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THE REHNQUIST COURT AND THE SEARCH FOR EQUAL JUSTICE*

The Honorable J. Harvie Wilkinson III†

The Supreme Court's struggles with racial division in America are subject to a special form of judgment. The verdict on the Court's work in the area of race will not be pronounced by an academic circle of court-watchers, or by the legal profession at large, or even by the broader audience of public opinion. The Court in the area of race will almost assuredly be judged by history. Future generations of Americans will want to know whether the Rehnquist Court got the big questions right.

Was the Rehnquist Court right on race or was it wrong? It seems on the surface an oversimplified question, much too crude for the subtle and sophisticated dissection we normally give the Court's work. And yet the Justices themselves must be acutely aware that race has played so large and so tragic a role in American history that the efforts of each generation of jurists to deal with it will in the end warrant the broadest and most sober measure of historical judgment. Most of us today are not interested in the doctrinal progressions of *Dred Scott v. Sandford*¹ or *Plessy v. Ferguson*.² We only know at this point in time that the Supreme Court got those two cases terribly wrong and that *Brown v. Board of Education*³ was supremely right.

Before passing judgment, however, we must first ask exactly what the Rehnquist Court has done in the area of race relations. The first part of this article describes the guiding principle of racial justice that has emerged from the Rehnquist Court. I then proceed to ask why that time-honored principle has proved so controversial in present day debates. Finally, I address whether the Rehnquist Court's chapter in the story of American race relations is likely to prove a lasting one. Will it continue to hold sway on the Court? Will it—should it—stand the test of time?

I

The guiding principle of the Rehnquist Court's race cases has been the non-

* Copyright © THE REHNQUIST COURT: FAREWELL TO THE OLD ORDER IN THE COURT? (Martin H. Belsky, ed. Oxford University Press, 1999 forthcoming). This remark is a revised and expanded version of a presentation delivered at the Rehnquist Court Conference at the University of Tulsa College of Law on Sept. 16, 1998.

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1. 60 U.S. (19 How.) 393 (1857).
2. 163 U.S. 537 (1896).
3. 347 U.S. 483 (1954).

discrimination principle. All racial classifications, no matter which race is burdened or benefitted, are presumptively unconstitutional. All must be subject to the most searching scrutiny. This principle emerged only during the Rehnquist Court. Previously, the Court drew distinctions among race-based remedies, approving some as “benign,” “remedial,” or even “necessary,” while striking down others. Although the Burger Court set in motion a tentative retreat from the excesses of past race-based policies, it is the Rehnquist Court that will be remembered for first developing a unitary non-discrimination principle, applicable to all governmental racial classifications.

The Court’s modern race jurisprudence can be traced through three phases. The first stretches roughly from the *Green v. County School Board* (1968)⁴ decision to *Fullilove v. Klutznick* (1980).⁵ The Court’s impatience with southern school desegregation efforts during the decade of the 1960s led it to approve race-based remedies. In these decisions, the Court measured progress towards racial equality through the use of numerical racial benchmarks.⁶ The second phase was marked by cases such as *Firefighters Local Union No. 1784 v. Stotts* (1984)⁷ and *Wygant v. Jackson Board of Education* (1986).⁸ With these decisions, the Court began a qualified retreat from its past approval of race-based remedies. It limited the use of racial preferences by insisting on findings of identified discrimination practiced by the specific governmental unit utilizing racial classifications. The third phase, which began in 1989 with the *City of Richmond v. J.A. Croson Co.*⁹ decision, marked the full emergence of the Rehnquist Court’s non-discrimination principle. During this period, the Court has condemned all use of race, equating benign racial classifications with all other forms of discrimination.¹⁰

During the first phase of the Court’s modern race jurisprudence, the approval of explicit race-based remedies was commonplace.¹¹ Frustrated by more than a decade of delay in the implementation of the *Brown II* mandate that school desegregation proceed with “all deliberate speed,”¹² the Court itself began to review desegregation remedies in southern states.¹³ Race-neutral policies were marked by an absence of results, and thus precipitated judicial orders for race-based remedies. In *Green v. County School Board* (1968),¹⁴ the Court considered just such a race-neutral “freedom of choice” plan.¹⁵ New Kent County, Virginia permitted any

4. 391 U.S. 430 (1968).

5. 448 U.S. 448 (1980).

6. *See id.* at 456-92; *Green*, 391 U.S. at 438-41.

7. 467 U.S. 561 (1984).

8. 476 U.S. 267 (1986).

9. 488 U.S. 469 (1989).

10. *See id.* at 504-08.

11. *See id.* at 476-77.

12. *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

13. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION 380-401 (1994); J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION 1954-1978, 78-127 (1979).

14. 391 U.S. 430 (1968).

15. *Id.* at 438-41.

student in the county to choose which of the county's two schools to attend.¹⁶ The Court rejected that remedy, paying close attention to the numbers.¹⁷ It observed that under New Kent's plan, eighty-five percent of the county's black children and no white children attended the previously all-black school.¹⁸ The statistics emboldened the Court to hold that affirmative, race-conscious action was necessary to achieve any meaningful amount of integration.¹⁹

Following the lead established by the *Green* decision, the Court actively endorsed the remedial use of race. In *North Carolina State Board of Education v. Swann* (1971),²⁰ the Court again faced a statute constructed in a race-neutral fashion: no student could be assigned to a school because of that student's race.²¹ The Court rejected the statute and called for a specific race-based response:

[T]he statute exploits an apparently neutral form to control school assignment plans by directing that they be "color blind"; that requirement, against the background of segregation, would render illusory the promise of *Brown v. Board of Education*. Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy.²²

In fact, the Court in this period approved trial court desegregation remedies which relied heavily on racial numbers. For example, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971),²³ the district court judge required the defendant school board to undertake efforts to achieve a seventy-one to twenty-nine ratio of white-to-black children in the individual schools, a ratio reflective of the white and black student populations.²⁴ The Court held the use of "mathematical ratios" to be a "useful starting point in shaping a remedy to correct past constitutional violations."²⁵

Although the modern movement toward affirmative action programs arose from this impatience with school desegregation in the South, the Court extended its

16. *See id.* at 431-32.

17. *See id.* at 441.

18. *See id.*

19. *See id.* at 437-38.

20. 402 U.S. 43 (1971).

21. *See id.* at 44-45.

22. *Id.* at 45-46 (citation omitted); *see also Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 28 (1971) ("'Racially neutral' assignment plans proposed by school authorities to a district court may be inadequate; such plans may fail to counteract the continuing effects of past school segregation . . .").

23. 402 U.S. 1 (1971).

24. *See id.* at 6, 23.

25. *Id.* at 25; *see also North Carolina State Bd. of Educ.*, 402 U.S. at 46 (explaining that "some ratios are likely to be useful starting points in shaping a remedy").

The Court, however, did not accord blind deference to the use of racial numbers in school desegregation remedies. For example, in *Milliken v. Bradley*, 418 U.S. 717 (1974), the Court rejected a district court remedy which was premised largely on the belief that "Detroit schools could not be truly segregated . . . unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole." *Id.* at 740. The Court found the remedy to be overexpansive because it included numerous school districts for which no findings of de jure segregation, or even segregative effects, had ever been made. Thus, although the Court in *Swann* approved of the use of mathematical ratios, the *Milliken* decision was a reminder that desegregation "does not require any particular racial balance." *Id.*

attachment to numbers beyond that limited context. In *Griggs v. Duke Power Co.* (1971),²⁶ the Court found that testing devices used by private employers would most often be declared unlawful when they resulted in a numerical disparity among the races.²⁷ Only those tests that bore a demonstrable relationship to job performance would pass muster under Title VII of the 1964 Civil Rights Act.²⁸ Race-by-numbers appeared in the Court's voting rights decisions too. In *United Jewish Organizations of Williamsburgh, Inc. v. Carey* (1977),²⁹ in separate opinions, the Court upheld the use of racial criteria in a New York legislative redistricting scheme.³⁰ Justice White explained in his plurality opinion that the use of "specific numerical quotas in establishing a certain number of black majority districts" did not violate the Equal Protection Clause.³¹ "[T]he creation of substantial nonwhite majorities in approximately 30% of the senate and assembly districts in Kings County was reasonably related to the constitutionally valid statutory mandate of maintaining nonwhite voting strength."³²

In the next term, in a decision which shaped the future of higher education in this country, the Court countenanced the use of race as a criterion for admissions decisions. In *Regents of the University of California v. Bakke* (1978),³³ the Court—again in a series of separate opinions—found unlawful a racial quota system. Yet the *Bakke* decision is perhaps best remembered for its holding, as expressed in Justice Powell's decisive opinion, that race could be considered as a plus factor by a university seeking to achieve diversity within its student body.³⁴ Justice Brennan, writing for four of the five Justices who comprised the majority on this second aspect of the Court's holding, wrote:

[T]his should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.³⁵

The separate opinions of the fractured Court in *Bakke* raised questions about the legality of numerical set-aside programs outside the realm of education. The

26. 401 U.S. 424 (1971).

27. *See id.* at 436.

28. *See id.* at 435.

29. 430 U.S. 144 (1971).

30. *See id.* at 145.

31. *Id.* at 162 (White, J., plurality opinion).

32. *Id.* at 163 (White, J., plurality opinion).

33. 438 U.S. 265 (1978) (Powell, J., Opinion of the Court).

34. *Id.* at 271-72 (Opinion of Powell, J., announcing the Judgment of the Court); *id.* at 317 (Powell, J., Opinion of the Court).

35. *Id.* at 325. Justice Powell, who was the crucial fifth Justice comprising the majority on the second aspect of the Court's holding, wrote: "In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin." *Id.* at 320.

Court's next decisions, regarding both private employment and public contracting, put such doubts to rest. In *United Steelworkers of America v. Weber* (1979),³⁶ the Court once again approved a numerically race-based remedy.³⁷ Specifically, the Court rejected a white steelworker's Title VII challenge to an employer's affirmative action plan which reserved fifty percent of the places in an in-plant craft-training program for blacks until such time as the percentage of black craft workers in the plant approximated the percentage of blacks in the local labor force.³⁸ And the very next term, in *Fullilove v. Klutznick* (1980),³⁹ the Court approved a federal minority business enterprise (MBE) program requiring at least ten percent of all federal funds for local public works to be used by grantees to procure goods or services from MBEs.⁴⁰ In a plurality opinion stressing the deference owed by the Court to Congress as a remedial actor, Chief Justice Burger wrote: "[W]e reject the contention that in the remedial context the Congress must act in a wholly 'color-blind' fashion."⁴¹

This early race-based jurisprudence was of course premised on the existence of a biracial society. The solutions approved in these cases were viewed as attempts to rectify centuries of injustices perpetrated against African Americans by white society. For example, in commenting on Title VII in the *Weber* decision, the Court noted:

It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had "been excluded from the American dream for so long," constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.⁴²

As such, the race-based actions of governments and private employers were seen as responses to the discrimination which manifested itself in each area of American society, whether it was the children's schools or the adult workplace. But as the Burger Court wound down, and perhaps because America faced a multiracial—rather than biracial—future, the Court began to rein in the excesses of the race-based solutions it had previously endorsed.

A common theme in the Court's second phase of modern race decisions was an insistence on proof of specific discrimination by the government institution involved as a prerequisite to any remedy drawn in racial terms. For example, this principle surfaced in *Firefighters Local Union No. 1784 v. Stotts* (1984).⁴³ There, a consent decree had been entered in a class action Title VII suit that required the Memphis Fire Department to fill fifty percent of job vacancies with qualified black candidates.⁴⁴ No

36. 443 U.S. 193 (1979).

37. *See id.* at 200-08.

38. *See id.* at 197.

39. 448 U.S. 448 (1980).

40. *See id.* at 448, 492.

41. *Id.* at 482 (Burger, C.J., plurality opinion).

42. *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) (citation omitted).

43. 467 U.S. 561 (1984).

44. *See id.* at 566.

findings of actual discrimination on the part of the department or the city were made by the district court.⁴⁵ When City budget deficits forced the fire department to reduce staff through its neutral “last hired, first fired” policy, the district court enjoined layoffs because of their discriminatory effects.⁴⁶ The Supreme Court, however, found the injunction to be an inappropriate exercise of the district court’s power because the most recently hired black employees, protected from dismissal by the court’s order, had never been proven to be victims of discrimination.⁴⁷ “[M]ere membership in the disadvantaged class is insufficient to warrant a seniority award; each individual must prove that the discriminatory practice had an impact on him.”⁴⁸ The Court in *Stotts*, however, grounded its decision in the limits on a district court’s power to modify a consent decree.⁴⁹ It did not consider whether the voluntary adoption of a plan for race-based layoffs would be constitutional.⁵⁰

The Court faced that question two years later in *Wygant v. Jackson Board of Education* (1986).⁵¹ There, a Court majority, writing in separate opinions, held the race-based layoff policy unconstitutional.⁵² The school board alleged that it had a legitimate interest in employing minority teachers to serve as role models for minority students.⁵³ Because this interest rested on societal discrimination, the plurality—in an opinion authored by Justice Powell—rejected it:

No 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 findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.⁵⁴

Although the Court did not demand strict color-blindness in the laws, the non-discrimination principle was beginning to take shape.⁵⁵

This slowly developing principle, so often articulated in individual and plurality opinions, finally emerged with the blessing of a Court majority during Chief Justice Rehnquist’s third term as the leader of the Court.⁵⁶ The third phase of the Court’s

45. *See id.* at 567.

46. *See id.*

47. *See id.* at 579.

48. *Id.*

49. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 587 (1984).

50. *See id.* at 583.

51. 476 U.S. 267 (1986).

52. *See id.*

53. *See id.* at 274.

54. *Id.* at 276 (Powell, J., plurality opinion).

55. *See id.* at 280-81 (Powell, J., plurality opinion); *id.* at 287 (Opinion of O’Connor, J.).

56. Some early analyses of the Rehnquist Court’s decisions in the area of race relations are in CHARLES FRIED, *ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT* 89-131 (1991); DAVID G. SAVAGE, *TURNING RIGHT: THE MAKING OF THE REHNQUIST SUPREME COURT* (1992); and JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 17-81 (1995). For a thoughtful review of the race discrimination cases of the Rehnquist Court’s first five years, see Brian K. Landsberg, *Race and the Rehnquist Court*, 66 *TUL. L. REV.* 1267 (1992).

modern race jurisprudence began with *City of Richmond v. J.A. Croson Co.* (1989).⁵⁷ As in *Fullilove*, the Court again considered a minority set-aside public contracting program—but this time enacted by a city government.⁵⁸ The Court struck down the Richmond set-aside, and articulated several important elements of the non-discrimination principle.⁵⁹ First, all racial classifications must be examined under strict scrutiny, regardless of the race of the persons benefitted or burdened by the program.⁶⁰ Second, only particularized findings of identified discrimination can support a race-based, governmental remedy: “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.’”⁶¹ Last, even when findings of identified discrimination provide a compelling remedial interest, government’s “outright racial balancing” through a “rigid numerical quota” system cannot be deemed narrowly tailored to that interest.⁶²

Despite the certainty with which the non-discrimination principle was announced in *Croson*, it was immediately dealt a setback in the very next term. In *Metro Broadcasting, Inc. v. FCC* (1990),⁶³ the Court upheld two FCC minority preference policies. The Court reasoned that *Croson* could not control in this case since it involved a city program, not one approved by Congress.⁶⁴ Free from *Croson*’s constraints, the Court announced a demonstrably less rigorous standard of review:

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.⁶⁵

The Court also declared the correction of minority underrepresentation in broadcasting and the achievement of programming diversity to be important governmental objectives.⁶⁶ Understandably, the coexistence of *Croson* and *Metro Broadcasting* resulted in profound uncertainty for lower courts considering the constitutionality of race-based affirmative action programs.

Such doubt was finally dispelled, and the non-discrimination principle

57. 488 U.S. 469 (1989).

58. *See id.* at 477.

59. *See id.* at 493-511.

60. *See id.* at 493-94 (O’Connor, J., joined by Rehnquist, C.J., White, and Kennedy, JJ., plurality opinion); *id.* at 520 (Scalia, J., concurring opinion).

61. *Id.* at 498 (Opinion of the Court) (quoting *Wygant*, 476 U.S. 267, 275 (Powell, J., plurality opinion)).

62. *Id.* at 507-08 (Opinion of the Court).

63. 497 U.S. 547 (1990).

64. *See id.* at 565-66.

65. *Id.* at 564-65.

66. *See id.* at 566.

announced in its clearest and strongest form, six years later in *Adarand Constructors, Inc. v. Peña* (1995).⁶⁷ There, the Court considered race-based presumptions in federal contract awards. The Court reiterated that the most searching standard of review would be applied to laws creating “benign”⁶⁸ as well as invidious distinctions.⁶⁹ It further held that the equal protection component of the Fifth Amendment—as applied to the federal government—requires nothing less than does the Equal Protection Clause of the Fourteenth Amendment—as applied to the states.⁷⁰ The Court then announced that all racial classifications employed by any level of government are suspect: “[W]e hold today that *all* racial classifications, imposed by *whatever* federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”⁷¹ To the extent that *Metro Broadcasting* was inconsistent with such a holding, and to the extent *Fullilove* required that federal racial classifications be reviewed more indulgently, they were both overruled.⁷²

While the emergence of the non-discrimination principle can best be discerned in the public contracting cases, the Rehnquist Court rejected racial classifications just as strongly in the voting rights context. The Court’s decision in *Shaw v. Reno* (1993)⁷³ illustrates this point. There the Court considered a redrawn majority-minority congressional district of “dramatically irregular shape.”⁷⁴ The three-judge district court in North Carolina had rejected petitioners’ equal protection claim, holding that “majority-minority districts have an impermissibly discriminatory effect only when they unfairly dilute or cancel out white voting strength.”⁷⁵ The Supreme Court rejected that cramped reading of its precedent, holding that one may state a claim under the Equal Protection Clause by alleging that a reapportionment scheme is “so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.”⁷⁶ Additionally, the Court held that such racial gerrymanders must be subject to strict scrutiny, even when the district lines were drawn to favor the minority.⁷⁷ The *Shaw* Court thus advanced the non-discrimination principle by recognizing that racial segregation of voters is a pernicious act in itself, independent of any diluting effects the practice might have.

Since *Shaw*, the Rehnquist Court has only strengthened its resolve in the face of obvious racial gerrymandering. In *Miller v. Johnson* (1995),⁷⁸ the Court rejected as unconstitutional a Georgia congressional district that was redrawn with race as the

67. 515 U.S. 200 (1995).

68. *Id.* at 225 (quoting *Metro*, 497 U.S. at 564).

69. *See id.* at 225-26.

70. *See id.* at 225-26, 235.

71. *Id.* at 227 (emphasis added); *see id.* at 224.

72. *See id.* at 227, 235.

73. 509 U.S. 630 (1993).

74. *Id.* at 633.

75. *Id.* at 638.

76. *Id.* at 658.

77. *See id.* at 650-51.

78. 515 U.S. 900 (1995).

predominant motivating factor.⁷⁹ The Court reaffirmed that the assignment of voters on the basis of race must be subject to strict scrutiny and to the extent *United Jewish Organizations v. Carey* dictated otherwise, it was no longer deemed controlling.⁸⁰ One term later, the Court handed down *Shaw v. Hunt* (1996)⁸¹ and *Bush v. Vera* (1996)⁸² on the same day. In *Shaw v. Hunt*, the Court considered the same serpentine North Carolina district that had been at the center of the earlier *Shaw v. Reno* decision.⁸³ It found the racially contrived district did not satisfy the requirements of strict scrutiny.⁸⁴ The Court, with Chief Justice Rehnquist writing, reminded state legislatures that there must be a specific finding of “identified discrimination” in order to show a compelling interest for a race-conscious remedy:

A generalized assertion of past discrimination in a particular industry or region is not adequate because it “provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.” Accordingly, an effort to alleviate the effects of societal discrimination is not a compelling interest.⁸⁵

In *Bush v. Vera*, the Court, in a series of separate opinions, found several oddly-shaped Texas voting districts to have been drawn with race as the predominant motivating factor.⁸⁶ Applying strict scrutiny, the Court once again struck down the racial gerrymander as unconstitutional. In her plurality opinion, Justice O’Connor pointedly rejected a view of American voters as “mere racial statistics.”⁸⁷

Bush v. Vera underscores problems the Rehnquist Court might have envisioned with race-based remedies in a multicultural society. The challenged Texas districts reflected racial gerrymandering in extreme detail. Each racial subgroup sought a voice for itself and refused to accept the challenge of coalition building outside its own group. Indeed the state’s own Voting Rights Act proposal had noted that the black community felt it “was necessary to assure its ability to elect its own Congressional representative *without having to form coalitions with other minority groups.*”⁸⁸ In two of the other three districts at issue, the Court observed that the highly irregular district lines were drawn so as to separate “Hispanic voters from African-American voters on a block-by-block basis[.]”⁸⁹ Apparently, party leaders had agreed to create a safe Hispanic seat while at the same time preserving an adjacent safe African American seat.⁹⁰ Undoubtedly, the Court feared the effects of

79. *See id.*

80. *See id.* at 914-15.

81. 517 U.S. 899 (1996).

82. 517 U.S. 952 (1996).

83. *See Hunt*, 517 U.S. at 901.

84. *See id.* at 906-07.

85. *Id.* at 909-10 (citations omitted).

86. *See Bush v. Vera*, 517 U.S. at 972-76 (O’Connor, J., plurality opinion); *see id.* at 996 (Kennedy, J., concurring); *see id.* at 999 (Kennedy, J., concurring).

87. *Id.* at 985 (O’Connor, J., plurality opinion).

88. *Id.* at 969 (O’Connor, J., plurality opinion) (emphasis added).

89. *Id.* at 975 (O’Connor, J., plurality opinion).

90. *See id.*

such racial division in our nation's multicultural politics: "Our Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive governmental use and reinforcement of racial stereotypes. We decline to retreat from that commitment today."⁹¹

Yet another area in which the Rehnquist Court forcefully applied the non-discrimination principle involved the exercise of peremptory challenges of jurors. *Batson v. Kentucky*,⁹² decided in the last term of the Burger Court, held that a criminal defendant could lodge an equal protection challenge to the prosecution's use of peremptory challenges to dismiss potential jurors on the basis of their race.⁹³ In three decisions, the Rehnquist Court expanded the equal protection principle. First, in *Powers v. Ohio* (1991),⁹⁴ the Court held that a criminal defendant may object to the race-based exclusion of jurors regardless of whether he or she is a member of the same race as the excluded jurors.⁹⁵ Then, in *Edmonson v. Leesville Concrete Co.*,⁹⁶ the Court extended *Batson* beyond the criminal context.⁹⁷ *Edmondson* held that the Equal Protection Clause also forbids private litigants in civil cases from using peremptory challenges to exclude jurors on account of race.⁹⁸ And finally, in *Georgia v. McCollum* (1992),⁹⁹ the Court held that the Equal Protection Clause precludes not only the state, but also a criminal defendant, from exercising peremptory challenges on the basis of race.¹⁰⁰

In these cases, the party defending its peremptory juror strikes often argued that the challenges were necessary in order to purge racial animus from the jury pool. The Court's response to this argument in *Edmonson* was typical:

[I]f race stereotypes are the price for acceptance of a jury panel as fair, the price is too high to meet the standard of the Constitution. Other means exist for litigants to satisfy themselves of a jury's impartiality without using skin color as a test. If our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury.¹⁰¹

By expanding the *Batson* principle beyond the criminal context and beyond those cases where the defendant shares the same race as the excluded jurors, the Court recognized the universal harm of racial discrimination in the jury selection process

91. *Id.* at 985-86 (O'Connor, J., plurality opinion) (citations omitted).

92. 476 U.S. 79 (1986).

93. *See id.* at 96-98.

94. 499 U.S. 400 (1991). Just last term, the Court extended *Powers* to the grand jury context, holding that a white defendant had "standing to raise an equal protection challenge to discrimination against black persons in the selection of his grand jury." *Campbell v. Louisiana*, 118 S. Ct. 1419, 1424 (1998).

95. *See id.* at 416.

96. 500 U.S. 614 (1991).

97. *See id.* at 631.

98. *See id.* at 628-29.

99. 505 U.S. 42 (1992).

100. *See id.* at 55.

101. *Edmonson*, 500 U.S. at 630-31.

and condemned all forms equally.¹⁰²

As the Rehnquist Court applied the non-discrimination principle in the juror selection context to expand *Batson's* reach, it was willing to read Title VII of the 1964 Civil Rights Act aggressively so as to expand its coverage. In the 1970s, with the decisions in *Griggs* (1971) and *Weber* (1979), the Burger Court had interpreted Title VII forcefully to encourage race-by-the-numbers. But the Rehnquist Court occasionally read Title VII to allow more plaintiffs to vindicate their interests in the non-discrimination principle.¹⁰³ Before *Robinson v. Shell Oil Co.* (1997)¹⁰⁴ it was anything but clear that a former employee would be covered by Title VII. However, in *Robinson* the Rehnquist Court held exactly that, thereby expanding to former employees the reach of the non-discrimination principle embodied in Title VII's language.¹⁰⁵

The Rehnquist Court's embrace of the non-discrimination principle was not limited to race. First, in *Romer v. Evans* (1996),¹⁰⁶ the Court invalidated an amendment to the Colorado Constitution, achieved via a statewide referendum, that "prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect homosexual persons."¹⁰⁷ The non-discrimination principle existed to prevent singling out "homosexuals, but no others,"¹⁰⁸ from the protection of the laws.¹⁰⁹ Invoking Justice Harlan's admonition from his *Plessy* dissent that the Constitution "neither knows nor tolerates classes among citizens,"¹¹⁰ the Court found the Colorado amendment unsupported by any rational basis.¹¹¹ The amendment was, in the words of Justice Kennedy, "inexplicable by anything but animus toward the class that it affects."¹¹²

102. The Court also extended the non-discrimination principle in this area beyond the context of race. In *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994), the Court held that "gender, like race, is an unconstitutional proxy for juror competence and impartiality." *Id.* at 129.

103. It should be noted that the Rehnquist Court also interpreted Title VII to counter directly the race-by-numbers results in *Griggs v. Duke Power Co.*, 401 U.S. at 434 (1971), and *United Steelworkers of America*, 443 U.S. at 194. In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the Court held, *inter alia*, that a mere showing of racial imbalance in a work force is insufficient to make out a case of disparate impact. Plaintiffs must also demonstrate that a specific employment practice has created the disparate impact. *See id.* at 656-57. The decision also clarified the proper placement of burdens of proof in disparate impact cases and expanded the grounds for affirmative defenses. *See id.* at 658-60. These latter aspects of the *Wards Cove* opinion were overruled by the Civil Rights Act of 1991 § 105, 42 U.S.C. § 2000e-2(k). Congress, however, appears to have accepted the portion of the Court's holding rejecting mere racial imbalance as insufficient proof of disparate impact. *See id.* § 2000e-2(k)(1)(A)(i).

104. 519 U.S. 337 (1997).

105. Relying in part on Title VII precedents, the Court similarly expanded the reach of the Age Discrimination in Employment Act of 1967 (ADEA) in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). There, the Court held that an employee discharged in violation of ADEA is not barred from all relief when the employer subsequently discovers evidence of wrongdoing that would have led to the employee's discharge on lawful grounds. *See id.* at 356-57. And, in *Bragdon v. Abbott*, 118 S. Ct. 2196 (1998), the Supreme Court confirmed the broad reach of the Americans with Disabilities Act of 1990, holding that infection with asymptomatic human immunodeficiency virus (HIV) constituted a disability under the Act. *See id.* at 4610.

106. 517 U.S. 620 (1996).

107. *Id.* at 624.

108. *Id.* at 627.

109. *See id.* at 627-28.

110. *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

111. *See id.*

112. *Romer v. Evans*, 517 U.S. 620, 632 (1996).

The strength of the non-discrimination principle outside the race context was again evident in *United States v. Virginia* (1996).¹¹³ There, the Court required Virginia's venerable military institution, VMI, to admit women to its ranks.¹¹⁴ It was the purpose of the non-discrimination principle to sweep away stereotypical class assumptions, in this case that women were unfit for the rigors of military education.¹¹⁵ The Court was unpersuaded by Virginia's arguments in favor of the single-sex institution, especially the belief that admission of women would compromise the "adversative" training method practiced at VMI for years. Justice Ginsburg wrote: "Surely that goal [of producing citizen-soldiers] is great enough to accommodate women, who today count as citizens in our American democracy equal in stature to men."¹¹⁶ In both *Romer* and *Virginia*, the Court addressed the distinctions as simple forms of discrimination indefensible under the Constitution's equal protection mandate.¹¹⁷

As this history shows, the emergence of the non-discrimination principle in the Court's race jurisprudence was anything but certain. Initially a majority approved of—and now a strong and tenacious minority holds out for—the use of race-based preferences to remedy our nation's shameful history of discrimination. But the lesson the Rehnquist Court took from this history was clear: Race must have no place in public life. And if government does utilize race, it must have a powerful reason to do so in order to satisfy the requirements of our Constitution. This principle developed only through the most closely divided decisions. It occupies, therefore, a potentially transitory position in American law. It is yet uncertain whether the Rehnquist Court's triumph will be of a permanent nature, or only an interlude between Courts allowing for a race-based America.

II

Why did the non-discrimination principle prove so controversial? It was, after all, a standard that Congress had fashioned in the Civil Rights Act of 1964¹¹⁸ and one that appeared to have won broad acceptance in American life. And yet, as we have seen, the attempts to invoke it provided some of the most divisive battles on the Rehnquist Court. Interestingly, Justices of all persuasions took issue with it. In the contract set-aside and voting rights cases, it was the more liberal justices who protested the application of the non-discrimination principle.¹¹⁹ And in the decisions on peremptory jury strikes and those on women's and gay rights, it was the conservative justices who raised their voices in dissent.

113. 518 U.S. 515 (1996).

114. *See id.* at 577-78.

115. *Id.* at 540-46.

116. *Id.* at 545.

117. *See id.* at 547-48; *Romer*, 517 U.S. at 635-36.

118. 42 U.S.C. § 2000e (1964).

119. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952 (1996) (Stevens, J., dissenting); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

I believe the controversy over the non-discrimination principle can be traced to one overriding concern. When a Rehnquist Court majority invoked the principle, it did so in an activist fashion. The principle of race neutrality (or of sexual equality) was generally summoned to strike down the enactments of the democratic branches of government. Whether it was a city council ordinance as in *J.A. Croson Co.*,¹²⁰ or a legislative redistricting plan as in *Miller v. Johnson*,¹²¹ or a statewide referendum as in *Romer v. Evans*,¹²² the Court served notice that the exercise of popular sovereignty would not protect discriminatory acts.

The dissenters on the Rehnquist Court thus donned the mantle of judicial self-restraint. The dissenters in *Romer* protested that the Court majority was choosing sides in the culture wars of politics, that it was invalidating even the “modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores”¹²³ by enacting an amendment to their state’s constitution.¹²⁴ Dissenters in the voting rights cases complained of the Court majority’s intrusion into the intensely political exercise of legislative redistricting. “I am certain only,” wrote Justice Stevens in *Bush v. Vera*, “that bodies of elected federal and state officials are in a far better position than anyone on this Court to assess whether the Nation’s long history of discrimination has been overcome”¹²⁵ Also, the dissenters in *Croson* complained that the Court would not even allow elected bodies the leeway to redress America’s history of racial injustice.¹²⁶ “The majority’s unnecessary pronouncements,” Justice Marshall lamented, “will inevitably discourage or prevent governmental entities, particularly [s]tates and localities, from acting to rectify the scourge of past discrimination.”¹²⁷

The Rehnquist Court thus invoked the powerful constitutional principle of non-discrimination to override the normal dictates of federalism and of judicial self-restraint. The question that its record on race poses is a stark one: should the states and the democratic branches of the federal government be allowed to experiment with race-based (or sex-based) solutions to social problems? The Rehnquist Court majority rather regularly answered this question “No.” This supposedly conservative Court turned suddenly activist when the popular branches of government sought to draw invidious distinctions. Sometimes the discrimination was alleged to be benign, as with race-based affirmative action programs.¹²⁸ Sometimes it was said to be justified by federal statutes such as the Voting Rights Act.¹²⁹ Sometimes the discrimination was alleged to be blessed by tradition, as with Virginia Military Institute’s long history of all-male military training.¹³⁰ And sometimes it was said to

120. 488 U.S. 469 (1989).

121. 515 U.S. 900 (1995).

122. 517 U.S. 620 (1996).

123. *Id.* at 636. (Scalia, J., dissenting).

124. *See id.*

125. 517 U.S. 952, 1041 (Stevens, J., dissenting).

126. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 529 (1989) (Marshall, J., dissenting).

127. *Id.*

128. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

129. *See Bush v. Vera*, 517 U.S. 952 (1996).

130. *See United States v. Virginia*, 518 U.S. 515 (1996).

represent the voice of the people themselves, as in Colorado's statewide referendum on gay rights.¹³¹ None of this mattered to the Rehnquist Court. Discrimination was discrimination, and even popular majorities had no right to practice it.

The Rehnquist Court's judicial activism in support of the non-discrimination principle stands in contrast to the Burger Court's more passive stance. On occasion, as in *United Steelworkers of America v. Weber*,¹³² the Burger Court exercised restraint with respect to racial goals set by the private sector. The Burger Court also practiced restraint, however, with respect to racial preferences adopted by the democratic branches of government. Its decision in *Fullilove v. Klutznick*¹³³ represented, perhaps, the apogee of judicial restraint in the face of race-based government action. In his plurality opinion, Chief Justice Burger continually returned to a theme of "appropriate deference"¹³⁴ to Congress: "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."¹³⁵ Although the pattern is not altogether clear-cut,¹³⁶ the Burger Court was more apt than the Rehnquist Court to invoke traditional maxims of judicial restraint to uphold the exercise of race-based action.

The question is whether the Rehnquist Court's activism on behalf of the non-discrimination principle was justifiable. On the one hand, it will be argued that racial justice is the most combustible issue in all of American politics and that its very volatility suggests that the Court should leave it alone. Democracy is generally better suited to handling hot potatoes than the courts because it allows the fullest array of citizens and viewpoints to be heard and because it is more adept at acts of compromise. Thus, the argument runs, the profound differences on race in America should be resolved in the political arena. Whether race-based remedies are necessary to redress the tragic errors of American history or whether they represent only the newest form of an old iniquity is said to be the essential political question.

Was it even necessary for the Rehnquist Court to intervene on behalf of color blindness? There was no shortage of political proposals to curb affirmative action. In 1995, sponsors in the House and Senate introduced the Equal Opportunity Act,¹³⁷ a bill which prohibited the intentional discrimination or granting of preferences on the basis of race, color, national origin, or sex with respect to federal contracting, employment, or other programs.¹³⁸ This legislation was reintroduced in virtually the

131. See *Romer v. Evans*, 517 U.S. 620 (1996).

132. 443 U.S. 193 (1979).

133. 448 U.S. 448 (1980).

134. *Id.* at 472 (Burger, C.J., plurality opinion).

135. *Id.* at 483 (Burger, C.J., plurality opinion).

136. Sometimes the Burger Court upheld far-reaching remedial decrees in school desegregation cases, see e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and invalidated employment tests that failed to admit sufficient numbers of minorities into the private work force. See e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

137. S. 1085, 104th Cong. (1995); H.R. 2128, 104th Cong. (1995).

138. See *id.*

same form as the Civil Rights Act of 1997.¹³⁹ The most celebrated effort to curtail racial preferences—the California Civil Rights Initiative of 1996 (CCRI)¹⁴⁰—won 54 percent of the statewide vote. Shortly after that vote, federal district judge Thelton Henderson (N.D. Cal.) invalidated the referendum on the grounds that the CCRI violated both the Equal Protection Clause’s guarantee of equal access to the political process and the Supremacy Clause because the CCRI was preempted by Title VII of the Civil Rights Act of 1964.¹⁴¹ The decision, later reversed on appeal,¹⁴² was widely decried as judicial activism at the time: “A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.”¹⁴³ A troubling question remains, however: If Judge Henderson’s efforts to preserve affirmative action from the political sword were judicial activism, then what of the Rehnquist Court’s efforts to end it?

There is a strong argument that the Rehnquist Court should have stayed its hand and allowed the political process to play itself out. History has not been kind to conservative interventionism as the assessments of the Court’s *Lochner* and anti-New Deal eras amply attest. In intervening on behalf of the non-discrimination principle, the Rehnquist Court majority took an enormous historical risk. Future historians might conclude that in restricting racial preferences the Court blocked yet again the efforts of African Americans and other minorities to enter not only the ranks of the learned professions but also the mainstream of American life. Such fears recurred when the Fifth Circuit, acting in the case of *Hopwood v. Texas*,¹⁴⁴ pushed the Supreme Court’s color-blind principle to its limits and helped precipitate a dramatic drop in minority enrollments in several of the nation’s most prestigious law schools.¹⁴⁵ At the University of Texas School of Law, only ten black students were admitted for the 1997-98 academic year, compared to sixty-five in the year before.¹⁴⁶ Similar drops occurred in the University of California law schools, where a Board of Regents resolution ending racial and gender preferences took effect.¹⁴⁷ Admissions of black students dropped from 104 to 21 at the UCLA School of Law and from 75 to 14 at UC Berkeley.¹⁴⁸ One Berkeley law professor was quoted as saying, “It’s so stunning it’s almost unbelievable. . . . What do we think? The leading public university in the most diverse state and the most diverse educational system is going to just withdraw behind some siege wall and be a white institution? It’s preposterous.”¹⁴⁹

It is not clear, however, that the judgment on the Rehnquist Court should rest

139. S. 950, 105th Cong. (1997); S. 952, 105th Cong. (1997); H.R. 1909, 105th Cong. (1997).

140. Proposition 209, California Civil Rights Initiative (enacted as CAL. CONST. art. I, § 31).

141. See *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491 (N.D. Cal. 1996), *vacated*, 110 F.3d 1431 (9th Cir.), *amended on denial of reh’g* by 122 F.3d 692 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

142. See *Wilson*, 122 F.3d 692 (9th Cir.), *cert. denied*, 118 S. Ct. 397 (1997).

143. See *Wilson*, 110 F.3d at 1437.

144. 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S.1033 (1996).

145. *The Cold Truth About Racial Preferences*, WASH. TIMES, July 29, 1997, at A16.

146. See *id.*

147. See *id.*

148. See *id.*

149. Peter Applebome, *Minority Numbers Plunge at Some Law Schools After Affirmative Action Banned*, SUNDAY PATRIOT-NEWS (Harrisburg), June 29, 1997, at A13 (quoting Professor Marjorie Shultz).

on the short-term movement of racial statistics. Notwithstanding the force of the argument against judicial activism on affirmative action, I believe the Rehnquist Court was correct and courageous to pursue the course it did. The case for intervention cannot be clinched in terms of the framers' original intent or in the intimative language of the Fifth and Fourteenth Amendments. Rather, the legitimacy of the Rehnquist Court's course rests on the Court's own precedent, namely the *Brown* decision itself. *Brown* stood for something so simple and so luminous that it will shine forever—namely the principle that public bodies may not draw distinctions based on race. If we are human beings in the sight of God and American citizens in the eyes of the law, then lines drawn on race should have no place. It was just such lines, of course, that *Brown* condemned. That decision is not just another "precedent." Rather, like *Marbury v. Madison*,¹⁵⁰ it has become a constitutional principle in itself, as basic to American life as amber waves of grain.

It may be forlorn to hope that race can be purged from a society whose psyche it has permeated for so long. In a myriad of informal ways, public decision-makers will, with the best and worst of intentions, take account of race. But should the law sanction and encourage such a course? Of course not. Without the law as a rein on race-based decisions, the use of race will proceed at a gallop. And without law as a break, citizens will resort to race-based rhetoric with alacrity, plunging public discourse into a toxic state. The fact that race may be a natural venom is not an argument for preferences. Rather, it is all the more reason for courts to stand vigilant against the use of it.

The Rehnquist Court thus rightly sensed that the ecumenical standard of citizenship must remain the ideal. The fact that the ideal of race neutrality may remain imperfectly achieved hardly means that America abandons the quest. To its credit, the Rehnquist Court did not retire while the country organized its political life, its educational institutions, its public entitlements, and its employment practices along racial lines. A course of constitutional inaction would have done much to ensure that race remained embedded as the foundation of American life. With *Brown*, the Warren Court had taken the lead in dismantling-discrimination. Whether Congress would have summoned the courage to act without the Court's example remains a matter of much doubt. Similarly, with such cases as *Croson* and *Adarand*, the Rehnquist Court emboldened those who sought to embody the non-discrimination principle through referendum or in legislation. Without the Court's constitutional example, the political process might once again have lost heart.

It is useful at this point to examine the character of the civil rights litigation reaching the Rehnquist Court. It is a matter of no small moment that *Brown* was a southern case. For the South had a more intimate acquaintance with a society organized along racial lines than any other region. Those segregated street cars, schools, and water fountains defied the American dream in every sense. More than three decades after the *Brown* decision, many of the civil rights cases reaching the

150. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Rehnquist Court continued to come from the South.¹⁵¹ In part, this was attributable to the fact that section 5 of the Voting Rights Act¹⁵² covers primarily southern states and their political subdivisions. Thus, major cases pertaining to congressional and state legislative redistricting came from Florida,¹⁵³ Georgia,¹⁵⁴ North Carolina,¹⁵⁵ and Texas.¹⁵⁶ In these cases, plaintiffs often claimed that districts were unconstitutionally drawn on the basis of race while the governmental entities defending them protested that the Department of Justice refused to approve anything but plans which created racially safe seats.¹⁵⁷ The voting rights cases were not the only ones to emerge from the South. Other decisions, such as *Croson*, reflected the region's continuing efforts to come to terms with its history of racial discrimination, while still others, such as *United States v. Virginia*, reflected the region's more traditional outlook on sexual mores.

By the time of the Rehnquist Court, the South's struggle with issues of race was hardly unique. Yet how one sees the southern experience is important in how one views the Rehnquist Court and race. One lesson people draw from those bleak days of southern segregation is that we must spend our national life atoning for the wrongs of the past and remediating its effects. Under this view, as Justice Marshall argued, the debt to the oppressionist past remains an unpaid one:

[R]acial classifications drawn for the purpose of remedying the effects of discrimination that itself was race based have a highly pertinent basis: the tragic and indelible fact that discrimination against blacks and other racial minorities in this Nation has pervaded our Nation's history and continues to scar our society.¹⁵⁸

One can respect this view, but it is assuredly not the view that the Rehnquist Court took of the southern experience. Its view drew more on the inherent evils of race as an organizing legal principle. The tragedy of southern life was that race demeaned everyone—those who took advantage of segregated arrangements as well as those who were the victims of them. Racial segregation threatened to suffocate all the better angels of our nature—our need for personal freedom, individual opportunity, and a communal life based upon mutual regard and respect.

The movement to race-based preferences threatened to recreate this whole dismal state of affairs. It promised to resurrect the worst instincts of the Old South. The Rehnquist Court moved to prevent America from coming full circle, from returning to race as its organizing principle. It understood better than most that race

151. See, e.g., *United States v. Fourdice*, 505 U.S. 717 (1992) (Mississippi); *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (Virginia).

152. Voting Rights Act of 1965, 42 U.S.C. §1973(b) (1998).

153. See *Lawyer v. Department of Justice*, 117 S. Ct. 2186 (1997); *Johnson v. DeGrandy*, 512 U.S. 997 (1994).

154. See *Abrams v. Johnson*, 117 S. Ct. 1925 (1997); *Miller v. Johnson*, 515 U.S. 900 (1995).

155. See *Shaw v. Hunt*, 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630 (1993).

156. See *Bush v. Vera*, 517 U.S. 952 (1996).

157. See *Abrams v. Johnson*, 117 S. Ct. at 6-7; *Lawyer v. Dep't of Justice*, 117 S. Ct. at 2189, 2192; *Shaw v. Hunt*, 517 U.S. at 905, 914; *Bush v. Vera*, 517 U.S. at 957, 960-61; *Miller v. Johnson*, 115 U.S. at 903, 906-07; *Johnson v. DeGrandy*, 512 U.S. at 1000, 1002; *Shaw v. Reno*, 509 U.S. at 644.

158. *Croson*, 488 U.S. at 552 (Marshall, J., dissenting).

as an element of public life would bring great rancor and little respite: “The dangers of such [racial] classifications are clear,” wrote Justice O’Connor. “They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.”¹⁵⁹ The evils of the race-based regime—the injustices to those rejected, the stigmatization of those preferred, and the dehumanization of both the favored and the scorned—would not be permitted to recur. The Rehnquist Court thus declined to permit this historic instrument of demagoguery and division to chart a course for twenty-first century America. For the Rehnquist Court, the southern past did not speak principally of guilt and reparation. Rather, it laid bare the dangers of a race-based regime.

Many of the race cases which came before to the Rehnquist Court not only bore a southern stamp. They tended, more often than not, to arise in the familiar context of black-white relations. To be sure, the occasional case would evidence emerging friction between African Americans and other racial or ethnic minorities. For example, in *Johnson v. DeGrandy*,¹⁶⁰ the Court considered the competing efforts of Black and Hispanic voters to maximize the electoral districts each group controlled in Dade County, Florida. Similarly, the voting districts at issue in *Bush v. Vera* were drawn specifically to avoid competition between, and thereby guarantee safe seats for, black and Hispanic candidates. But by and large, the Rehnquist Court plaintiffs were African Americans alleging employment discrimination,¹⁶¹ contesting the adequacy of school desegregation remedies,¹⁶² and seeking representation in Congress and state legislatures, or on civil juries. Or, as in *Taxman v. Board of Education*¹⁶³ and *Shaw v. Reno*,¹⁶⁴ the plaintiffs were whites challenging remedial employment preferences or majority-minority districts created for blacks. Either way, the battleground tended to feature the traditional combatants of biracial America. If one were to look only at the Supreme Court cases, one would be led to believe that racial tension in America remained predominantly a matter of black and white.

That impression, however, ignores the dazzling demographic changes taking place in America during the time of the Rehnquist Court. According to the Census Bureau, the foreign-born population—most recently estimated at 9.3 percent of the total population—is at its highest level since the 1930s.¹⁶⁵ More than one-quarter of this segment hails from one country—Mexico—while another quarter comes to the United States from Asia.¹⁶⁶ In addition to Mexico, members of foreign-born populations most often claim the Philippines, China, Cuba, and India as their

159. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 603 (O’Connor, J., dissenting).

160. 512 U.S. 997 (1994).

161. *See, e.g.*, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *overruled in part* by Civil Rights Act of 1991, § 101(2)(b), 42 U.S.C. § 1981(b); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

162. *See, e.g.*, *United States v. Fourdice*, 505 U.S. 717 (1992).

163. 91 F.3d 1547 (3d Cir. 1996) (en banc), *cert. granted*, 117 S. Ct. 2506, *cert. dismissed*, 118 S. Ct. 595 (1997).

164. 509 U.S. 630 (1993).

165. *See* Kristin A. Hansen & Carol S. Faber, *U.S. Bureau of the Census, Current Population Reports P20-494, The Foreign-Born Population: 1996*, at 1 fig.1 (1997).

166. *See id.* at 2 tbl.A.

birthplace.¹⁶⁷ Surging immigration helps explain this phenomenon. The Immigration and Naturalization Service reports that legal immigration to the United States increased by twenty-seven percent from 1995 to 1996, with most new immigrants being Latin American or Asian arrivals.¹⁶⁸ “We’ve never had this kind of diversity before, and neither has anybody else,” comments Loyola University sociologist Philip Nyden.¹⁶⁹

New America will only become more diverse. The Census Bureau projects that the non-Hispanic white population will be only a bare majority in 2050, and that America will have no racial or ethnic majority sometime thereafter.¹⁷⁰ Already, Hawaii and New Mexico do not have either a racial or ethnic majority, and California should follow suit by the year 2000.¹⁷¹ By 2010, the Hispanic population, projected to be 13.8 percent of the total population, is expected to outnumber the black population, which is projected to be 13.5 percent.¹⁷²

New America’s diversity is recognizable outside the statistics too. President Clinton recently noted that five school districts in the United States each serve over 100 racial and ethnic groups.¹⁷³ Detroit holds an annual Latino film festival and Seattle enjoys a Latino literary scene.¹⁷⁴ Houston, which has experienced substantial growth in its Asian American population, is experiencing “a profusion of mini-Chinatowns.”¹⁷⁵ In addition to its two older Chinatowns, the Texas city now has a “booming” Vietnam town, a Korean town, and a growing Cambodian community.¹⁷⁶ America’s diversity is not restricted to the major metropolis. The Hispanic population of Durham, North Carolina has grown from a few thousand to approximately 12,000 persons in the past year.¹⁷⁷ There is a significant Hispanic workforce in Omaha, Nebraska; Garden City, Kansas; and in Arkansas.¹⁷⁸ America’s multicultural status is visible from sea to shining sea.

The question, of course, is what direction this new multicultural country will take. Immigration adds vitality and variety to America, as it always has. It is possible that New America will become a land of unprecedented economic power and cultural diversity, a mighty universal nation that the world has not heretofore seen.

167. *See id.*

168. *See* Melissa Healy, *Changes in Law Lead to 27% Hike in Legal Immigration*, L.A. TIMES, Apr. 23, 1997, at A4.

169. Heather Dewar, *U.S. in 50 Years—Not Black or White, but Everything Else*, HOUSTON CHRONICLE, Apr. 27, 1997, at 1 (quoting Philip Nyden).

170. *See* Jennifer C. Day, *Current Population Reports: Population Projections of the United States by Age, Sex, Race, and Hispanic Origin: 1995 to 2050*, at 13 & tbl. J (U.S. Bureau of the Census P25-1130, 1996); Jill Lawrence, *Political Battlegrounds of the Future*, USA TODAY, Aug. 8, 1997, at 6A.

171. *See* Lawrence, *supra* note 170, at 6A.

172. *See* Day, *supra* note 170, at 13 tbl.J.

173. *See* Lawrence, *supra* note 170.

174. *Morning Edition: U.S. Latinos* NPR radio broadcast, Aug. 11, 1997, available in Westlaw, MORNED File.

175. Bruce Nichols, *Taking Off: Houston’s Asian Communities Growing Rapidly*, DALLAS MORNING NEWS, June 29, 1997, at 45A (quoting Glenda Joe, a publicist and Asian community leader).

176. *See id.*

177. *See Morning Edition: Latinos in North Carolina* NPR radio broadcast, Aug. 15, 1997, available in Westlaw, MORNED File.

178. *See Morning Edition: U.S. Latinos*, *supra* note 174.

But there is another scenario. One-third of the new immigrants lack a high-school diploma; many do not speak English; and many reject the idea of assimilation as a call for “Anglo conformity.”¹⁷⁹ Thus, writes William Booth in the *Washington Post*, “the neighborhoods where Americans live, the politicians and propositions they vote for, the cultures they immerse themselves in, the friends and spouses they have, the churches and schools they attend, and the way they view themselves are defined by ethnicity.”¹⁸⁰ If diversity could make this a true land of destiny, we could also be witnessing what one scholar terms the “twilight of common dreams.”¹⁸¹

There is a curious disconnect between the rapid changes in the country and the docket of the Rehnquist Court. The odd thing is that the cases themselves often did not deal much with this emerging New America. The settings were quite frequently traditional, both in their regional flavor and in their bipolar racial perspectives. The debates on the Court itself seldom ventured onto the multicultural terrain or discussed the problems posed by unprecedented racial and ethnic diversity in New America. It is fair at least to ask whether the Court was caught in a sort of time-warp; where civil rights issues remained frozen in the tableau of that greatest of civil rights eras, the decade of the 1960s.

Herein lies the irony. It matters not that the Rehnquist Court failed to explore multiculturalism extensively in its decisions. It is not even critical that the Court declined to ask how the emergence of a New America should affect the law of civil rights. Without ever really plumbing these questions, the Rehnquist Court embraced the proper principle to guide a multiracial nation. If America was a changed nation, the principle itself was changeless—as timeless as Justice John Marshall Harlan’s reminder that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”¹⁸² That exhortation becomes more pertinent with the passage of time and the march of demographics. Indeed, it is inconceivable that a multiracial society could be constructed on anything other than transracial legal standards.

It is, in fact, the advent of American multiculturalism that will justify the course of the Rehnquist Court in the eyes of history. A race-based legal regime has even less to commend it in a multiracial nation than in a biracial society. According to the 1990 census, roughly one-half of native-born 25-34 year old Asian Americans and two-fifths of Hispanics married spouses of a different racial or ethnic group.¹⁸³ To have government benefits or electoral districts or school admissions or employment practices all turn on someone’s race will therefore present decision-makers with a

179. William Booth, *One Nation Indivisible: Is It History?*, WASH. POST, Feb. 22, 1998, at A1; William Branigin, *The Myth of the Melting Pot: Immigrants Shunning Idea of Assimilation*, WASH. POST, May 25, 1998, at A1.

180. Booth, *supra* note 179, at A18.

181. *Id.* (quoting Todd Gitlin, a professor of culture and communications at New York University).

182. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

183. See Glenn C. Loury, *Double Talk*, NEW REPUBLIC, Aug. 25, 1997, at 23. The Census Bureau’s Current Population Survey documents that, as of 1995, approximately 2.5 percent of our nation’s total married couples—over 1.3 million couples—are interracial. U.S. Bureau of the Census, *Interracial Married Couples: 1960 to Present* (last modified Sept. 20, 1996) <<http://www.census.gov/population/socdemo/ms-la/95his04.txt>>.

formidable classification problem. To devote prodigious efforts to devising the correct racial categorizations of American citizens is about as divisive an enterprise as it is possible to imagine. The new specialty of racial science would have many an odious historical pedigree. Whether an American citizen is two-fifths this or three-fourths that ought to be in the eyes of law a matter of supreme irrelevance. The more diverse America becomes, the more compelling the color-blind ideal remains.

The problems multiculturalism poses for race-based regimes do not end there. The Voting Rights Act has been read by the Department of Justice to require “[s]tates to create majority-minority districts wherever possible”¹⁸⁴ (a majority-minority district being one where there is at least a majority of minority voters). In a biracial political order, determining what constitutes a majority-minority district poses no special difficulty. In a multicultural society, the task can become quite complex. For example, must the minority voters in a majority-minority district all be of one minority? Or may we combine compatible minority interests for that purpose? How then do we determine which minority interests are compatible (and subject to combination) and which are antithetical? And just how broad is the definition of a minority interest supposed to be? May we lump all Hispanic Americans together as a single minority interest or must we recognize the different characteristics of the Mexican American, Cuban American and Puerto Rican American communities? State legislatures can hardly be expected to know the answers to all these questions, and when courts try to provide them, no end of racial animosity will result. Having the politics of New America run by such legal requirements of race guarantees our country a future of racial fragmentation. Surely the Rehnquist Court was correct to criticize the insistence of the Department of Justice on majority-minority voting districts and to reject the use of race as a predominant factor in redistricting.¹⁸⁵

Similarly, the administration of an affirmative action plan becomes more problematic within a multicultural setting. In the biracial context, whites had discriminated and blacks had been discriminated against. In our multicultural society, many racial or ethnic groups can lay claim to being victimized in the past, underrepresented in the present, or simply dispossessed. Although African Americans have experienced more discrimination than have other groups, it is difficult to premise group preferences on such matters of degree. Latinos and Asian Americans have their own grievances in this regard. Latinos still face widespread discrimination in areas such as employment, housing and education. “[M]ost Hispanics know—even if they have not experienced discrimination personally—that discrimination in this country is not dead. Its roots run as deep as the oil in Texas, and the legacy of discrimination still taints the lives of many Hispanics.”¹⁸⁶ Asian Americans can point

184. *Miller v. Johnson*, 515 U.S. 900, 925 (1995).

185. *See id.* at 920-27.

186. Mali Michelle Fleming, *The Faces of Discrimination*, HISPANIC, June 1994, at 22; *see also* 140 CONG. REC. S12,933 (1994) (statement of Sen. Riegle) (“It is estimated that one in every four Hispanic-American families lives in poverty. Only about half of the adults hold high school diplomas and fewer than 10 percent have graduated from college. And at a time when U.S. concern over illegal immigration is high, Hispanic-Americans are frequently the targets of racial discrimination.”). *Id.*

to a history of state-sponsored discrimination.¹⁸⁷ And despite being labeled the “model minority,” Asian Americans still suffer discrimination in terms of income, employment, and education.¹⁸⁸

How social planners will juggle all these claims for racial recompense is anything but clear. The real problem, however, is that there are such stark differences within groups that affirmative action plans habitually lump into the same preference category. For example, there are wide disparities between poor and middle-class African Americans. The Latino population can be divided between different nationalities and between recent immigrants and families who have been in the United States for many generations. Asian Americans also can be divided into an American-born and an increasingly foreign-born segment that includes Chinese, Filipinos, Japanese, Indians, Koreans, and Vietnamese, among others. One suspects, in fact, that the differences between individuals within the same racial group are as striking as the differences between individuals of different races. This being the case, an affirmative action plan cannot rest on the stereotypical assumption that members of a given racial or ethnic group in New America are, at least for purposes of preferences, the same.

In a multicultural setting, race becomes an impossible thicket. The Rehnquist Court thus typically expressed the ideal of race-neutrality in an unqualified fashion. The strict scrutiny of racial classifications, it held, was “not dependent on the race of those burdened or benefitted by a particular classification.”¹⁸⁹ Rather, all races would be governed by a single legal standard. Should an exception to this simple and sweeping pronouncement have been made for African Americans? Should preferences for this one group be revived under a less rigorous Fourteenth Amendment standard? It was, after all, African Americans whose path the Court blocked in the *Dred Scott* and *Plessy* decisions. And the legacy of injustice to this particular minority lingers to this very day. Glenn Loury has noted:

The race problem that deserves national attention concerns the bottom third of the black population, which is locked in ghettos at the center of our great cities and remains shut out from access to the engines of social mobility in our society. Consider that 42 percent of black children lived in poverty in 1995, a rate that has remained essentially unchanged for a quarter-century. And, while patterns of unwed childbearing among blacks are a principal cause of this depressing reality, the fact remains that a great many black youngsters never really have a chance to properly develop their God-given talents.¹⁹⁰

187. See Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943) (suspending immigration of Chinese laborers to the United States for 10 years); *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion order); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding curfew order).

188. 143 CONG. REC. S2619-20 (daily ed. Sept. 14, 1997) (statement of Sen. Akaka); see also Ann Scott Tyson, *Asian Americans Spurn Image as Model Minority*, CHRISTIAN SCI. MONITOR, Aug. 26, 1994, at 6.

189. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989)).

190. Loury, *supra* note 183, at 23.

Even conservative columnist Charles Krauthammer echoes that “opponents of affirmative action should not protest too loudly if the whole structure of preferences that has metastasized into mindless ‘diversity’ were dismantled and replaced with a simple single preference for the black underclass, the most bereft and isolated minority in America.”¹⁹¹

So the great piece of unfinished racial business in America pertains to the plight of the black underclass. One can accept the full truth and burden of that statement without believing that the Rehnquist Court should have honored racial preferences for black citizens alone. The squalor of the ghetto or the barrio or the reservation merits our attention as a matter of the human predicament, not as a question of race. The creation of opportunity must be a matter of national pride, not of racial guilt. Our moral obligations run to individuals, not to races. And our sense of patriotism encompasses all Americans who suffer the blight of hopelessness, be they white or brown or yellow or black. If in fact, the problems of poverty become no more than the problem of someone else’s race, they will soon become the subject of indifference and neglect. The race of the nine-year-old child in the urban ghetto may be different than our own. But his citizenship and his humanity are the same. A legal standard based on race stresses only the differences among Americans. Solving our problems requires those in political life to celebrate the ways in which we are the same.

The dangers of singling out African Americans for special treatment would not end there. Even though an objective assessment might confirm that the degree of disadvantage among blacks and discrimination against blacks as a group to be unique, many individual black citizens have had great advantages in America and many non-black citizens have suffered acute disadvantages and discrimination of their own. The greatest disservice, however, of a special equal protection standard would be to African Americans themselves. They would be marked as a group as special wards of the state. Their legitimate accomplishments would be wrongly tarnished by the widespread perception of special treatment. They would become objects of resentment from the rest of society, and the subject of stereotypical assumptions that would cause prejudice against them to endure. The Rehnquist Court was right to avert this tragedy and to impose race-neutrality in the law. “[A]ny person, of whatever race,” wrote Justice O’Connor for the Court in *Adarand*, “has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”¹⁹²

If the Rehnquist Court refused to qualify the color-blind ideal for African Americans, should it have varied the standard of review according to the context of a particular case? Are race-based preferences more justifiable, for example, in educational admissions than in employment? Should race-based discharges be subject to more rigorous scrutiny than race-based hiring on the theory that individuals depend more on the jobs they already have than on the ones they have yet to get? The

191. Charles Krauthammer, *Diversity Trap*, WASH. POST, Aug. 15, 1997, at A25.

192. *Adarand*, 515 U.S. at 224.

possibility that public employers might seek to achieve racial diversity in hiring but not in firing was set to come before the Court in the celebrated case of *Taxman v. Board of Education*.¹⁹³ There, Sharon Taxman, a white teacher in Piscataway, New Jersey, was dismissed instead of Debra Williams, an equally qualified and equally tenured black teacher, when the school board decided to reduce its staff.¹⁹⁴ The board relied on its affirmative action policy and Williams' race in retaining her instead of Taxman.¹⁹⁵ The purpose, however, of the race-based layoff was not to remedy past underrepresentation by blacks in Piscataway's teaching ranks, but instead to achieve diversity in the teaching staff.¹⁹⁶ The Third Circuit found this non-remedial use of race to violate Title VII.¹⁹⁷

Taxman became the Supreme Court case that never was. In November of 1997, in a surprising move, the NAACP Legal Defense and Educational Fund and other civil rights groups helped finance the case's settlement before the Court could even hear argument.¹⁹⁸ The groups contributed approximately seventy percent of the \$433,500 necessary to pay Taxman's back salary and legal costs.¹⁹⁹

Two important lessons can be drawn from the manner in which the *Taxman* case was resolved. First, the message of the Rehnquist Court rang loud and clear across the land: Few doubted the Court would reject the Piscataway school board's use of racial preferences in the context of employee layoffs and many feared it would announce an even broader principle of race neutrality applicable to personnel and school admissions decisions alike. A second lesson to be learned from the settlement is that the problem of race is a stubborn one; it cannot be solved by the Supreme Court alone. The *Taxman* case, although seemingly within reach of the Court, ultimately eluded it. And although the Supreme Court plays an important role in determining whether we will become a race-based society, the Court cannot chart our nation's path alone. Much will now depend on the actions of Congress and the response of the Executive Branch both as an employer and as a litigator. Much will also turn on the private sector itself, as admissions officers and corporate executives choose policies for selecting individuals to attend and represent their institutions. The truly relevant question thus becomes: What do we want as a nation?²⁰⁰

In the final analysis, the standard of race-neutrality is not one that can be easily qualified. The law rightly views many questions as ones of nuance and degree, but the wrongness of using race as a means of measuring human beings cannot be winked away. How can courts say that it is permissible to use race in this area but not that?

193. 91 F.3d 1547 (3d Cir. 1996), cert. granted, 117 S. Ct. 2506, cert. dismissed, 118 S. Ct. 595 (1997).

194. See *id.* at 1551.

195. See *id.*

196. See *id.* at 1563.

197. See *id.* at 1567.

198. See Joan Biskupic, *Rights Groups Pay to Settle Bias Case*, WASH. POST, Nov. 22, 1997, at A1.

199. See *id.*

200. I have tried to explore this question in my book *ONE NATION INDIVISIBLE: HOW ETHNIC SEPARATISM THREATENS AMERICA* (1997). The concern over the future of America's identity is certainly not mine alone. See, e.g., MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* (1995); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1991).

The poison of race, once admitted, will course through the veins of our national system. The need to reject race as a legal yardstick stems in large part from its contagious nature. The racial explanation for events and the racial justification for actions is one that is all too readily available for every American. To admit race in our public decisions is to gamble with our future as a nation. When our grandchildren celebrate the tricentennial, they will respect the Rehnquist Court for resisting the road to disunion.

