

A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia's Color-Blind Rule

James L. McAlister

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

James L. McAlister, *A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia's Color-Blind Rule*, 77 Marq. L. Rev. 327 (2009).

Available at: <http://scholarship.law.marquette.edu/mulr/vol77/iss2/5>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

COMMENTS

A PIGMENT OF THE IMAGINATION: LOOKING AT AFFIRMATIVE ACTION THROUGH JUSTICE SCALIA'S COLOR-BLIND RULE

I. INTRODUCTION

One Saturday, old friends, Judge Learned Hand and Justice Oliver Wendell Holmes, shared a ride in a coupe. At their destination, Holmes stepped down and walked away. Hand decided to goad his older friend. Hand called out, "Well, sir, good-bye. Do justice!" Holmes stopped, turned, and summoned Hand nearer. Hand drew close. "That is not my job," Holmes admonished. "My job is to play the game according to the rules."¹ In the area of benign racial classifications (affirmative action), the Supreme Court has, for a good number of years, been more concerned with achieving some amorphous concept of justice than playing by the constitutional and statutory rules.²

As both a law professor and a Supreme Court Justice, Antonin Scalia consistently criticized the Supreme Court's approach to benign racial classifications. Similarly, Scalia has forthrightly appealed for a race neutral standard for benign racial classifications. He stated that "there is only one circumstance in which the States may act *by race* to 'undo the effects of past discrimination': where that is necessary to eliminate their own maintenance of a system of unlawful racial classification."³

Part II of this Comment discusses the background to the constitutionality of benign racial classifications, which can conveniently be divided into three historical time periods. Part III juxtaposes upon that background Antonin Scalia's own thinking on the question of affirmative action, including his color-blind rule. Part IV argues that a rule of color-

1. HARRY C. SHRIVER, *WHAT GUSTO: STORIES AND ANECDOTES ABOUT JUSTICE OLIVER WENDELL HOLMES* 10 (1970).

2. The focus of this Comment, Section One of the Fourteenth Amendment, reads in part: 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.

U.S. CONST. amend. XIV, § 1.

3. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 524 (1989) (Scalia, J., concurring).

blindness for benign racial classification schemes is practical, anchored in sound legal principles, and morally and philosophically correct.

II. THE LEGAL BACKGROUND OF AFFIRMATIVE ACTION

The history of affirmative action law and the concept of color-blindness, at least for these purposes, can conveniently be divided into three time periods: 1896 to 1978, the pre-*Bakke* period; 1978, the year *Regents of the University of California v. Bakke*⁴ was decided; and 1978 to the present, the post-*Bakke* period.

A. 1896 to 1978: From *Plessy* to *DeFunis*

"The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."⁵

—Justice John Marshall Harlan

The Equal Protection Clause of the Fourteenth Amendment applies when states classify people and treat them differently on the basis of that classification. The meaning given the clause, and the standard of review courts have found within it, determine what state classifications and differences are constitutionally permissible. Traditionally, ordinary economic regulation that classifies people and things into groups has been evaluated under a highly deferential standard of review: "minimum rationality." Minimum rationality means a statute will *not* be stricken if it is conceivable that there is some *rational relation* between the means selected by the legislature and a *legitimate* public objective.⁶

At one time, classifications based on race or national origin also received this level of deference from the Supreme Court. The deference was most apparent in *Plessy v. Ferguson*.⁷ At issue in *Plessy* was the constitutionality of a Louisiana statute that segregated railroad cars.⁸

4. 438 U.S. 265 (1978).

5. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).

6. This standard has been expressed many times, in many similar ways. See, e.g., *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (upholding a New York City ban of advertising on vehicles). Today, this test is often expressed by quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961) (holding, inter alia, that a state Sunday closing law did not violate the Equal Protection Clause). "The constitutional safeguard [of the Fourteenth Amendment] is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *Id.* This expression of the minimum rationality standard is preferred by Chief Justice Rehnquist.

7. 163 U.S. 537 (1896).

8. *Id.* at 540.

The law was challenged on several grounds, one of which was that it violated the Equal Protection Clause.⁹ Seven members of the United States Supreme Court upheld the Louisiana statute, justifying their decision, in part, on a distinction between social and political equality.¹⁰ Blacks, the Court said, were guaranteed only political equality by the Fourteenth Amendment. “[The amendment] could not have been intended 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.*”¹¹

Justice Harlan, in his dissent, gave a simple reason for striking the statute: “Our Constitution is color-blind”¹² Based on this principle, Harlan regretted “the [Court’s] conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.”¹³

Harlan was a distant and largely unheeded voice by the time the Court again approached the issue of equal protection and non-economic classifications in two important and historic cases. In *Korematsu v. United States*¹⁴ and *Hirabayashi v. United States*,¹⁵ the Court faced governmental acts as invidiously and perniciously based on national origin as the regulation in *Plessy* was based on race. The impetus for both cases came from early American involvement in World War II.¹⁶ The United States government, fearful of an imminent Japanese attack on West Coast bases, imposed unprecedented restrictions on American citizens of Japanese ancestry.

In *Hirabayashi*, Chief Justice Stone, writing for a unanimous Court, upheld a military curfew for Japanese-Americans living on the West Coast.¹⁷ Nonetheless, Stone wrote, “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.”¹⁸

9. *Id.* at 543.

10. *Id.* at 544. Justice Brewer did not participate in the case. Justice Harlan was the lone dissenter.

11. *Id.* (emphasis added).

12. *Id.* at 559 (Harlan, J., dissenting).

13. *Id.* (Harlan, J., dissenting).

14. 323 U.S. 214 (1944).

15. 320 U.S. 81 (1943).

16. The United States Naval Base at Pearl Harbor, Hawaii, was bombed on December 7, 1941. President Roosevelt issued Executive Order No. 9066 on February 19, 1942. The actions taken pursuant to this Executive Order form the basis for both cases.

17. *Hirabayashi*, 320 U.S. at 105.

18. *Id.* at 100.

Likewise, in *Korematsu*, the Court let stand a military order excluding all persons of Japanese ancestry from certain areas of the West Coast.¹⁹ In the Court's opinion, Justice Black set the standard upon which the next half century of racial classification law would rest. Legal restrictions, Black wrote, that affect the civil rights of a single race or national origin are "immediately suspect."²⁰ Although not immediately unconstitutional, such restrictions are subject to "the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."²¹

Although it was not immediately apparent, *Korematsu* gave birth to a standard beyond the "minimum rationality" or "reasonableness" of the *Plessy* era—strict scrutiny. The standard worked as follows: classifications that *discriminated* against racial minorities or people of a certain national origin were inherently "suspect" and therefore subject to "strict scrutiny."²² To pass constitutional muster under the strict scrutiny test, a legislative classification would have to show a "compelling" interest advanced by "narrowly tailored" means.²³

The death knell for the prescriptive segregation at issue in *Plessy* and *Korematsu* sounded in *Brown v. Board of Education*.²⁴ In this famous case, the Court held segregation in public schools to be violative of the Fourteenth Amendment's guarantee of equal protection.²⁵ *Brown* was later used as a basis for striking down numerous state-sponsored classification schemes that segregated blacks and whites to the disadvantage of blacks.²⁶

19. *Korematsu*, 323 U.S. at 216.

20. *Id.*

21. *Id.* Justice Black is often cited as a champion of civil rights. Yet, he never renounced what may be his most savagely criticized and most anti-civil rights opinion. JAMES J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT 71 (1979).

22. JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.10(a)(1), at 655 (4th ed. 1991).

23. *Id.* This test is almost impossible to meet, *Korematsu* being an exception.

24. 347 U.S. 483 (1954). Realizing and enforcing "the promise of *Brown*" was a more difficult process for both the Court and an emerging civil rights movement buoyed by *Brown*. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (upholding a desegregation plan that involved busing within a metropolitan school district).

25. *Brown*, 347 U.S. at 495.

26. See, e.g., *Johnson v. Virginia*, 373 U.S. 61 (1963) (per curiam) (courthouses); *New Orleans City Park Improvement Ass'n v. Detiege*, 252 F.2d 122 (5th Cir.), *aff'd per curiam*, 358 U.S. 54 (1958) (parks); *Holmes v. City of Atlanta*, 223 F.2d 93 (5th Cir.), *vacated*, 350 U.S. 879 (1955) (golf courses); *Mayor of Baltimore v. Dawson*, 220 F.2d 386 (4th Cir.), *aff'd per curiam*, 350 U.S. 877 (1955) (beaches); *Gayle v. Browder*, 142 F. Supp. 707 (M.D. Ala.), *aff'd per curiam*, 352 U.S. 903 (1956) (buses). The rationale for striking down segregated public schools—that segregation had an adverse psychological effect upon black school children—

A few decades later, the constitutionality of affirmative action programs, that is classifications that *advantage* people on the basis of race or national origin, came before the Court. Affirmative action programs posed a constitutional dilemma distinct from *Brown* and its offspring. Segregated school systems clearly violated the Equal Protection Clause. Enforcing *Brown* deprived no one "of the right to an equal education or any other legal right."²⁷ On the other hand, affirmative action programs deny a legal right to some members of a racial *majority*.²⁸ As a result, the judicial standard of review used for such affirmative action programs became the issue.

The Supreme Court approached the issue tentatively. In *DeFunis v. Odegaard*,²⁹ the Court looked at the benign use of race in a minority admissions program for the University of Washington Law School. Although a "promising vehicle"³⁰ for resolution of the issue, the Supreme Court heard oral arguments and then vacated and remanded the case as moot because DeFunis would graduate regardless of the Court's decision.³¹ Justice Douglas did not think the case was moot and reached the merits.³² Douglas picked up the fallen standard of color-blindness that Harlan had once carried and berated affirmative actions programs in general and Washington Law School's program in particular. "There is no constitutional right for any race to be preferred. . . . There is no superior person by constitutional standards. . . . Whatever his race, [DeFunis] had a constitutional right to have his application considered on its individual merits in a *racially neutral manner*."³³

B. 1978: Bakke

"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 pro-

was supported by a number of studies. See *Brown*, 347 U.S. at 494 n.11. Since this rationale hardly seemed applicable to segregated public beaches, buses, golf courses, courthouses, and parks, the *Brown* opinion has been as roundly criticized as *Plessy*. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 75-76 (1990). Only the righteous core of the *Brown* decision saves it from total disgrace.

27. BERNARD SCHWARTZ, *THE NEW RIGHT AND THE CONSTITUTION* 155 (1990).

28. *Id.*

29. 416 U.S. 312 (1974) (per curiam).

30. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1046 (1978).

31. *DeFunis*, 416 U.S. at 319.

32. *Id.* at 320 (Douglas, J., dissenting).

33. *Id.* at 336-37 (Douglas, J., dissenting) (emphasis added).

tection, then it is not equal."³⁴

—Justice Lewis F. Powell

The Court in *DeFunis* predicted that another similar case involving affirmative action would present itself "with relative speed."³⁵ It did not have to wait long. In *Regents of the University of California v. Bakke*,³⁶ the plan in question was the Medical School of the University of California at Davis's reservation of sixteen seats in each entering class of one hundred for disadvantaged or minority students.³⁷ In a precursor of future affirmative action cases, the Supreme Court fractured severely. From the numerous opinions, the "holding" of *Bakke* may be summarized as follows: Five Justices found the Davis scheme violated Title VI,³⁸ while a different combination of five Justices held that race could be considered in the Davis admissions process.³⁹

Although he wrote for only himself, Justice Powell's opinion would eventually become the law.⁴⁰ Powell first concluded that the U.C. Davis scheme was "suspect," despite its *advantaging* of minority groups, because the Constitution and its guarantees run to the individual not groups. Powell stated: "[I]t 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"⁴¹

As a suspect classification, Powell analyzed the U.C. Davis plan under strict scrutiny and found it violated the Fourteenth Amendment.⁴² The medical school had advanced four goals as "compelling" interests,⁴³

34. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 289-90 (1978) (Powell, J.).

35. *DeFunis*, 416 U.S. at 319 (per curiam).

36. 438 U.S. 265 (1978).

37. *Id.* at 275.

38. Chief Justice Burger and Justices Powell, Stevens, Stewart, and Rehnquist all found the Davis plan violated Title VI. *Id.* at 421. Title VI generally prohibits racial discrimination in any program receiving federal financial assistance.

39. Justices Brennan, White, Marshall, Blackmun, and Powell agreed on this. As a model for race-conscious admission plans, Powell recommended the "Harvard College Admissions Program." *See id.* at 321 (appendix to opinion).

40. *Id.* at 269-324. There is a degree of irony in the fact that although Powell believed strict scrutiny should be the standard of review for benign racial classifications (as he stated in *Bakke*), only Powell's departure and the subsequent appointment of Anthony Kennedy in 1988 would solidify the five votes necessary to make this standard the law of the land. *See generally* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1988).

41. *Bakke*, 438 U.S. at 299 (Powell, J.).

42. *Id.* at 320 (Powell, J.).

43. The interests purportedly served were:

only one of which Powell found permissible—a diverse student body.⁴⁴ This interest was compelling because such a student body contributed to the robust exchange of ideas, enriched the medical training of students, and equipped students with understanding.⁴⁵

Next, Powell found the means selected by Davis to promote this interest wholly inadequate. The U.C. Davis plan was not sufficiently tailored to meet the diversity interest because a “special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.”⁴⁶

Justices Brennan, White, Marshall, and Blackmun coauthored a single opinion. This group of four found *no* Title VI violations.⁴⁷ The group also found *no* violation of the Constitution.⁴⁸ They added that the Constitution did not have to be color-blind.⁴⁹ Instead of using strict scrutiny, they applied a different constitutional standard of review, “intermediate scrutiny.”⁵⁰ In other words, a benign racial classification scheme must serve “important” governmental objectives and must be “substantially related” to the achievement of the objectives.⁵¹ The group decided that “Davis[s] articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs.”⁵² The second prong of intermediate scrutiny was also met because the plan did not stigmatize or single out either the minorities chosen or the whites rejected.⁵³

(i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,’ . . . (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Id. at 306 (Powell, J.).

44. *Id.* at 312 (Powell, J.).

45. *Id.* at 312-14 (Powell, J.).

46. *Id.* at 315 (Powell, J.).

47. *Id.* at 328 (Brennan, White, Marshall, & Blackmun, JJ.).

48. *Id.* at 325-26 (Brennan, White, Marshall, & Blackmun, JJ.).

49. *Id.* at 356, 362 (Brennan, White, Marshall, & Blackmun, JJ.).

50. *Id.* at 359 (Brennan, White, Marshall, & Blackmun, JJ.). The intermediate standard of review originated in gender discrimination cases. See *Craig v. Boren*, 429 U.S. 190 (1976). The four Justices justified the use of this standard because neither a presumption of constitutionality (minimum rationality) nor strict scrutiny applied to the benign use of race. *Bakke*, 438 U.S. at 360-62 (Brennan, White, Marshall, & Blackmun, JJ.).

51. This is a popular way to state this test, which has been fully articulated in other cases. See, e.g., *Craig*, 429 U.S. at 197-99.

52. *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall, & Blackmun, JJ.).

53. *Id.* at 374 (Brennan, White, Marshall, & Blackmun, JJ.).

Justice Stevens wrote the third major opinion.⁵⁴ Stevens disposed of the case by ruling that the U.C. Davis admissions program violated Title VI.⁵⁵ Stevens never reached the constitutional question of whether the Davis Plan violated the Fourteenth Amendment.⁵⁶

Beyond getting Allan Bakke admitted to medical school, *Bakke* resolved little. The divided *Bakke* court simply mapped out the territory upon which future Supreme Courts would do battle. Many questions remained unanswered, the most important of which was whether the standard of review for benign racial classifications would be strict scrutiny or the lesser standard, intermediate scrutiny.

C. 1978 to 1993: Weber to Croson and Beyond

"This dispute regarding the appropriate standard of review may strike some as a lawyers' quibble over words, but it is not."⁵⁷

—Justice Sandra Day O'Connor

Post-*Bakke* race-conscious affirmative action cases involve (1) attempted remedies for employment discrimination and (2) the preferential treatment of racial minorities in the award of public licenses or funds.⁵⁸ To oversimplify somewhat, affirmative action plans in recent cases were generally challenged on two grounds: under Title VII of the 1964 Civil Rights Act⁵⁹ or under the Fourteenth Amendment's guarantee of equal protection, or both.⁶⁰

54. *Id.* at 408 (Stevens, J.). Stevens was joined by Chief Justice Burger and Justices Stewart and Rehnquist.

55. *Id.* at 421 (Stevens, J.).

56. *Id.* at 412 (Stevens, J.).

57. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting).

58. GERALD GUNTHER, *INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW* 451 (5th ed. 1992).

59. Title VII of the Civil Rights Act of 1964 provides as follows:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1988); see also *id.* § 2000e-2(b)-(j).

60. Since the Fourteenth Amendment applies only to the states, federal benign racial classifications are challenged under the equal protection component of the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

1. Employment Discrimination

In *United Steelworkers of America v. Weber*,⁶¹ the Court held that “private, voluntary”⁶² affirmative action programs did not violate Title VII. An employer and a union had collectively bargained for a plan “that reserve[d] for black employees 50 [percent] of the openings in an in-plant craft-training program until the percentage of black craftworkers in the plant was commensurate with the percentage of blacks in the local labor force.”⁶³ Justice Brennan’s majority opinion rejected the plaintiff’s argument that Title VII should be read literally “to prohibit all race-conscious affirmative action plans.”⁶⁴ The statute’s language “must therefore be read against the background of the legislative history of Title VII and the historical context.”⁶⁵

In the years after *Weber*, the Supreme Court addressed what would be a recurring issue: an employer’s race-conscious layoff plan.⁶⁶ In *Wy-*

61. 443 U.S. 193 (1979). *Weber* has become quite unpopular with the Rehnquist Court. Two members of the Court have, on the record, declared that it should be overruled. See *Johnson v. Transportation Agency*, 480 U.S. 616, 669-77 (1987) (Scalia, J., dissenting) (joined by Rehnquist, C.J.).

62. *Weber*, 443 U.S. at 208. Plaintiff did not challenge the plan on the basis of the Fourteenth Amendment because there was no state action. *Id.* at 200.

63. *Id.* at 197.

64. *Id.* at 201.

65. *Id.* The history and legislative intent of Title VII, Brennan argued, show that Congress wanted to open employment opportunities for blacks. See, e.g., *id.* at 202-07.

Justice Rehnquist, joined by Chief Justice Burger, wrote a long and fervent dissent, accusing the majority of evading “clear statutory language, ‘uncontradicted’ legislative history, and uniform precedent” in order to reach its conclusion. *Id.* at 222 (Rehnquist, J., dissenting). This conclusion was clearly opposite of what Congress said that “no racial discrimination in employment is permissible under Title VII.” *Id.* at 230 (Rehnquist, J., dissenting).

This thought would be repeated a number of times by opponents of affirmative action plans. See Scalia’s dissent in *Johnson*, 480 U.S. at 657, where the court upheld an affirmative action plan that attempted to increase the hiring and promotion of women.

66. *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); see also *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (a layoff plan for public school teachers).

In *Stotts*, the city of Memphis entered into a consent decree with a number of black firefighters. *Stotts*, 467 U.S. at 565. Because the Court’s decision was devoid of any constitutional guidelines for affirmative action programs, it merits only brief mention here.

The decree’s purpose was to increase the hiring and promotion of minorities. *Id.* While it agreed to the consent decree, the city never admitted to, nor were there findings to the effect that the city had discriminated in the past in its hiring and promotion practices. *Id.* at 565, 583 n.16. A year or so after the decree, budgetary problems struck. When the city considered laying off some firefighters, the federal district court intervened. *Id.* at 566. After issuing a preliminary injunction, the district court approved a modified layoff plan for the city. *Id.* at 567. When executed, the effect of the modified plan was that in “certain instances . . . nonminority employees with more seniority than minority employees were laid off or demoted in rank.” *Id.*

The Supreme Court overturned the lower court’s order because it was not “a justifiable

gant v. Jackson Board of Education,⁶⁷ a school board and a teachers' union negotiated a collective bargaining agreement. The agreement stated that when layoffs were required, teachers with the most seniority would be retained "except that at no time [would] there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff."⁶⁸ Two years later layoffs were required. Adhering to the collective bargaining agreement, the school board laid off some white teachers who had more seniority than black teachers who were retained.⁶⁹ The white teachers sued.

The Court addressed whether a school board could, within the confines of equal protection, "extend preferential protection against layoffs to some of its employees because of their race or national origin."⁷⁰ A majority of the Supreme Court said no.⁷¹

Justice Powell's plurality opinion decided that the collective bargaining agreement was a "suspect" race-based classification favoring minorities and disfavoring whites.⁷² As he had for the racially disadvantaging scheme in *Bakke*, Powell applied the strict scrutiny standard.⁷³ Powell found the collective bargaining agreement unconstitutional because the ends forwarded by the school board were not compelling and the means were not narrowly tailored.⁷⁴

The school board set forth two goals of the agreement: providing minority role models and remedying past discrimination. Powell found neither compelling. The role model goal lacked a "logical stopping point."⁷⁵ The interest in remedying past discrimination, Powell stated, was compelling only in the face of *proof* of past discrimination.⁷⁶ The

effort to enforce the terms of the [consent] decree [or] . . . a legitimate modification of the decree. . . ." *Id.* at 583.

67. 476 U.S. 267 (1986).

68. *Id.* at 270 (Powell, J.) (quoting Article XII of the Collective Bargaining Agreement).

69. *Id.* at 272 (Powell, J.).

70. *Id.* at 269-70 (Powell, J.).

71. Justice Powell wrote the opinion, which Chief Justice Burger and Justice Rehnquist joined. Justices O'Connor and White concurred with Powell's opinion for their own separate reasons. Justice Marshall, joined by Justices Brennan and Blackmun, dissented, as did Justice Stevens.

72. *Wygant*, 476 U.S. at 273 (Powell, J.).

73. *Id.* at 273-74 (Powell, J.).

74. *Id.* at 283-84 (Powell, J.). Justice O'Connor found the plan's means adequate, but indicated that the board had "failed to isolate a sufficiently important governmental purpose." *Id.* at 293 (O'Connor, J., concurring). Similarly, Justice White could not find any of the board's asserted interests compelling. *Id.* at 295 (White, J., concurring).

75. *Id.* at 275-76 (Powell, J.).

76. *Id.* at 277 (Powell, J.).

board provided no such proof.⁷⁷ Powell then found the board's means "too intrusive" and "not sufficiently narrowly tailored."⁷⁸ In general, race-conscious layoff plans, Powell wrote, "impose the entire burden of achieving racial equality on particular [nonminority] individuals, often resulting in serious disruption of their lives."⁷⁹

Later, the Court took an approach very different from that in *Wygant*. It held that neither the Constitution nor Title VII prevented the implementation of race-conscious programs that benefit individuals who are *not* identified victims of prior discrimination.⁸⁰

In *Sheet Metal Workers' International v. EEOC*,⁸¹ a plurality of the Court held that a series of court orders did not violate the equal protection component of the Fifth Amendment due process clause or statutory law.⁸² After a series of cases and resultant court orders, a federal district court imposed a 29.23% minority membership goal on the union.⁸³ The union appealed the order through the lower courts.⁸⁴

Justice Brennan quickly disposed of the constitutional question. While recognizing the Court's failure to agree upon a standard of constitutional review, Brennan held that the plan in question passed even the

77. *Id.* at 278. Possibly seeing the error of their ways, the board was eager for the Supreme Court to grant another opportunity to prove prior discrimination.

78. *Id.* at 283 (Powell, J.).

79. *Id.* In dissent, Justice Marshall, joined by Justices Brennan and Blackmun, eschewed applying any constitutional standard of review. *Id.* at 296 (Marshall, J., dissenting). He concluded that the school board's plan "should not be upset by this Court on constitutional grounds." *Id.* at 312 (Marshall, J., dissenting). Justice Stevens dissented on different grounds. *See id.* at 313-20.

80. *Sheet Metal Workers' Int'l v. EEOC*, 478 U.S. 421 (1986); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986). Both cases were decided on July 2, 1986. *Sheet Metal Workers* dealt briefly with a constitutional challenge to a remedial court order. *See Sheet Metal Workers*, 478 U.S. at 479-81 (Brennan, J.). *Cleveland* involved a Title VII challenge.

81. 478 U.S. 421 (1986).

82. *Id.* at 444-81 (Brennan, J.). Portions of Brennan's opinion were joined by Justices Marshall, Blackmun, and Stevens.

83. *Id.* at 437. The union was found to have discriminated in the past against blacks and Hispanics. *Id.* at 428. Justice Powell emphasized the extraordinary nature of this case, "It would be difficult to find defendants more determined to discriminate against minorities." *Id.* at 485 (Powell, J., concurring).

84. In its decision, the Supreme Court first addressed the Title VII question. Title VII did not limit affirmative action programs to those that benefitted victims of past discrimination. *Id.* at 453 (Brennan, J.). These programs "may be appropriate where an employer or a labor union has engaged in persistent or egregious discrimination, or where necessary to dissipate the lingering effects of pervasive discrimination." *Id.* at 445 (Brennan, J.). As he had in *Weber*, Justice Brennan located Congress's intent in Title VII—not in the statute's plain language—but in the statute's legislative history and its historical context. *Id.* at 453-70 (Brennan, J.).

strictest scrutiny.⁸⁵ The interest of remedying prior discrimination was compelling,⁸⁶ and the court's orders were "properly tailored."⁸⁷

Justice Powell concurred and wrote separately on the constitutional matter. He applied the strict scrutiny standard and found that the plan passed it.⁸⁸ Neither Justice O'Connor nor Justice Rehnquist reached the constitutional question. O'Connor upheld the plan under Title VII⁸⁹—Rehnquist would have struck it under the same law.⁹⁰

The final employment discrimination case explicitly involving race⁹¹ was *United States v. Paradise*.⁹² After a lengthy battle in lower courts, this issue was presented to the Supreme Court: Whether it was permissible for a court to order relief "in the form of a one-black-for-one-white promotion requirement to be applied as an interim measure to state trooper promotions in the Alabama Department of Public Safety . . ." ⁹³ The Supreme Court answered yes and upheld the lower court's order. Justice Brennan's plurality opinion again noted the Court's failure to settle on the appropriate level of constitutional scrutiny for race-conscious affirmative action cases. However, the relief here satisfied even strict scrutiny.⁹⁴ The interest "in remedying past and present discrimination by a state actor" was found to be compelling.⁹⁵ And the one-for-one

85. *Id.* at 480 (Brennan, J.).

86. *Id.* (Brennan, J.).

87. *Id.* at 481 (Brennan, J.).

88. *Id.* at 485 (Powell, J., concurring). Eliminating the union's discriminatory practices was a compelling interest. The means used here were akin to a hiring goal that was found to be permissible in *Wygant*.

89. *Id.* at 489 (O'Connor, J., concurring).

90. *Id.* at 500 (Rehnquist, J., dissenting). On the same day, the Court decided *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 510 (1988), in which a group of black and Hispanic firefighters entered into a consent decree with the city to increase the promotion of minority firefighters. A union representing a majority of the city's firefighters objected to the decree.

The Supreme Court held six to three that nothing in Title VII prohibited the remedy of a *consent decree*. *Id.* at 515. Justice Rehnquist and Justice White wrote separate dissents. *Id.* at 530-45. The Court distinguished this case from *Sheet Metal Workers*: "[W]hether or not . . . [Title VII] precludes a court from imposing certain forms of race-conscious relief *after trial*, that provision does not apply to *relief awarded in a consent decree*." *Id.* at 515 (emphasis added).

91. In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the challenged plan sought to aid the promotion of minorities *and* women. However, the only issue for the Court was "whether in making the promotion [of a woman over a man] the Agency impermissibly took into account the sex of the applicants in violation of Title VII." *Id.* at 619. The Court's approach to benign gender classifications is beyond the scope of this Comment.

92. 480 U.S. 149 (1987).

93. *Id.* at 153 (Brennan, J.).

94. *Id.* at 167 (Brennan, J.).

95. *Id.* (Brennan, J.).

promotion was “an effective, temporary, and flexible” means.⁹⁶

In dissent, Justice O'Connor, joined by Chief Justice Rehnquist and Justice Scalia, insisted strict scrutiny must be the standard.⁹⁷ While she agreed with Justice Brennan that the ends were compelling,⁹⁸ she maintained that the remedy was not “narrowly tailored.”⁹⁹

2. Preferential Contracting and Licensing Programs

The next three cases involving federal and local preference programs for racial minorities in the distribution of public funds and licenses succinctly demonstrate how badly the Court was once split and how far it has come in forming a majority on the issue of affirmative action.

In *Fullilove v. Klutznick*,¹⁰⁰ at issue was a requirement in a congressional spending program that, absent an administrative waiver, mandated that ten percent of federal funds granted for local public works projects must be used by the state or local grantee to procure services from minority business enterprises (MBEs).¹⁰¹ A business was an MBE if minority group members had a controlling interest in the business.¹⁰² The statute further provided that a minority group member was a citizen of the United States who was Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut.¹⁰³ Nonminority contractors challenged this “minority set-aside” program on equal protection grounds. Although there was no majority opinion, the Supreme Court held the MBE provision did not violate the equal protection component of the Due Process Clause of the Fifth Amendment.¹⁰⁴

Chief Justice Burger's opinion—announcing the judgment of the Court—was joined only by Justices White and Powell. Burger clearly

96. *Id.* at 185 (Brennan, J.). In a separate opinion, Justice Powell analogized this case to *Sheet Metal Workers'* and upheld the plan as constitutional. *Id.* at 186 (Powell, J., concurring).

97. *Id.* at 196 (O'Connor, J., dissenting).

98. *Id.* (O'Connor, J., dissenting).

99. *Id.* at 197 (O'Connor, J., dissenting). “[T]he District Court imposed a racial quota without first considering the effectiveness of alternatives that would have a lesser effect on the rights of nonminority troopers.” *Id.* at 201 (O'Connor, J., dissenting).

100. 448 U.S. 448 (1980).

101. *Id.* at 452-53 (Burger, C.J.).

102. *Id.* at 454 (Burger, C.J.) (quoting 42 U.S.C. § 6705(f)(2) (1976)). “Controlling interest” means, in this context, “a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members.” 42 U.S.C. § 6705(f)(2) (1988).

103. *Id.* (Burger, C.J.) (quoting 42 U.S.C. § 6705(f)(2) (1976)). An interesting aspect of these preferential licensing cases is the governmental entity's attempts to define who is a “minority group member.”

104. *Id.* at 492 (Burger, C.J.).

adopted *neither* strict nor intermediate scrutiny as a standard of review.¹⁰⁵ “However, our analysis demonstrates that the MBE provision would survive judicial review under either ‘test’ articulated in the several *Bakke* opinions.”¹⁰⁶ Considering this ambivalence over the proper constitutional standard, Burger was unusually harsh in rejecting a color-blind rule.¹⁰⁷

Justice Powell concurred and wrote separately to emphasize the need for a standard of constitutional review.¹⁰⁸ Powell applied strict scrutiny and found the MBE provision met the test.¹⁰⁹ Like Burger, Powell also rejected the contention that the Constitution is a color-blind document.¹¹⁰

Justice Stewart wrote a blistering dissent.¹¹¹ Joined by Justice Rehnquist, Stewart resurrected the theme of a color-blind Constitution. “Under our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and *presumptively invalid*.”¹¹² He added that “the government may never act to the detriment of a person solely because of that person’s race.”¹¹³ Stewart concluded, “From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law’s purpose, be it purportedly ‘for the promotion of the public good’ or

105. *Id.* (Burger, C.J.).

106. *Id.* (Burger, C.J.).

107. *Id.* at 482 (Burger, C.J.).

108. *Id.* at 495-96 (Powell, J., concurring).

109. *Id.* at 496 (Powell, J., concurring). Powell also articulated five factors that should be considered when determining whether the *means* of a certain program were “narrowly tailored”: (1) the efficacy of alternative remedies; (2) the planned duration of the remedy; (3) the relationship between the percentage of minority workers to be employed and the percentage of minority group members in the relevant population or work force; (4) the availability of waiver provisions if the hiring plan could not be met; (5) the effect of the remedy on innocent third parties.

Id. at 510-14.

Justice Brennan used a similar series of factors to analyze the means in *United States v. Paradise*, 480 U.S. 149, 171-83, and *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 584-600 (1990).

110. *Fullilove*, 448 U.S. at 496 n.1 (Powell, J., concurring). Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment. Marshall applied intermediate scrutiny and found the MBE provision “plainly constitutional.” *Id.* at 519 (Marshall, J., concurring).

Considering *Bakke* and *Fullilove* together, at this point in time, six Justices opposed the concept of a color-blind constitution.

111. *Id.* at 522-32 (Stewart, J., dissenting).

112. *Id.* at 523 (Stewart, J., dissenting) (emphasis added).

113. *Id.* at 525 (Stewart, J., dissenting).

otherwise."¹¹⁴

A strikingly similar, although technically distinguishable¹¹⁵ MBE provision instituted by a local government came before the Court nine years later. In *City of Richmond v. J.A. Croson Co.*,¹¹⁶ Richmond's plan required *nonminority*-owned prime contractors to subcontract at least thirty percent of the dollar amount of their city-awarded contract to one or more MBEs.¹¹⁷ Like the plan in *Fullilove*, a business was considered an MBE if minority group members had a controlling interest in the business.¹¹⁸ The city's plan also provided that a minority group member was a citizen of the United States who was black, Spanish-speaking, Asian, Indian, Eskimo, or Aleut.¹¹⁹

The most significant development of *Croson* was that a majority of the Court¹²⁰ finally agreed that strict scrutiny should be the constitutional standard of review for benign racial classifications.¹²¹ Richmond's plan failed strict scrutiny because the city had failed to define both the

114. *Id.* at 526 (Stewart, J., dissenting).

115. In *Fullilove*, there was a 10% set-aside. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), set-aside was 30%. In *Fullilove*, the affected minority population represented 15-18% of the total population, while in *Croson*, it represented 50% of Richmond's population. Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1745 n.71 (1989).

116. 488 U.S. 469 (1989).

117. *Id.* at 477. "There was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors." *Id.* at 480.

118. *Id.* at 478; *see supra* note 102 and accompanying text.

119. *Id.*

120. O'Connor wrote the opinion of the Court. Her opinion was joined by Chief Justice Rehnquist, and Justices White and Kennedy. Justice Scalia concurred in judgment and in the application of strict scrutiny. Although Justice Stevens concurred in judgment, he avoided joining the portion of O'Connor's opinion that set forth strict scrutiny as the standard of review.

Some critics of the current Court's attitude have tried to deconstruct the *Croson* decision in hopes of making it less significant. Michel Rosenfeld, for instance, wrote:

First, although six of the Justices found the Plan to be unconstitutional, only five agreed that the strict scrutiny test provided the correct judicial standard. Of those five, moreover, only four—a mere plurality—agreed on what would satisfy strict scrutiny in the context of race-based affirmative action . . . even if not undertaken by the actual wrongdoer(s). The fifth Justice in this group, Justice Scalia, had a more narrow conception of strict scrutiny and argued that it would only be satisfied when compensation is undertaken by actual wrongdoers.

Rosenfeld, *supra* note 115, at 1748.

121. *Croson*, 488 U.S. at 493 (plurality opinion of O'Connor, J.); *id.* at 520 (Scalia, J., concurring). At least one commentator has argued that the decision to adopt strict scrutiny means that the Supreme Court has also adopted a color-blind approach. Fred N. Knopf, *Assessing Affirmative Action: City of Richmond v. J.A. Croson Co. Strictly Scrutinizes Minority Business Set-Aside Plans*, 11 U. BRIDGEPORT L. REV. 237, 237 (1990).

scope of the injury and the necessary scope of the remedial action.¹²²

Justice O'Connor began and effectively ended her analysis with the plan's purportedly compelling end to remedy past discrimination. The Court held if a governmental entity attempted to defend the use of a benign racial classification, the entity must be able to show prior discrimination by the entity itself or by the specific, private sector industry in that entity's jurisdiction.¹²³ O'Connor found no evidence to support a conclusion that there was any past discrimination in the Richmond construction industry.¹²⁴ Similarly, she declared, "There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry."¹²⁵

Justice Kennedy concurred.¹²⁶ He also joined Justice Scalia's concurrence and praised the color-blind rule set forth therein.¹²⁷ Justice Scalia's concurrence is the focus of this Comment and will be discussed at length in Part III.

Shortly after *Croson*, a federal race-conscious licensing scheme came before the Court. In *Metro Broadcasting, Inc. v. FCC*,¹²⁸ the FCC had instituted two policies aimed at increasing minority ownership of broadcast licenses. One policy took race into account as a factor in comparative proceedings for new licenses; the other policy permitted a "limited category of existing radio and television broadcast stations to be transferred only to minority-controlled firms."¹²⁹ The FCC defined a "minority" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction."¹³⁰

Justice Brennan wrote for a five member majority. Brennan insisted that because the measures in this case were mandated by Congress (not by a local government, as in *Croson*), the constitutional standard of review was intermediate scrutiny.¹³¹ Brennan then found two important

122. *Croson*, 488 U.S. at 510-11 (O'Connor, J.).

123. *Id.* at 498; see also NOWAK & ROTUNDA, *supra* note 22, § 14.10(a)(1), at 655-56.

124. *Croson*, 488 U.S. at 505.

125. *Id.* at 506. Having found the ends inadequate, O'Connor had only two comments on the means used by the city. *Id.* at 507. First, Richmond had not considered the use of alternative, race-neutral means. *Id.* "Second, the 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *Id.*

126. *Id.* at 518-20 (Kennedy, J., concurring).

127. *Id.* at 519 (Kennedy, J., concurring).

128. 497 U.S. 547 (1990).

129. *Id.* at 552.

130. *Id.* at 553 n.1 (citation omitted).

131. *Id.* at 564-65.

governmental goals: remedying past discrimination in the broadcast industry and encouraging programming diversity.¹³² For the means prong, Brennan deferred to congressional fact-finding that there was a sufficient "nexus between minority ownership and programming diversity."¹³³

Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, dissented. O'Connor found the majority's distinction between this case and *Croson* on federalism grounds unsupported by precedent or constitutional language.¹³⁴ O'Connor stated, "The Constitution's guarantee of equal protection binds the Federal Government as it does the States, and no lower level of scrutiny applies to the Federal Government's use of race classifications."¹³⁵ O'Connor wrote that strict scrutiny must control, and the policies here failed that standard.¹³⁶

The cohesiveness of the four *Metro* dissenters, Rehnquist, O'Connor, Scalia, and Kennedy, who believe strict scrutiny should be the standard of review, has become especially important in the wake of Justices Brennan, Marshall, and White's retirements.¹³⁷ Although Justice White was often unpredictable on the issue of affirmative action,¹³⁸ Brennan and Marshall clearly favored the lesser constitutional standard of review, intermediate scrutiny. With Justices Souter and Thomas replacing the two liberal Justices, there is reason to believe that *Croson* (and *Wygant* in the employment discrimination area), rather than *Metro*, is more suggestive of a "permanent" resolve by the Court that strict scrutiny should be the constitutional standard of review for benign racial classifications.¹³⁹

III. JUSTICE SCALIA'S THOUGHTS ON AFFIRMATIVE ACTION

A. *Before the Ascension*

The only son of a Sicilian immigrant, Antonin Scalia graduated from Harvard Law School.¹⁴⁰ In the 1970s, while a professor at the University

132. *Id.* at 567-69.

133. *Id.* at 569.

134. *Id.* at 603 (O'Connor, J., dissenting). Justice Kennedy, joined by Justice Scalia, also dissented. *See id.* at 631-38 (Kennedy, J., dissenting).

135. *Id.* at 604 (O'Connor, J., dissenting).

136. *Id.* at 611-12 (O'Connor, J., dissenting).

137. Justice Brennan retired on July 20, 1990. For the possible effect on *Metro*, see NOWAK & ROTUNDA, *supra* note 22, § 14.10(b)(3). Justice Marshall retired on July 20, 1991. Justice White announced his retirement on March 19, 1993.

138. *See* Kenneth Jost, *The Courtship of Byron White*, A.B.A. J., Oct. 1993, at 66-67.

139. The word "permanent," considering an issue of this controversial degree and the mortality of the Justices, is used as a relative—not an unequivocal—term.

140. 13 ROY M. MERSKY & J. MYRON JACOBSTEIN, *THE SUPREME COURT OF THE*

of Chicago Law School, Scalia wrote an illuminating piece on affirmative action.¹⁴¹

In this piece, Scalia was sharply critical of the Supreme Court's efforts in affirmative action law, primarily the *Bakke* decision. He labeled this area of the law "utterly confused" and full "of pretense or self-delusion."¹⁴² He called Powell's assumption in *Bakke*, that a diverse student body was a compelling interest, "an historic trivialization of the Constitution."¹⁴³

He then explored some flaws in the justifications of affirmative action programs. Scalia noted affirmative action plans sought to disadvantage a "white majority" without examining the many ethnic strands of this majority. For example, Scalia pointed out that thousands of people from southern and eastern Europe came to the United States in the last great waves of immigration and suffered discrimination at the hands of the dominant Anglo-Saxon majority.¹⁴⁴ More recently, some or all of these groups benefitted from or practiced discrimination themselves. However, comparing their racial "debt" with others who worked the slave trade and maintained a racial caste system for years afterward, Scalia wrote, "confuse[s] a mountain with a molehill."¹⁴⁵ He concluded that for reasons of "principle and practicality," he was flatly opposed to benign racial classifications.¹⁴⁶

In 1982, President Reagan appointed Scalia to the United States Court of Appeals for the District of Columbia. On June 17, 1986, Chief Justice Warren Burger formally retired. President Reagan nominated Associate Justice Rehnquist as the new Chief Justice and Scalia was nominated to fill Rehnquist's seat.

Scalia's appearance before the Senate Judiciary Committee was amicable.¹⁴⁷ Scalia appeared for one day and fielded a variety of questions. On the issue of affirmative action and especially the Court's decision in *Wygant*, Scalia proved elusive and unwilling to commit to a point of

UNITED STATES: HEARINGS AND REPORTS ON SUCCESSFUL AND UNSUCCESSFUL NOMINATIONS: 1916-1986, at vii (1989). The biographical information restated here is culled from the somewhat more detailed treatment of Antonin Scalia's life in this volume.

141. Antonin Scalia, *Commentary: The Disease as Cure*, 1979 WASH. U. L.Q. 147. The piece is illuminating not so much for what it says, but rather how true Scalia would remain to the ideas he set forth there.

142. *Id.* at 147-48.

143. *Id.* at 148.

144. Scalia listed Italians, Jews, Irish, and Poles among these groups. *Id.* at 152.

145. *Id.*

146. *Id.* at 156.

147. MERSKY & JACOBSTEIN, *supra* note 139, at viii.

view.¹⁴⁸

About his article in the *Washington University Law Quarterly*,¹⁴⁹ Scalia was more forthcoming. He declared that the opinions set forth there were "policy views of mine at the time. I think they are views held by other reasonable people."¹⁵⁰ When pressed, Scalia said the comment did *not* address the constitutionality of affirmative action programs.¹⁵¹ He continued, "when I had policy views I didn't think it [affirmative action] was a good idea. That has nothing to do with whether I would enforce it vigorously if it's passed by Congress."¹⁵²

After a second day of hearings, a unanimous Judiciary Committee reported favorably regarding Scalia's nomination to the full Senate. Shortly thereafter, the Senate voted ninety-eight to zero to confirm Scalia's nomination.¹⁵³

B. *On the Supreme Court*

Of the four affirmative action cases to come before the Court since his appointment, Justice Scalia voted to strike the plan in question every time, although he only expressed his reasoning twice.¹⁵⁴

In *Johnson v. Transportation Agency*,¹⁵⁵ Scalia demonstrated that his views on affirmative action had not changed from those expressed in the law review article.¹⁵⁶ He dissented in *Johnson* because the majority had turned Title VII into "a powerful engine of racism and sexism, not merely *permitting* intentional race- and sex-based discrimination, but often making it, through operation of the legal system, practically com-

148. *Hearings on the Nomination of Judge Antonin Scalia Before the Senate Comm. on the Judiciary*, 99th Cong., 2d Sess. 45 (1986) [hereinafter *Hearings*] (question of Sen. Charles Mathias, Jr.).

149. See Scalia, *supra* note 141.

150. *Hearings*, *supra* note 148, at 76 (in response to a question by Sen. Howell Heflin).

151. *Id.* at 94 (in response to a question by Sen. Paul Simon).

152. *Id.* at 95 (in response to a question by Sen. Paul Simon). In light of his vote in *Metro*, cynics may ask if Scalia qualified this statement enough not to have committed perjury. Justice Scalia voted against the affirmative action policies promulgated by Congress. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

153. MERSKY & JACOBSTEIN, *supra* note 140, at 1. Republican Senators Barry Goldwater and Jake Garn did not vote.

154. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring); *Johnson v. Transportation Agency*, 480 U.S. 616, 657 (1987) (Scalia, J., dissenting).

Scalia has joined dissents in the two other cases. See *United States v. Paradise*, 480 U.S. 149, 196-201 (1987) (O'Connor, J., dissenting); *Metro*, 497 U.S. at 602-31 (O'Connor, J., dissenting); *id.* at 631-38 (Kennedy, J., dissenting).

155. 480 U.S. 616 (1987).

156. *Id.* at 657-77 (Scalia, J., dissenting); RONALD J. FISCUS, *THE CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION* 12 (1992).

pelled.”¹⁵⁷ The result of the majority’s interpretation of Title VII—whites and males being unfairly disadvantaged—Scalia could not find constitutionally permissible.¹⁵⁸

Scalia’s second expression on the issue of benign racial classifications was his concurrence in *City of Richmond v. J.A. Croson Co.*¹⁵⁹ Although he agreed with O’Connor that strict scrutiny should be the constitutional standard of review,¹⁶⁰ Scalia concurred in the judgment because he disagreed with O’Connor’s reasoning.¹⁶¹

First, he differentiated between benign racial classifications enacted by state entities and those enacted by the federal government. Scalia stated that “[a] sound distinction between federal and state (or local) action based on race rests not only upon . . . [the plain language of the first and fifth sections of the Fourteenth Amendment] but upon social reality and governmental theory.”¹⁶² One such reality was “that racial discrimination against any group finds a more ready expression at the state and local than at the federal level.”¹⁶³

Upon this base of federalism, Scalia constructed a color-blind rule for benign racial classifications. “[T]here is only one circumstance in which the States may act *by race* to ‘undo the effects of past discrimination’: where that is necessary to eliminate their own maintenance of a system of unlawful racial classification.”¹⁶⁴ This rule may *not* be entirely color-blind, but the rule views every racial classification as invidious, and thus constitutionally invalid, under all but the most exigent and obvious circumstances.¹⁶⁵

157. *Johnson*, 480 U.S. at 677 (Scalia, J., dissenting).

158. *Id.* (Scalia, J., dissenting).

159. 488 U.S. 469 (1989).

160. *Croson*, 488 U.S. at 520 (Scalia, J., concurring).

161. DONALD E. LIVELY, *THE CONSTITUTION AND RACE* 151 (1992). At least one commentator attributed Scalia’s concurrence to O’Connor’s failure to follow her premise (all racial classifications are suspect and thus merit strict scrutiny) to its logical conclusion (all racial classifications are unconstitutional). Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 108 n.9 (1990).

162. *Croson*, 488 U.S. at 522 (Scalia, J., concurring).

163. *Id.* at 523 (Scalia, J., concurring).

164. *Id.* at 524 (Scalia, J., concurring). Justice Kennedy’s concurrence in *Croson* does much to explain, at least from one point of view, what Scalia meant. Scalia’s opinion “would make it crystal clear to the political branches, at least those of the States, that legislation must be based on criteria other than race.” *Id.* at 518-19. However, because Scalia’s rule was such a radical departure from precedent, Kennedy did not believe it needed immediate adoption. *Id.* (Kennedy, J., concurring).

165. An exigent circumstance would encompass threats to life and limb, e.g., a prison race riot. *Id.* at 521 (Scalia, J., concurring).

Justice Scalia explained the obvious circumstance. “If, for example, a state agency has a

States, Scalia continued, may act to remedy past discrimination in several *nonracial*, and thus permissible, ways. Instead of preferential contract and licensing programs for racial minorities, a state may adopt a preference for small or new businesses.¹⁶⁶ Scalia also suggested “giving the identified victim of state discrimination that which [the state] wrongfully denied him.”¹⁶⁷ Either way, the result would be the same: “While most of the beneficiaries might be black, neither the beneficiaries nor those disadvantaged by the preference would be identified *on the basis of their race*.”¹⁶⁸

At the end of his concurrence, Scalia attacked two common arguments advanced by affirmative action proponents. First, with a rhetorical flurry, Scalia dismissed the notion that affirmative action programs do not stigmatize or victimize *nonminority* group members.¹⁶⁹ Second, Scalia rejected the theory of compensatory justice. Roughly stated, this theory (also called restorative justice) declares that since minorities (specifically blacks) have been discriminated against in the past, affirmative action programs are necessary and acceptable in order to “compensate” those minorities.¹⁷⁰ Scalia replied that this belief reinforces “a manner of thinking by race that was the source of the injustice and that will, if it endures within our society, be the source of more injustice still.”¹⁷¹

An inconsistency, in light of Scalia’s later vote in *Metro Broadcasting, Inc. v. FCC*,¹⁷² now becomes fully apparent and is best dealt with here. The *Croson* rule was founded upon principles of federalism and explicitly mentioned only state action as presumptively unconstitutional.¹⁷³ For these reasons, it may be inferred that Scalia would be highly deferential to federal affirmative action programs.¹⁷⁴ However, Scalia voted

discriminatory pay scale compensating black employees in all positions at 20% less than their nonblack counterparts, it may assuredly promulgate an order raising the salaries of ‘all black employees’ to eliminate the differential.” *Id.* at 524; see also LIVELY, *supra* note 161, at 151; Donald E. Lively, *Constitutional Turf Wars: Competing for the Consent of the Governed*, 42 HASTINGS L.J. 1527, 1539 n.94 (1991).

166. *Croson*, 488 U.S. at 526 (Scalia, J., concurring).

167. *Id.* (Scalia, J., concurring) (“for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if it means terminating the latter’s employment”).

168. *Id.* (Scalia, J., concurring).

169. *Id.* at 527 (Scalia, J., concurring). “When we depart from this American principle [of race neutrality] we play with fire, and much more than an occasional DeFunis, Johnson, or *Croson* burns.”

170. *Fiscus*, *supra* note 156, at 8.

171. *Croson*, 488 U.S. at 527-28 (Scalia, J., concurring).

172. 497 U.S. 547 (1990).

173. *Croson*, 488 U.S. at 524 (Scalia, J., concurring).

174. This inference must be made with caution. Scalia did not believe *Fullilove* controlled

against the federal policies at issue in *Metro*. How does one reconcile the seeming inconsistency between this interpretation of the *Croson* rule with Scalia's vote in *Metro*?

Some commentators do not agree that Scalia has been "inconsistent." Rather, they charge Scalia with a sinister consistency. Scalia, they contend, voted against both state and federal affirmative action programs because such programs favor minorities and unfavorably disadvantage white males.¹⁷⁵

Beyond this possible explanation, there are two others. First, in *Metro*, the federal government argued that its main policy interest was not solely undoing the effects of past discrimination, but also the promotion of broadcast diversity.¹⁷⁶ Scalia may consider the promotion of broadcast diversity an illegitimate interest.¹⁷⁷ Therefore, the FCC plan failed the strict scrutiny test.

The second possibility, of course, is that Scalia changed his mind and decided to abandon altogether any distinction between the appropriate level of review accorded federal and state governmental benign racial classifications. There is ample evidence to support this as the more likely explanation. First, Scalia, it will be remembered, joined Justice O'Connor's dissent in *Metro* that stated there should only be *one level* of scrutiny for either local or federal affirmative action plans.¹⁷⁸ Second, in his law review article, Scalia stated his opposition to all affirmative action programs without distinguishing between state and congressional action.¹⁷⁹ Finally, there are the sources from which Scalia derived his race neutral idea. To take the most prominent example, Scalia quoted

the outcome of *Croson*, and he was reluctant to revisit the *Fullilove* holding. *Id.* at 522 (Scalia, J., concurring).

175. See, e.g., FISCUS, *supra* note 156, at 40; see also Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understanding*, 1991 DUKE L.J. 39, 83 (arguing that for Scalia "race is the determining factor" in deciding cases); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 83 (1992) (arguing that Scalia is result-orientated and his supposed dedication to "textualism, originalism, and historical positivism is contingent and secondary"). *Contra* George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 YALE L.J. 1297, 1309 (1990) (conceding Scalia's conservative position on affirmative action but arguing "that a facile focus on any supposed 'result-orientation' in explaining his approach to constitutional adjudication does not do [him] justice").

176. *Metro*, 497 U.S. at 566.

177. Scalia joined Justice Kennedy's dissent, which specifically attacked the FCC's goal of broadcast diversity. *Id.* at 635 (Kennedy, J., dissenting).

178. *Id.* at 604 (O'Connor, J., dissenting).

179. Scalia, *supra* note 141, at 156.

Professor Alexander Bickel in his *Croson* concurrence,¹⁸⁰ and Bickel made *no* distinction between the federal and state government. Bickel focused not on the level of government doing the discriminating, but rather the individual (regardless of color) upon whom that discrimination was visited.¹⁸¹

IV. THE IMPERATIVE OF A COLOR-BLIND RULE

Having surveyed the background of affirmative action and in particular, Justice Scalia's view on the matter, a closer look at a race neutral (a color-blind) rule for racial classifications, especially benign ones, is appropriate. The meaning of a race neutral or color-blind rule was best expressed by Professor Laurence Tribe.¹⁸² Tribe's definition must be read with caution. It provides a sound foundation for inquiry, but it is not a perfect definition of race neutralism nor does it encompass all the variations of race neutralism. Tribe defined race neutralists as "those who deem race-specific preferences for minorities [affirmative action plans] to be presumptively invalid, subject only to a narrow exception for judicial relief to identified victims of proven race discrimination."¹⁸³

This Part will first examine the legal foundation for a color-blind rule and then briefly look at the practicality of a race neutral approach. It concludes with a summary of the strong moral and philosophical arguments against benign racial classifications and for a color-blind rule.

A. *The Legal Foundation of a Color-Blind Rule*

The legal foundation for a rule of race neutrality rests on a number of cases in which the Supreme Court implicitly or explicitly endorsed such a rule. The first step, however, should be to examine the text of the Fourteenth Amendment. The Equal Protection Clause simply says, no state shall "deny to any person within its jurisdiction the equal protection of

180. *Croson*, 488 U.S. at 527 (Scalia, J., concurring) (quoting ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975)).

181. BICKEL, *supra* note 180, at 133. Bickel is so often cited by affirmative action opponents that this small part of his book has become a quasi-catechism.

182. See generally Laurence H. Tribe, "In What Vision of the Constitution Must the Law Be Color-Blind?," 20 J. MARSHALL L. REV. 201 (1986). Tribe is a strong opponent of a color-blind rule.

183. *Id.* at 201-02; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring); *id.* at 524 (Scalia, J., concurring). Whereas Tribe's definition allowed for an exception to the color-blind rule, others have argued that "strict adherence to the color-blind principle is incompatible with the Supreme Court's endorsement of color-conscious remedies in a long line of school desegregation cases." Rosenfeld, *supra* note 115, at 1755-56.

the laws."¹⁸⁴ Of course, the larger question is what does this simple clause mean? A number of preliminary conclusions can be drawn. First, the appropriate focus should be on the word "person," because the guarantee of equal protection of the law is an individual right.¹⁸⁵ However, the guarantee does *not* run to individuals based on their membership in a group, whether it is a majority or minority group.¹⁸⁶ Besides, if the guarantee ran to groups, identifying persons in the majority racial group is not as easy as it seems. Upon inspection, the white majority turns out to be an amalgamation of ethnic minorities.¹⁸⁷

The most famous expression of the race neutral principle from the Supreme Court was Justice Harlan's statement in *Plessy*: "Our constitution is color-blind, and neither knows nor tolerates classes among citizens."¹⁸⁸ Opponents of a color-blind rule stress the "manifest racism"¹⁸⁹ surrounding Harlan's dissent.¹⁹⁰ However one assesses the strength of Harlan's dissent nearly a century after it was written, the judgment implicit within it still rings true. In the area of race relations, the massive power of the state must be used for the unequivocal good of society. One commentator stated that the tools of government are "capable of much harm," and when those powers cannot confidently be used for good, they should be "adjured altogether."¹⁹¹

The initial formulation of strict scrutiny by Justice Black in *Korematsu* provides, if not a foundation, at least a standard against which race neutralism may be measured. Black stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [The] courts must subject them to the most rigid scrutiny."¹⁹² A race neutral approach, with its narrow exemption for vic-

184. U.S. CONST. amend. XIV, § 1.

185. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) ("The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual.")

186. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (Powell, J.).

187. Lino A. Graglia, *Racially Discriminatory Admission to Public Institutions of Higher Education*, 9 Sw. U. L. REV. 583, 585 (1977); see also *Bakke*, 438 U.S. at 292 (Powell, J.).

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

189. Tribe, *supra* note 182, at 203. "[The] color-blind ideal, it turns out, was only shorthand for the concept that the Fourteenth Amendment prevents our law from enshrining and perpetuating white supremacy. . . ." *Id.*; see also Culp, *supra* note 175, at 90.

190. *Plessy*, 163 U.S. at 552-65 (Harlan, J., dissenting).

191. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 224 (1992).

192. *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Tribe has argued that *Korematsu* is an illegitimate foundation for the color-blind principle. He says *Korematsu* dealt primarily with governmental restriction of civil rights. To use this standard in the area of affirmative action, Tribe continues, where the government is allocating state-created opportunities for advancement, confuses Black's meaning. Tribe, *supra* note 182, at 202. Tribe ignores the fact that allowing the government to allocate a certain number of its *limited*, state-created

tims of past discrimination, would even strike laws that passed strict scrutiny. Because nearly all racial classifications would fail under a race neutralism, there is no scrutiny more "rigid"—to use Black's word—than race neutralism.

It is true that neither *Korematsu* nor *Plessy* will be celebrated as red-letter days in the Court's history. Yet history's judgment does not detract from two conclusions. First, it is possible and justifiable to rescue from these "bad" cases the sound legal reasoning of Harlan and Black.¹⁹³ Second, the holdings of these "bad" cases surely would have been different under a race neutral rule, because such a rule prohibits all racial classifications including those which disadvantage minorities.¹⁹⁴

It has been argued that neither strict scrutiny nor a race neutral approach should be applied to benign racial classifications. John Hart Ely was among the first to make this contention.¹⁹⁵ He suggested that strict scrutiny was not the appropriate standard of review when whites favored blacks at the expense of other whites.¹⁹⁶ "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing [strict scrutiny] . . . are lacking."¹⁹⁷

Although appealing on its face, Ely's argument is flawed. He assumes that the "white majority" controls the decision-making process. Yet, it is minority groups—not large, diffuse, and disorganized majorities—who control the American legislatures on both the federal and state level.¹⁹⁸ Minority groups, whether members of the particular group are linked by race, gender, age, or a special political interest (e.g., trial lawyers or gun owners), are politically powerful.¹⁹⁹ Since they control the decision making process, the minority groups act to advantage them-

opportunities for advancement to minority group members restricts the ability of others to receive those state-created opportunities.

193. The Supreme Court has often used language from "bad" cases to justify "good" results. See *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (striking down the state's miscegenation laws under the strict scrutiny test and quoting with approval *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

194. Rosenfeld, *supra* note 115, at 1755.

195. See generally John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

196. *Id.* at 727.

197. *Id.* at 735.

198. Justice Scalia, himself, made this point. *Johnson v. Transportation Agency*, 480 U.S. 616, 677 (1987) (Scalia, J., dissenting) (stating that affirmative action proponents have ignored the "predominantly unknown, unaffluent, unorganized" workers).

199. Guido Calabresi, *Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 96 (1991).

selves. The National Rifle Association, for example, has been repeatedly successful in blocking stringent gun control legislation despite apparent majority support.²⁰⁰ Likewise, social security benefits have become a political "sacred cow" because of the power of the elderly. Minority groups have conquered the decision making process (that is, state legislatures and Congress) through their concentrated lobbying, single-issue voting, ability to build coalitions with other minorities, money, internal cohesiveness, and threats of violence or other disorder.²⁰¹ Minorities not only control legislative branches, but oftentimes determine who sits in the Oval Office. In eleven American presidential elections, the winner received only a plurality of the popular vote.²⁰² Accordingly, Ely misreads the political process and how groups actually control the decision making process.²⁰³

Another legal foundation for a color-blind rule is contained in the great moral principle of the school desegregation cases, especially *Brown v. Board of Education*.²⁰⁴ In *Brown*, Chief Justice Warren never mentioned a race neutral approach nor did he apply strict scrutiny or any other constitutional standard of review. Yet, the justification for the *Brown* decision rests in "the wide acceptance and enormous persuasiveness of the principle that no person should be disadvantaged by government because of his race."²⁰⁵ The invidious school segregation of *Brown* operates in the same way as, and cannot be distinguished in any sense from, benign racial classifications.²⁰⁶

In sum, the legal foundation of race neutrality was most forcefully expressed by Alexander Bickel. "The 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."²⁰⁷

200. *Id.* at 96 n.48.

201. *Id.*; Richard A. Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 27.

202. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 125 (1956). Dahl mentioned nine elections. The elections of President Nixon in 1968 and President Clinton in 1992, both by pluralities, occurred after the publication of this book.

203. Posner, *supra* note 201, at 21.

204. 347 U.S. 483 (1954).

205. Graglia, *supra* note 187, at 596.

206. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 61 (1962).

207. BICKEL, *supra* note 180, at 133.

B. *The Practicality of a Color-Blind Rule*

Because almost all racial classifications would be struck under a color-blind rule, it is a simple rule to implement. The rule is not burdened with any complex "theoretical apparatus" that must be used to determine "the nature and scope of its proper application."²⁰⁸ Most important, a color-blind rule is, by its own terms, a neutral principle. It is important for all courts, especially the Supreme Court, to use neutral principles for the adjudication of cases.²⁰⁹ Neutral principles foreclose "*ad hoc* constitutional judgments which express merely the judge's transient feeling of what is fair, convenient, or congenial in the particular circumstances of a litigation."²¹⁰ A neutral principle also produces like results in like cases.²¹¹ In the area of affirmative action, it is readily apparent that the Supreme Court has not yet grasped a neutral principle. The Court still does battle over the proper standard of constitutional review, and the different standards produce different constitutional results (that is, whether the statute is struck down or not).

The color-blind rule can be "authoritatively enforced without adjustment or concession and without let-up."²¹² In addition, the rule eliminates a problem inherent in the judicial review of all affirmative action programs, that is, "*who decides* what groups are sufficiently disadvantaged to deserve special treatment."²¹³ Of course, the result of a race neutral rule when applied to affirmative action plans will offend some groups. However, this only proves the rule's validity.²¹⁴

Besides being a neutral principle, a color-blind rule is practical on another level—the rule increases judicial efficiency. Justice Kennedy commented that the rule would serve an important structural goal, eliminating the necessity for courts to examine, on a case-by-case basis, each

208. Rosenfeld, *supra* note 115, at 1755. Both the strict scrutiny and intermediate scrutiny tests have difficult theoretical apparatus with which to deal. For example, what are "compelling" governmental interests? How close must the means be to the ends in order to be "substantially related?"

209. Both sides of the debate over benign racial classifications realize this. For example, Ely wrote that "the principle I propose is a *neutral* one: regardless of whether it is wise or unwise, it is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself." Ely, *supra* note 195, at 727 (emphasis added).

210. BICKEL, *supra* note 206, at 59.

211. *Id.*

212. *Id.*

213. Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312, 1321 (1986).

214. BICKEL, *supra* note 206, at 59.

racial preference disseminated by federal or local governments.²¹⁵

C. *The Morality of a Color-Blind Rule*

The principle that no one should be disadvantaged by the government on the basis of race or national origin is the moral axiom upon which the color-blind rule stands.²¹⁶ The persuasive appeal and usefulness of this axiom and of a color-blind rule cannot be denied.²¹⁷ However, opponents of the rule (and by implication, such opponents are proponents of affirmative action) fiercely claim that today, the "color-blind criteria have become more instrumental in defeating the remediation rather than the reality of discrimination against minorities."²¹⁸ With this criticism in mind, race neutralists must overcome charges of sinister motivation²¹⁹ through the collection of arguments which rest upon unimpeachable moral and philosophical grounds.

From the Tower of Babel, which the discussion of a color-blind rule and its close cousin affirmative action often resemble, it is possible to draw out three separate and somewhat interrelated arguments²²⁰ which, when marshalled together, best support this proposition: A color-blind rule for almost all racial classifications is the morally and philosophically correct approach; to disadvantage some races for the benefit of others is disastrous for the individual and society.

The first argument is that preferential treatment for racial minorities "exacerbates racial resentments, entrenches racial divisiveness, and thereby undermines the consensus necessary for effective reform."²²¹ As mentioned above, the universal principles of equality before the law and neutral decision making are etched in the American psyche. When laws, like Title VII and the Constitution, are interpreted to support

215. *City of Richmond v. Croson*, 488 U.S. 469, 518-19 (1989) (Kennedy, J., concurring).

216. Rosenfeld, *supra* note 115, at 1755.

217. Graglia, *supra* note 187, at 584.

218. LIVELY, *supra* note 161, at 137.

219. See, e.g., Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986). Kennedy claims that the motives of those who disfavor affirmative action programs "reflect racially selective indifference, antipathy born of prejudice, or strategies that seek to capitalize on widespread racial resentments." *Id.* at 1339.

Like much criticism of affirmative action opponents, Kennedy's comment drips of bitter, self-righteous indignation summoned from depths that are, to me, unfathomable. Ely once confessed to having "trouble understanding the place of righteous indignation on either side of this wrenching moral issue." Ely, *supra* note 195, at 723.

220. These arguments are, by no stretch of the imagination, novel. Randall Kennedy nicely summarized many anti-affirmative action arguments. See Kennedy, *supra* note 219, at 1327.

221. *Id.* at 1330.

color-blindness for some citizens and color-consciousness for other citizens, grotesque violence is done to those principles.²²² And such an interpretation "exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America."²²³

The source of this resentment reveals itself when the operation of affirmative action programs is examined. Governments create only a limited number of opportunities in the area of employment, education, and the awarding of public funds. For example, the University of California at Davis Medical School matriculated only one hundred new students each year. When blacks are given opportunities simply on the basis of their skin color, the government has denied those same opportunities to others not born black.²²⁴ Those denied the opportunities on the basis of their skin color must feel resentment not only toward the government but also toward the advantaged minorities. It is, without a doubt, the kind of resentment felt by millions of blacks who, after emancipation and the Civil War, were also denied opportunities on the basis of race. It is the kind of resentment that fuels the many political campaigns of David Duke in Louisiana and provides fodder for Jesse Helms's television spots. Beyond these manifestations, the damage caused to the compelling goal of racial harmony in America is not readily apparent. It is only apparent that the powerful tools of government are best used elsewhere; for in this area, by promulgating benign racial classifications, the government only harms society.²²⁵

The second argument in favor of a color-blind rule is that affirmative action programs disregard the traditional American system of advancement through individual merit and stigmatize those preferred minorities because it is implied that they cannot compete on an equal basis with whites.²²⁶ When judged on their individual merits, people receive a de-

222. Abram, *supra* note 213, at 1319.

223. Posner, *supra* note 201, at 12. Posner avoided making the argument that benign racial classifications stigmatize the person chosen.

224. JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 170 (1980).

225. Morris Abram first joined the civil rights movement in the late 1940s. He suggests a useful role the government could play. "The role of government in securing racial justice, I came to believe, is best limited to vigilant concern with equal opportunity, procedural regularity, and fair treatment of the individual." Abram, *supra* note 213, at 1314.

226. Kennedy, *supra* note 219, at 1330. Kennedy rejected this argument as did Justice Brennan in *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 374 (Brennan, White, Marshall, & Blackman, JJ.).

The traditional, American system of advancement through individual merit has not been kind to blacks nor helped them in the past. All the talent in the world, for instance, did not

sired benefit, opportunity, or reward because of what they have achieved, and that achievement indicates individual excellence.²²⁷ On the other hand, affirmative action plans judge those preferred minorities only on the basis of their skin color. To return to the example of the U.C. Davis Medical School, only *one* black applicant would have qualified through the normal admission procedures between 1970 and 1974. During those same years, twenty-six black applicants were admitted under the school's affirmative action program.²²⁸ For society to condone this and allow affirmative action to flourish, with governmental sponsorship, makes America little more than a society of quotas.²²⁹ Further, racial quotas demean "the human dignity and individuality" of everyone they favor.²³⁰

The importance of assessing individuals on their own merit, not their skin color, cannot be overemphasized. No one can rest easy when they cross a highway viaduct in Richmond, Virginia and realize the subcontractor who designed the concrete supports was awarded this important job not on merit (i.e., because the subcontractor was experienced or an excellent engineer), but on the basis of skin color. No affirmative action program can erase the stigma felt by a black medical student at U.C. Davis who, despite hard work and outstanding achievement in his undergraduate college, feels the questioning glances of his white colleagues—colleagues who believe his presence is only attributable to the medical school's affirmative action program.

Some in the modern civil rights movement will respond, "Why shouldn't there be more black doctors? More minority construction workers? Blacks have not traditionally been proportionally represented (thanks to discrimination) in these and other areas of employment." This demand for the equality of results²³¹ is a far cry from the original civil rights movement's promotion of equal opportunity and Dr. Martin Luther King, Jr.'s dream of a nation in which his four children would "not be judged by the color of their skin, but by the content of their

help Thurgood Marshall, who was forced to attend the segregated, all-black Howard University Law School.

227. Richard H. Fallon, Jr., *To Each According to His Ability, from None According to His Race: The Concept of Merit in the Law of Antidiscrimination*, 60 B.U. L. REV. 815, 815 n.1 (1980).

228. See *Bakke*, 438 U.S. at 276 n.6 (Powell, J.).

229. BORK, *supra* note 26, at 106.

230. BICKEL, *supra* note 180, at 133.

231. THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 42 (1984); see also Abram, *supra* note 212, at 1313.

character.”²³² As sad as this shift of focus is, even sadder is the inability of the modern civil rights movement to see any difference between the two goals. But as Thomas Sowell explained, “there are many reasons, besides genes and discrimination, why groups differ in their economic performances and rewards. Groups differ by large amounts demographically, culturally, and geographically—and all of these differences have profound effects on incomes and occupations.”²³³ All the social engineering in the world cannot change these results and will merely stigmatize the intended beneficiaries.

Third and finally, benign racial classifications frequently help those blacks who need it least and who can least plausibly claim to have been disadvantaged by past discrimination.²³⁴ Such racial classifications also hurt blameless whites and thus, cause some of the problems discussed earlier, including racial resentment.

It is difficult for modern Americans to conceive of the physical and psychological horror and degradation inherent in the institution of slavery. Furthermore, the great economic, political, and social burdens that have been placed on blacks, often with the explicit, or at least implicit, imprimatur of the state, from the time of this nation's founding and to lesser and lesser degree until today must never be lightly disregarded.

However, it is one thing to acknowledge the hardships suffered by blacks in the past; it is quite a different proposition to judicially allow the state to advantage the minorities of today who have suffered a good deal less than their ancestors.²³⁵ Moreover, it must be remembered, the *nonminority* group members excluded from such “benign” preferences may not have inflicted, nor ever have received, any tangible benefits from the prior discrimination.²³⁶ Some proponents of affirmative action programs reject the presumption of racial innocence for any individual.²³⁷ However, convincing many white people today that they are guilty of racism, even if they never practiced it, would be a nearly impossible mission. In reality then, affirmative action plans undo no past harms. Instead they inflict new harms on individuals, American society,

232. CORETTA S. KING, *MY LIFE WITH MARTIN LUTHER KING, JR.* 239 (1969) (quoting the March on Washington speech of August 28, 1963).

233. SOWELL, *supra* note 231, at 42.

234. Kennedy, *supra* note 219, at 1333.

235. Posner, *supra* note 201, at 16.

236. *Id.*; see also BORK, *supra* note 26, at 106.

237. LIVELY, *supra* note 161, at 158; see also Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 468 (arguing in a different context—college speech codes—that “[r]acism is ubiquitous. We are all racists.”).

and the cause of justice.²³⁸

V. CONCLUSION

The Supreme Court has been misguided on the question of affirmative action. In *Bakke*, Justice Blackmun intriguingly posited, "In order to get beyond racism, we must first take account of race."²³⁹ This is an interesting but false proposition. To truly get beyond racism in America, Americans must stop thinking in racial terms and more importantly, prevent our government from acting on the basis of race in the distribution of opportunities.

As *Bakke* demonstrates, the Supreme Court was wrong from the beginning in the area of affirmative action. It has been nearly a century since Justice Harlan's initial declaration of a color-blind Constitution. As time went by Justices Douglas and Stewart also declared allegiance to race neutralism, but it was not until Justice Scalia's concurrence in *Croson* that a color-blind rule for benign racial classifications was fully articulated. Unfortunately, Scalia, like Harlan, Douglas, and Stewart before him, is far from commanding a majority of the Court and, given the current political climate, probably never will.²⁴⁰

From the time of the Civil War to the triumph of the civil rights movement in the 1960s, state sponsored racial segregation was fought with the belief that the government should not classify people by the color of their skin, regardless of the equality with which they were treated.²⁴¹ Now that the civil rights movement and liberal establishment have shifted their focus, it seems that a color-blind rule has become a rallying point for conservative jurists. While it is true that the debate over this issue generally splits along ideological lines (with a few notable exceptions like Alexander Bickel), the split is truly unfortunate²⁴² since

238. BORK, *supra* note 26, at 106.

239. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J.).

240. Currently, there are only three Justices who could be considered supporters of a race neutral approach to benign racial classifications: Chief Justice Rehnquist, Justice Kennedy, and Justice Scalia. See *Fullilove v. Klutznick*, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting) (joined by Rehnquist, J.); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 519 (1989) (Kennedy, J., concurring) (praising Scalia's color-blind approach); *id.* at 520 (Scalia, J., concurring). Justice Ginsburg may not support a race neutral approach.

241. KULL, *supra* note 191, at 1.

242. At least one commentator does not feel the same remorse. "Those who believe that a principle permitting [affirmative action] . . . can be made acceptable to many of those it would disadvantage must have had experiences and have perceptions so different from mine as to make communication between us on this subject difficult." Graglia, *supra* note 187, at 586.

both liberals and conservatives have claimed the race neutral principle and its moral imperative as their own, albeit at different times in history. Take note of this ringing denunciation of state sponsored racial classifications. "Classifications and distinctions based on race or color have no moral or legal validity in our society. They are contrary to our constitution and laws" ²⁴³

The author of those words was Thurgood Marshall.

JAMES L. MCALISTER

243. Brief for Petitioner at 27, *Sipuel v. Oklahoma State Bd. of Regents*, 332 U.S. 631 (1948) (No. 369) (*per curiam*).