive strict scrutiny as our more recent cases have defined it.

Id.

[198] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 478 (1989).

[199] *See* Katzenbach v. Morgan, 384 U.S. 641, 651 (1966).

> Thus the . . . standard is the measure of what constitutes 'appropriate legislation' under §5 of the Fourteenth Amendment. Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.

Id.

[200] *Adarand*, 515 U.S. at 230.

> It is true that various Members of this Court have taken different views of the authority S 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. [citation omitted] We need not, and do not, address these differences today. For

and as such must conform to the mandates of the Court's interpretation of the equal protection paradigm.[201] Notwithstanding lingering questions about the scope of Congressional remedial power, one fact is clear. Any governmental use of racial classifications, whether utilized by city, state, federal, or Congressional authority, must comply with the strict scrutiny analysis. As the Court in *Adarand* held, the equal protection paradigm requires that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[202]

Justice O'Connor's willingness to apply strict scrutiny with equal force to remedial legislation promulgated by state or federal actors has been severely criticized. In his dissenting opinion in *Adarand*, Justice Stevens argues that such application ignores the "practical and legal differences between federal and state or local decisionmakers."[203] He argues that §5 of the Fourteenth Amendment empowers the federal government to enact legislation aimed at eliminating "historic racial subjugation."[204] As such, judicial deference must be expended to the exercise of the federal decision-making authorized in furtherance of this mandate. He argued that such deference is a necessary weapon in the fight to eliminate racial discrimination:

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

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> now, it is enough to observe that Justice Stevens' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, post at 2123-2125, 2127, is incorrect.

Id.

[201] *See* Justice Powell's concurring opinion in *Fullilove*, 448 U.S. at 509.

[202] *Adarand*, 515 U.S. at 227.

[203] *Id*. at 249 (Stevens, J., dissenting).

> An additional reason for giving greater deference to the National Legislature than to a local law-making bady is that federal affirmative-action programs represent the will of our entire Nation's elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless fell the effects of that program.

Id. at 252.

[204] *Id*. at 252.

our system of government is unacceptable.[205]

One proposition which served as the basis for Justice O'Connor's decision in *Adarand* to apply strict scrutiny to evaluate the use of racial classifications by federal actors focused on the need for congruence between the equal protection analysis required by the Fifth and Fourteenth Amendments.[206] Justice Stevens, however, argued that Justice O'Connor's rule of congruence ignores the fundamental distinction between the broad national decision-making authority of the federal government, and the limited scope of state legislatures to the detriment of programs aimed at furthering the goals of the Fourteenth Amendment.[207] Justice O'Connor countered this argument by noting that the principles of equality are furthered by applying the same exacting standard of review, notwithstanding the branch of government serving as the decision-maker.[208]

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[205] *Id*. at 255.

[206] See Justice O'Connor discussion regarding congruence in *Adarand*, 515 U.S. at 224.

[207] Justice Stevens, dissent, *Adarand*, 515 U.S. at 253. *Id.* at 253 (Stevens, J., dissenting).

> Presumably, the majority is now satisfied that its theory of 'congruence' between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress' institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due to a State legislature.

Id.

[208] *Id*. at 230-31 (O'Connor, J.).

> Justice Stevens also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a 'compelling interest' does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority §5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress' exercise of that authority. *See*, e.g., Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 605-06 (1975) (O'Connor, J., dissenting); City of Richmond v. J.A. Croson Co., 488 U.S.469, 486-93 (O'Connor, J., Rehnquist, C.J., and White, J.) (Kennedy, J., concurring in part and concurring in judgment) (Scalia, J., concurring in judgment); Fullilove v. Klutznick,, 448 U.S. 448, 472-73 (1980) (Burger, C.J.) (Powell, J., concurring) (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that Justice Stevens'

Notwithstanding this criticism, the Court has, however, acknowledged that Congressional legislative power is broader than that which may be exercised by state and local governments. Justice O'Connor recognized this distinction in *Croson*, when she noted that "Congress may identify and redress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate."[209] The scope of Congressional power has clearly been distinguished from that held by other political entities. In *Bakke*, the Court noted that the University's "broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality."[210] This lack of national legislative authority prevented the University from implementing remedial affirmative action measures designed to address societal discrimination.[211] Congress, on the other hand, is not only authorized, but expected to fulfill the mandated of the Fourteenth Amendment by addressing discrimination on a national scope. In *Bakke*, Justice Powell concluded that "[b]efore relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination."[212]

This position was also expressed by Justice Powell in his concurrence in *Fullilove.* In drawing the distinction, he noted that "[t]he history of this Court's review of congressional action demonstrates beyond question that the national Legislature is competent to find constitutional and statutory violations."[213] He thus concluded that "it is beyond question, therefore, that Congress has the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eradicate their continuing effects."[214]

B. Strict Scrutiny Analysis:

1. Compelling state interest

> suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, post, at 2123-2125, 2127, is incorrect.

Id. at 230-31.

[209] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 490 (1989).

[210] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 309 (1978).

[211] *Bakke*, 438 U.S. at 309 ("Petitioner does not purport to have made, and is in no position to make, such findings.").

[212] *Id*.

[213] *Fullilove*, 448 U.S. at 498 (Powell, J. concurring).

[214] Fullilove v. Klutznick, 448 U.S. 448, 498 (1980), *overruled by* Adarand Constructors v. Pena, 515 U.S. 200, 235 (1995) (Powell, J. concurring). *Id*. at 502.

It is axiomatic that the goal of remedying past discrimination or the present effects of past discriminatory practices[215] can serve as a basis for use of race-based classifications.[216] Prior to the development and implementation of a race-based affirmative action program, Congress must establish a "strong basis in evidence for its conclusion that remedial action was necessary."[217] Thus it would require proof of the existence of prior discrimination or the present effects of discrimination within the field of higher education.[218] As Justice Powell noted in *Bakke*, "[t]he State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the

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[215] Definition of present effects of past discrimination:
Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994) ("To have a present effect of past discrimination sufficient to justify the program, the party seeking to implement the program must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program.").

[216] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 286 (1986) (O'Connor, J. concurring in part and concurring in judgment) ("The Court is in agreement that . . . remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."); *See also Id*. at 274 (Powell, J. plurality) ("This Court has never held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insis ted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."); *Id*. at 286 (O'Connor, J. concurring in part and concurring in judgment) ("The Court is in agreement that, whatever the formulation employed, remedying past or present racial discrimination by a state actor is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program."); *Fullilove*, 448 U.S. at 497 (Powell, J. concurring) ("The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination.").

[217] Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986).

[218] Congress together with the Federal Communications Commission, made a similar finding of past discrimination in the field of mass communications. In *Metro Broadcasting*, the FCC promulgated a program to encourage minority participation in communications industry. Although the case primarily focused on the attainment of diversity as a constitutional basis for the FCC's preferential incentive program, the FCC and Congress also argued that there was a remedial basis for the program.

> Congress found that 'the effects or past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications.' Citations omitted. Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies.

Metro Broadcasting, Inc., v. FCC, 497 U.S. 547, 566 (1990).

disabling effects of identified discrimination."[219] He further noted that the Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations."[220] There is an unresolved question regarding the scope and specificity required of such Congressional findings.

Justice Powell has, however, provided guidance in this area. He stated that the "degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of a governmental body."[221] Congress as a national governing body has broader investigative and remedial powers than municipal or state governments. The Court has approved this deferential approach to Congressional decision-making.[222] For example, strict scrutiny analysis rejects the argument that societal discrimination can also serve as a compelling justification for the use of race-based remedial measures. Justice Powell in *Wygant* argued that the Court requires "some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination."[223] In defining "societal" discrimination, Justice

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[219] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978).

[220] *Id.* "Before relying upon these sorts of findings in establishing a racial classification, a governmental body must have the authority and capability to establish, in the record, that the classification is responsive to identified discrimination." *Id.* at 309. See also Justice Powell, plurality opinion in *Wygant*, 476 U.S. at 276 ("In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future."). Justice O'Connor, concurring in part and concurring in the judgment in *Wygant*, 476 U.S. at 286 ("This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.").

[221] Fullilove v. Klutznick, 448 U.S. 448, 515 (1980), (Powell, J., concurring) *overruled by* Adarand Constructors v. Pena, 515 U.S. 200 (1995).

[222] *Id.* at 472.

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment. Art. I, §8, cl. 1; Amdt. 14, §5.

Metro Broadcasting, 497 U.S. at 563 ("We explained [in *Fullilove*] that deference was appropriate in light of Congress' institutional competence as the National Legislature . . . as well as Congress' powers under the Commerce Clause . . , the Spending Clause, . . . , and the Civil War Amendments.").

[223] *Wygant*, 476 U.S. at 274.

O'Connor points out that it is "discrimination that is not traceable to [government agency's] own actions."[224]

To the extent that Congress, through the exercise of its legislative authority, engaged in specific acts of discrimination, Congress may use race-based measures to eliminate the effects of those acts. However, Congressional remedial authority may also come into play if Congress was a "passive participant" in the discriminatory conduct of others, and acts to alleviate the effects of that conduct as well. The basis for the Court's reasoning in this regard can be found in the exercise of the government's spending powers. The Court has previously established that government entities may intervene to eliminate racially discriminatory structures that receive public financing. In *Croson*, the Court held that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."[225]

In expanding on the connection between the exercise of spending powers and Congressional remedial authority previously discussed in *Croson*, the Court in *Fullilove* noted that

> Congress was exercising its powers under §5 of the Fourteenth Amendment in making a finding that past discrimination would cause federal funds to be distributed in a manner which reinforced prior patterns of discrimination. While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race-conscious relief.[226]

The Court has had several opportunities to apply the "passive participant" theory within the context of determining the constitutionality of race-based remedial measures. In *Croson*, the Court noted that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."[227] Also, in *Fullilove*, Congress approved a $4 billion state and local public works bill that included a 10% minority set-aside provision.[228] One of the primary objectives of the set-aside provision was to eliminate

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[224] *Id*. at 288 (O'Connor, J., concurring in part and concurring in judgment).
[225] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).
[226] *Id*. at 504.
[227] *Id*. at 492.
[228] Fullilove v. Klutnick, 448 U.S. 448, 453 (1980), *overruled by* Adarand Constructors v. Pena, 515 U.S. 200 (1995). One proponent of the bill stated that its purpose was to "direct funds

barriers to and encourage minority participation in the government contracting and procurement program.[229] Although there was no direct evidence that Congressional legislation was the source of such barriers, the Court deferred to Congress's authority to remedy what it perceived as a violation of the equal protection guarantees of the Fourteenth Amendment.[230] For example, the Civil Rights Commission found several barriers to the entry of minority contractors in the government procurement program.

> Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.[231]

These findings and others presented by other governmental agencies, including the General Accounting Office, indicated that minorities were excluded from the government procurement program as a result of societal discrimination, and not the exercise of direct Congressional authority. Although the Court viewed Congress as a passive participant in this process, it concluded that this legislation was a valid exercise of Congressional Spending Powers.[232]

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into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with Government procurement programs, could not be expected to benefit significantly from the public works programs as then formulated." *Id*. at 459.

[229] *Id*. at 473. ("The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. The program was designed to ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress has decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.").

[230] *Id*. at 472. ("A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the ... general welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment.")

[231] *Id*. at 467.

[232] *Fullilove*, 448 U.S. at 473-475.

> Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination.

Congress's role as a passive participant in the racial segregation of the broadcasting industry was also apparent in *Metro Broadcasting*. In this case, Congress and the FCC attempted to implement race-based incentive programs, the goal of which was to increase minority participation in the broadcasting industry.[233] The government's principle argument in support of the constitutionality of these remedial programs was related to its desire to foster diversity within the industry.[234] However, Congress and the FCC also noted that they were acting to eliminate barriers to minority entry in the field that were caused by past discrimination.[235] Although there were no allegations that government legislation or conduct were directly responsible for the past discrimination,[236] the Court acknowledged the remedial authority utilized by Congress in

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> Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under S5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

Id. at 478.

[233] The minority incentive program at issue in *Metro Broadcasting* had two primary components. "First, the Commission pledged to consider minority ownership as one factor in comparative proceedings for new licenses." Metro Broadcasting, 497 U.S. 547, 556 (1990). The FCC also "outlined a plan to increase minority opportunities to receive reassigned and transferred licenses through the so-called 'distress sale' policy." *Id.* at 557.

[234] *Id*. at 566. ("Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies.")

[235] Congress found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." *Id*. at 566.

[236] *Id*. at 553-54.

> Although for the past two decades minorities have constituted at least one-fifth of the United States population, during this time relatively few members of minority groups have held broadcast licenses. In 1971, minorities owned only 10 of the approximately 7,500 radio stations in the country and none of the more than 1,000 television stations, . . . in 1978, minorities owned less than 1 percent of the Nation's radio and television stations, see FCC Minority Ownership Task Force, Report on Minority Ownership in Broadcasting 1 (1978) (hereinafter *Task Force Report*); and

this regard pursuant to constitutional mandates.[237]

When engaging in the legislative fact-finding process to determine the existence of past discrimination or the present effects of any discriminatory practices, the Congressional inquiry must be broader than that undertaken by other types of political entities.[238] In order to determine if race-based remedial action is warranted, Justice Powell in *Bakke* noted that there must be "judicial, legislative, or administrative findings of constitutional or statutory violations."[239] Within the context of government action,

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> in 1986, they owned just 2.1 percent of the more than 11,000 radio and television stations in the United States. See National Association of Broadcasters, Minority Broadcasting Facts 6 (Sept.1986). Moreover, these statistics fail to reflect the fact that, as late entrants who often have been able to obtain only the less valuable stations, many minority broadcasters serve geographically limited markets with relatively small audiences.

Id. at 554.

[237] *Metro Broadcasting*, 497 U.S. at 563.

> It is of overriding significance in these cases that the FCC's minority ownership programs have been specifically approved--indeed, mandated--by Congress. In *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), Chief Justice Burger, writing for himself and two other Justices, observed that although "[a] program that employs racial or ethnic criteria . . . calls for close examination," when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." (Citations omitted) We explained that deference was appropriate in light of Congress' institutional competence as the National Legislature, . . . as well as Congress' powers under the Commerce Clause, . . . ;the Spending Clause,. . . , and the Civil War Amendments.

Id. at 563.

[238] Appendix-The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, Fed. Reg., Vol. 61, No. 101 (1996) ("Furthermore, in combatting (sic) discrimination and its effects, Congress has the latitude to develop national remedies for national problems. Congress need not make findings of discrimination with the same degree of precision as do state or local governments. Nor is it obligated to make findings of discrimination in every industry or region that may be affected by a remedial measure.").

[239] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1998). Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 206 (1986), (O'Connor, J., concurring) ("This remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is

the scope of these findings is dependent on the branch of the political entity engaged in the inquiry. Congress, as the national legislative body, is not bound by the same restrictions that limit municipalities and states to investigate only localized instances of discrimination.[240] On the contrary, §5 of the Fourteenth Amendment, as well as the Court, has given Congress the latitude to investigate and determine whether discrimination exists on a national level. In discussing this issue, Justice Powell argued that "[t]he degree of specificity required in the findings of discrimination and the breath of discretion in the choice of remedies may vary with the nature and authority of the governmental body."[241]

The distinction between the scope of Congressional fact-finding, and fact-finding undertaken by municipalities or states was set forth by Justice O'Connor in *Croson.* She noted that

> Congress has made national findings that there has been societal discrimination in a host of fields. If all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection cause will, in effect, have been rendered a nullity.[242]

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required.").

[240] *Metro Broadcasting*, 497 U.S. at 565 (Brennan, J.)

> In fact, much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments. For example, Justice O'Connor, joined by two other Members of this Court, noted that "Congress may identify and redress the effects of society-wide discrimination," and that Congress "need not make specific findings of discrimination to engage in race- conscious relief." Echoing *Fullilove's* emphasis on Congress as a National Legislature that stands above factional politics, Justice Scalia argued that as a matter of "social reality and governmental theory," the Federal Government is unlikely to be captured by minority racial or ethnic groups and used as an instrument of discrimination. Justice Scalia explained that "[t]he struggle for racial justice has historically been a struggle by the national society against oppression in the individual States," because of the "heightened danger of oppression from political factions in small, rather than large, political units."

Id. at 565-66. (Citations ommitted).

[241] Fulllove v. Klutznick, 448 U.S. 515, n.14 (1980), *overruled by* Adarand Constructors v. Pena, 515 U.S. 200, (1995) (Powell, J., concurring).

[242] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989); Justice Powell, in *Fullilove* discussed the breath of Congress's fact finding authority. He noted that:

This distinction was apparent in the Court's analysis of the race-based remedial programs at issue in *Metro Broadcasting*, *Croson*, *Fullilove*, *Wygant*, and *Adarand*. In these cases, challenges were made to race-based remedial programs established by a governmental entity. Note that in *Wygant* and *Croson* the Court rejected the factual predicate of past discrimination relied upon by the respective municipalities to justify their race-based remedial programs.[243] The Court in each instance determined that the municipalities relied upon generalized findings of discrimination that were indicative of broader societal discrimination, and not the particularized finds of discrimination required to overcome the constitutional invalidity of racial classifications.[244] Although other equal protection challenges were raised, the Congressionally mandated findings of past discrimination were all upheld in the remaining cases due to the Court's recognition of Congress's authority to engage in national fact-finding.

> The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding. Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 502-03.

[243] *J.A. Croson Co*., 488 U.S. at 498.

> We think it clear that the factual predicate offered in support of the Richmond Plan suffers from the same two defects identified as fatal in *Wygant*. The District Court found the city council's "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the construction industry." Like the "role model" theory employed in *Wygant*, a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It "has no logical stopping point." "Relief" for such an ill-defined wrong could extend until the percentage of public contracts awarded to MBE's in Richmond mirrored the percentage of minorities in the population as a whole.

Id.

[244] *Id*. at 491. (citing *Associated General Contractors of Cal. v. City of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987)) ("The city is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action.").

A Congressional inquiry into the existence of discrimination or the present effects of past discrimination within the educational arena would not be unprecedented.[245] Congress, the Department of Justice, the Small Business Administration, and additional governmental agencies engaged in a coordinated effort to examine the government procurement and contracting program following *Adarand*.[246] The purpose of this investigation was to establish a factual predicate for the continued implementation of race-based contract decision that would satisfy the strict scrutiny analysis mandated by *Adarand*.

In developing a strategic plan for Congressional review of the existence of discrimination or the present effects of past discrimination within the educational arena, several factors must be considered. As indicated in Section IV.B.1. above, there must be a "strong basis in evidence"[247] for concluding that race-based affirmative action is the appropriate remedy. Further, such evidence cannot broadly sweep across every segment of American society searching for generalized findings of discrimination against racial and ethnic minority groups.[248] On the contrary, to establish that Congress

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[245] In 1964, President Lyndon B. Johnson initiated a national dialogue on the socio-economic condition of poor Americans. Pinned as the "War on Poverty,' government agencies, economic advisors, and Congress worked together to identify problems such as sub-standard housing, education, health care, and unemployment that plagued this segment of the population. After numerous Congressional hearings, and the submission of reports and studies on this subject, Congress passed the Economic Opportunity Act of 1964 which established a number of programs designed to "eliminat[e] poverty by giving all Americans opportunities for work, for education and training and for the chance to live in 'decency and dignity.'" Louise Lander, ed., War on Poverty, 21 (Facts on File, Inc. 1967)

[246] *See*, inquiry into contracting industry, Appendix-The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed.Reg., 101(1996).

[247] *J.A. Croson Co*., 488 U.S. at 500.

[248] *See*, inquiry into contracting industry Appendix-The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement. 61 Fed.Reg. 101, May 23, 1996, at 26042, 26051. ("In evaluating the evidentiary predicate for affirmative action in federal procurement, it is highly significant that the measures have been authorized by Congress, which has the unique and express constitutional power to pass laws to ensure the fulfillment of the guarantees of racial equality in the Thirteenth and Fourteenth Amendments. These explicit constitutional commands vest Congress with the authority to remedy discrimination by private actors as well as state and local governments. Congress may also exercise its constitutionally grounded spending and commerce powers to ensure that discrimination in our nation is not inadvertently perpetuated through government procurement practices. In exercising its remedial authority, Congress need not target only deliberate acts of discrimination. It may also strive to eliminate the effects of discrimination that continue to

has a compelling interest in remedying discrimination within the educational community, the Congressional investigation must be limited in a number of ways.

a. Time frame

First, an appropriate time frame must be established for determining the existence of discrimination within this context. Although the process of judicial dismantling of segregated educational institutions began with *Brown*, many judicial and legislative hurdles, including the passage of Title VI of the Civil Rights Act of 1964, followed that historic decision.[249] Any attempts to determine when wholesale de jure segregation ended must realistically acknowledge that this was a gradual process that occurred over a significant period of time. However, discriminatory patterns and practices that are too remote in time will not serve as a compelling justification for the

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impair opportunity for minorities, even in the absence of ongoing, intentional acts of discrimination."); *See also*, Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, One Hundredth Congress, First Session on Sex and Race Differences on Standardized Tests, April 23, 1987, Serial No. 93.

[249] *See also*, STEPHAN THERNSTROM AND ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 105 (1997).

> *Brown I* stated the principle; *Brown II* was a guide to implementation, and it sent a signal of extreme patience and considerable flexibility. To begin with, the task of determining what desegregation remedy was appropriate in each community and of setting a realistic timetable for implementing that remedy was left to local federal district judges. As a result, individual black parents had to bring complaints on a case-by-case basis when local authorities were indifferent to the law. In the course of the prolonged struggle that followed, the NAACP had to assume the burden of initiating desegregation suits in more than two thousand southern school districts.
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> In addition, the Court ordered districts operating single-race schools to proceed toward dismantling their dual school systems 'with all deliberate speed.' 'With ... speed' would seem to have meant expeditiously, but in fact the permission to proceed at a 'deliberate' pace was the more important message. In the Border states, where black population concentrations were smaller and the caste system was not as rigidly enforced, desegregation did proceed with some dispatch and little conflict. But in the eleven ex-Confederate states 'deliberate' meant not slow but stop. There, a full decade after *Brown*, a mere 1.2 percent of black public school students attended schools that had any white pupils at all. Desegregation, one observer remarked, was proceeding with 'the pace of an extraordinary arthritic snail.'

Id.

use of race-based remedial measures.[250] Unfortunately, there is no magic formula for determining an appropriate time period. Limited guidance may be found by examining the time periods utilized by Congress in similar inquiries.[251]

b. Scope of Congressional inquiry

As discussed in Section IV.A. above, a Congressional inquiry into the systemic policies, patterns, and practices of educational institutions must specifically identify evidence of discrimination or the present effects of past racial discrimination. As Justice O'Connor determined in *Croson*:

> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. '[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members.'[252]

Pursuant to the provisions of Title VI, educational institutions, both public and private, that receive federal funds are prohibited from engaging in racially discriminatory conduct.[253] The focus of the inquiry will include not only Congressional actions, but

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[250] *Id*. Middleton v. City of Flint, 92 F.3d 396, 409 (6th Cir. 1996). ("Furthermore, as this court has noted previously, evidence of past discrimination that is remote in time will not support a claim of compelling governmental interest when other evidence is adduced to show that the governmental body has taken serious steps in subsequent years to reverse the effects of past discrimination and to implement appropriate new standards. Thus in *Brunet v. City of Columbus*, 1 F.3d 390 (6th Cir. 1993), we held that strong evidence proffered in 1989 that a city fire department had discriminated prior to 1975 "is too remote to support a compelling governmental interest to justify the affirmative action plan, "especially in light of evidence that the city had subsequently taken steps to improve its recruitment efforts.")

[251] *See*, inquiry into contracting industry in which they examined Congressional findings for a twenty-six period from 1980 through 1996. Appendix-The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. No. 101 (1996).

[252] *J.A. Croson Co*., 488 U.S., at 510-11.

[253] Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States

on the actions of institutions of higher education governed by the provisions of Title VI because of their receipt of federal funds. The data assembled for this inquiry may focus on a number of disputed areas that fall within the scope of Title VI. There must, however, be a recognition that there are two somewhat distinct areas within the educational field - students and faculty. One area of inquiry may focus on the existence of discrimination relating to faculty hiring, retention, and promotion.[254] Also included in the Congressional inquiry would be the equally important issues related to student admissions and retention.[255] As the following indicates, a number of highly disputed areas could be included within the scope of student related issues:

· Cultural, racial or ethnic bias on standardized tests[256] such as the

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shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C §2000d.

[254] *See generally*, Edgar G. Epps, *Affirmative Action and Minority Access to Faculty Positions*, 59 OHIO STATE L. J. 755 (1998); Deborah Jones Merritt and Barbara F. Reskin, *Sex, Race, and Credentials: The Truth about Affirmative Action in the Law Faculty Hiring*, 97 COLUM.L.REV. 199 (1997); Caroline Sootello Viernes Turner and Samuel L. Myers, Jr., *Faculty Diversity and Affirmative Action*, in AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION 131 (Mildred Garcia ed., 1997); Deborah J. Merritt and Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S.CAL. L. REV. 29 (1992).

[255] *See generally*, Deborah Jones Merritt, *Symposium: Twenty Years After Bakke: The Law and Social Science of Affirmative Action in Higher Education*, 59 OHIO ST. L.J. 1055 (1998); *Why a Nationwide Ban on Race-Conscious Admissions Will Sharply Curtail Black Enrollments as the Nation's Highest-Ranked Medical Schools*, 23 JOURNAL OF BLACKS IN HIGHER EDUCATION 22 (Spring 1999); William G. Bowen and Derek Bok, *The Shape of the River: Long-term Consequences on Considering Race in College and University Admissions* (Princeton University Press 1998); SUSAN WELCH AND JOHN GRUHL, AFFIRMATIVE ACTION AND MINORITY ENROLLMENTS IN MEDICAL AND LAW SCHOOLS (1998); LINDA F. WIGHTMAN, STANDARDIZED TESTING AND EQUAL ACCESS: A TUTORIAL, CHAPTER 4, IN COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION, Prepublication Draft Advance Copy, A Report of the AERA Panel on Racial Dynamics in Colleges and Universities (Mitchell Chang, Daria Witt, James Jones, Kenji Hakuta, eds., 1999)(On file with the author); ELLIS COSE, COLOR-BLIND 136-37 (1997); Theodore Cross and Robert Bruce Slater, *Special Report: Why the End of Affirmative Action Would Exclude All But a Very Few Blacks form America's Leading Universities and Graduate Schools*, J. OF BLACKS IN HIGHER EDUC., September 30, 1997, at 8.

[256] For discussions of racial and cultural bias, *see generally* STEPHAN THERNSTROM AND ABIGAIL THERNSTROM, AMERICA IN BLACK AND WHITE 348-422 (1997); CHRISTOPHER JENCKS AND MEREDITH PHILLIPS, THE BLACK-WHITE TEST SCORE GAP (1998); CHILLING ADMISSIONS: THE AFFIRMATIVE ACTION CRISIS AND THE SEARCH FOR ALTERNATIVES (Gary Orfield and Edward Miller, eds., 1998); Roberto Rodriguez, *Test-Driven Admissions: ETS Responds to Criticism of SATs*, Black Issues in Higher Education, September 5, 1996, at 7; Leslie G.

PSAT, SAT, ACT, LSAT, GRE, and MCAT[257]

- Reliance on the accuracy of numerical predictors such as grade point averages and standardized test scores[258]
- Access to public and private sources of financial assistance
- Access to academic counselors and preparatory assistance
- Bias in the development, administration, and implementation of admissions policies[259]
- Under-representation of racial and ethnic minorities in certain professional fields of study

For example, the controversy surrounding continued use of standardized admissions tests has not escaped Congressional scrutiny.[260] In May, 1999, the Office of Civil Rights ("OCR") of the U.S. Department of Education distributed a draft version of a guidebook entitled "Nondiscrimination in High-Stakes Testing: A Resource

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Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993).

[257] The Pre-Scholastic Aptitude Test(PSAT), Scholastic Aptitude Test(SAT), Graduate Record Examination(GRE), Medical College Admissions Test(MCAT) are administered by Educational Testing Services. The ACT Assessment is administered by American College Testing, Law Services administers the Law School Admissions Test (LSAT).

[258] *See generally*, Nicholas Lemann, *Behind the SAT*, Book Expert, Adapted from "*The Big Test: The Secret History of the American Meritocracy*," September 6, 1999 at 52; *A Measurement of What? Although 'Reliably Constant,' Experts Say Standardized Test Scores Are Often Misunderstood*, Black Issues in Higher Education, September 4, 1997, at 18; Susan Strum and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 CALIFORNIA L. REV. 953, 957 (1996). ("Typical among the existing criteria and selection methods are paper-and-pencil tests, such as the Scholastic Assessment Test (SAT), the Law School Admissions Test (LSAT), and civil service exams. These tests, which are used to predict future performance based on existing capacity or ability, do not correlate with future performance for most applicants, at least not as a method of ranking those 'most qualified.' These tests and informal criteria making up our 'meritocracy' tell us more about past opportunity than about future accomplishments on the job or in the classroom.").

[259] *See generally*, SYLVIA HURTADO AND CHRISTINE NAVIA, RECONCILING COLLEGE ACCESS AND THE AFFIRMATIVE ACTION DEBATE, IN AFFIRMATIVE ACTION'S TESTAMENT OF HOPE: STRATEGIES FOR A NEW ERA IN HIGHER EDUCATION 105 (1997).

[260] *See* Sex and Race Differences on Standardized Tests: Oversight Hearings before the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, One Hundredth Congress, First Session on Sex and Race Differences on Standardized Tests, April 23, 1987, Serial No. 93.

Guide."[261] This guidebook provides educational institutions with a framework to insure that their use of standardized admissions tests conform with the anti-discrimination mandates of Title VI of the Civil Rights Act of 1964. The guidebook provides, in pertinent part, that "the use of any educational test which has a significant disparate impact on members of any particular race, national origin, or sex is discriminatory."[262] This initial draft guidebook required educational institutions to justify their use of standardized admissions tests as "educationally necessary," and further provided that the institutions establish that no "practical alternative" for increasing the number of racial minorities and women was available.[263] The Department of Education received considerable criticism from Congress, testing services, and educational institutions regarding the proposed guidelines.[264] In response to concerns raised during Congressional hearings on the matter, the Department of Education agreed to modify the guidelines to "conform to existing law."[265] Although this issue appears resolved at the moment, unresolved questions remain about the exclusion of racial and ethnic minorities from access to avenues of higher education.

2. Narrow tailoring

As discussed in Section IV.B.1. above, Congress must initially find evidence of either past discrimination or the present effects of past discrimination in the field of higher education. Such a finding would support a finding of a compelling state interest sufficient to justify the facial as well as applied use of race-based remedies. Thereafter, the federal entity charged with developing a race-based remedial affirmative action program would be responsible for insuring that the scope of the remedy be narrowly tailored to specifically address the problems identified by the Congressional findings.[266]

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[261] Amy Dockser Marcus, *Standardized Test Guide Could Lead to Lawsuits*, WALL STREET J., May 5, 26, 1999, at A2.

[262] *Id.*

[263] *Id.*

[264] Patrick Healy, *Education Dept. Official tells Congress Guidelines on Testing Won't Burden Colleges*, Chron. Higher Educ., July 2, 1999 at A30; Jeffrey Selingo, *Colleges urge civil-rights office to revise guidelines on testing*, Chron. Higher Educ., July 23, 1999, at A58.

[265] In her testimony on June 22, 1999, before the House Subcommittee on Oversight and Investigation of the House Committee on Education and the Workforce, Norma V. Cantu', Assistant Secretary for Civil Rights, stated that "[w]e will make the language clear to conform to existing law . . . yes, the language will change." Statement of Norma V. Cantu', Assistant Secretary for Civil Rights, Before the House Subcommittee on Oversight and Investigations of the House Committee on Education and the Workforce, June 22, 1999. After receipt of comments from interested educators, testing services, and the public, the OCR will issue a final version of the guidebook in Fall, 1999.

[266] Rothe Development Corp. v. US DOD, 49 F. Supp. 2d 937 (W.D. Texas 1999).

> The three post-*Adarand* cases that have addressed the question of whether the federal government's SBA-based remedial program was

Supreme Court precedent does offer guidance in this area. In *United States v. Paradise*,[267] the Court developed a set of objectives that must be considered when evaluating whether racial classifications are narrowly tailored enough to overcome the strict scrutiny of the equal protection paradigm. In *Paradise*, Justice Brennan articulated the following narrow tailoring standard:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability or waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.[268]

The notion that strict scrutiny is "fatal in fact" is never more apparent than when searching for a race-based remedial program
capable of withstanding the challenge that the program does not conform to the narrow tailoring component of the equal protection paradigm. However, until such time as Congressional findings indicate that present effects of past discrimination continue to impact the field of higher education, a thorough discussion of ways in which a program

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> narrowly tailored to its purpose have unanimously agreed that it is not. Each of these courts held, however, that the Government had a compelling purpose in acting. The Court is troubled by the implicit suggestion in these opinions that, while the federal government may be given more deference than state and local governments in articulating a compelling purpose for remedial action, it must nonetheless be rigidly held to the standards set forth in *Croson*, a case involving the actions of a municipality, if it is to show that its action is narrowly tailored to that purpose. If Congress is to be allowed a broad vision of the nation's problems, it seems only logical that it be allowed some measure of deference in addressing those problems. In other words, there must be some relationship between the breadth of the problem to be remedied and the breadth of the remedy to be allowed. Strict application of the *Croson* criteria, without consideration of Congress's role in addressing issues that face the nation as a whole, will almost inevitably result in the invalidation of congressional remedial measures. Such automatic invalidation would render strict scrutiny "strict in theory; fatal in fact," a result that the Supreme Court has explicitly rejected.

Adarand Constructors v. Pena, 515 U.S. 200, 237 (1995); *See also,* Sherbrooke Sodding Co., 17 F.Supp.2d 1026 (D. Minn. 1998); Cortez III Service Corp. v. NASA, 950 F.Supp. 357 (D.D.C. 1996); Adarand Constructors v. Pena, 964 F.Supp. 1556 (1997), *judgment vacated and remanded with directions to dismiss*, 163 F.3d 1292 (10th Cir. 1999).

[267] United States v. Paradise, 480 U.S. 149 (1987).

[268] *Id*. at 171.

might be narrowly tailored is premature.

V. CONCLUSION

At this juncture in the evolution of the Equal Protection Clause the Court finds itself at an impasse. Although the application of the strict scrutiny test fosters a sense that the constitution is a racially neutral document, this interpretation remains in opposition to the realities of the American social and political framework. Questions remain regarding whether there is a causal link between the continuing effects of discrimination and the minimal number of racial and ethnic minorities enrolled in institutions of higher education. In addition, the ability of pubic and private actors to implement race-based remedial measures remains a constitutional mystery. While we wait for that "perfect" affirmative action test case to work its way up to the Supreme Court, the viability of race-based affirmative action programs is questionable. Unfortunately, we have run out of time and can no longer wait for a judicial solution when equally viable avenues of relief are available.

That this is an issue of national importance is not subject to dispute. It is the very nature of this national issue which calls for a remedial solution that is both national in scope and mandated by the provisions of the constitution. Treating the question of the viability of race-based affirmative action programs as a political, not solely judicial issue is one important step toward finding an overarching, expedient remedy that could exist within the constitutionally permissible parameters of the strict scrutiny analysis.