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HOPWOOD, EQUAL PROTECTION, AND AFFIRMATIVE ACTION: CAN ANYONE'S OX BE GORED?¹

INTRODUCTION

Seeking to right a wrong, affirmative action² was born of the heels of the advancements made in the area of civil rights during the nineteen sixties. The Civil Rights Act of 1964³ and the Voting Rights Act of 1965⁴ were, as legislative entities, far

¹ See ALEXANDER BICKEL, *THE MORALITY OF CONSENT* 133 (1975). In this highly influential treatise, the author writes:

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. Now this is to be unlearned and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored.

Id.

² See 3 C.F.R. § 339 (1964-65). The term affirmative action comes from this order, later codified into the United States Code, which mandated that government agencies and private contractors employ "affirmative action" to "insure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin." *Id.* See also Randall Kennedy, *Persuasion and Distrust: A Comment of the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986). "[A]ffirmative action refers to policies that provide preferences based explicitly on membership in a designated group. Affirmative action policies vary widely, ranging from [soft] forms that might include special recruitment efforts to [hard] forms that might include reserving a specific number of openings exclusively for members of the preferred groups." *Id.* at 1327 n. 1.

³ 42 U.S.C. § 2000(d) *et seq.* Title VI of the Civil Rights Act of 1964 provides: "No person shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." *Id.*

⁴ 42 U.S.C. § 1973 (1965). This section provides in pertinent part: "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of any right of any citizen of the United States to vote on account of race or color" *Id.*

reaching in their aspiration to enforce the civil rights of the still disenfranchised black community.⁵ Ten years prior to this, the Supreme Court of the United States in *Brown v. Board of Education*⁶ ended de jure segregation.⁷ From the judiciary and from the legislature the message was clear, all citizens were entitled to equal rights and privileges under the laws of the United States.⁸ While this idea was put forth clearly enough, the manner by which this was to be accomplished was not explicitly expressed.⁹ Ending de jure segregation was the first step. Much more a challenge was eradicating the residual effects left by the structures that created it. The affirmative action debate as it exists today focuses on the constitutionality of measures that do, in effect, seek to treat people differently.¹⁰ On one side of the argument are those who feel that the laws of state and federal governments must be "colorblind"¹¹ in its vision, and that

⁵ *Kennedy*, *supra* note 2, at 1327.

⁶ 347 U.S. 483 (1954). In *Brown*, plaintiffs challenged the constitutionality of a segregated public school system. *Id.* at 488. The Court ruled that the separate but equal doctrine (*see Plessy v. Ferguson*, 163 U.S. 537 (1896)) "deprived the children of minority groups of equal educational opportunities" in violation of the Fourteenth Amendment guarantee of equal protection under the law. *Id.* at 493

⁷ *Id.* at 494.

⁸ BLACK'S LAW DICTIONARY 425 (6th ed. 1990). De jure is discussed "as a condition in which there has been a total compliance with all requirements of law, of right" *Id.* De jure can be contrasted with de facto which is defined as "in fact in deed, actually." *Id.* at 416.

⁹ *Brown v. Board of Education*, 349 U.S. 294, 301 (1955) (stating "the cases below are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases.").

¹⁰ U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of its laws." *Id.*

¹¹ *See Plessy v. Ferguson*, 163 U.S. 537 (1896) "Our constitution is colorblind," is the phrase uttered by Justice Harlan in his dissenting opinion in *Plessy* and bears the distinction of being one of the most quoted phrases in the Court's history. *Id.* at 554 (Harlan, J., dissenting). In *Plessy*, the plaintiff petitioner challenged the constitutionality of a Louisiana statute that required

treating people differently on the basis of race can never again be allowed.¹² On the other side lies the idea that such measures are the only way to bring all of society's members onto level playing fields. The topic is highly charged with even the original proponents of the Civil Rights movement, once united, becoming divided over this very issue.¹³ This comment will focus on the constitutionality of race-based preferences, leaving the formidable task of addressing the *validity* of such programs from a social policy standpoint to others. This comment will limit its focus to discussing the various arguments surrounding affirmative action and its treatment by the Supreme Court over the past twenty years and provide an interpretation of the current state of the law in regard to affirmative action in the context of admission policies of institutions of higher education.

AFFIRMATIVE ACTION AND THE SUPREME COURT

The opinions written in *Regents of the University of California v. Bakke*¹⁴ provide the most appropriate place to jump into the

railway companies carrying passengers in their cars to provide equal, but separate accommodations for the "white and colored races" *Id.* at 537. The Supreme Court found the Statute to be constitutionally sound in that a legal distinction between the races "has no tendency to destroy the legal equality of the two races or re-establish a state of involuntary servitude." *Id.* at 543. Justice Harlan disagreed with the Court's upholding a "separate but equal" policy of segregated passenger cars on trains. *Id.* at 554. He stated that the Thirteenth Amendment "prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude." *Id.* at 555.

¹² *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

¹³ Kennedy, *supra* note 2, at 1327.

¹⁴ 438 U.S. 265 (1978). In *Bakke*, plaintiff filed an action under Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment in which he sought a seat in the incoming class of the medical school after he was rejected two times in as many years. *Id.* at 277. The plaintiff contended that the special admission program (designed to boost minority enrollment) operated to deprive him of a spot in the school on the basis of his status as a non-minority. *Id.* at 277-78. The Supreme Court held that the University's special admission program was invalid and that *Bakke* must be given a seat in the incoming class, but reversed the lower court's judgment enjoining the school from considering race in its admission process.

affirmative action fray. Justice Powell delivered the opinion of the Court.¹⁵ The plurality opinion was, however, accompanied by a confusing array of part concurrences and dissents.¹⁶ Ultimately, the Supreme Court's review of the medical school's admission policy yielded a decision that granted *Bakke* a seat in the incoming class and held that racial classifications must be reviewed under exacting scrutiny,¹⁷ but nonetheless remarked that a State has a "substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."¹⁸ With no majority opinion,¹⁹ the continued authority of Justice Powell's decision has been challenged with lower courts diverging in their interpretation of *Bakke*.²⁰ Did the Court mean that distinctions based on race were not to be "per se" invalid?²¹ Were the lower courts to interpret the holding in *Bakke* to stand for the

Id. at 320. The Court struck down the University's affirmative action program as being violative of the Equal Protection Clause of the Fourteenth Amendment. *Id.*

¹⁵ *Id.* at 269.

¹⁶ *Id.* at 271.

¹⁷ See LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000-02 (1978) (stating that for a law to survive strict scrutiny, the standard of review employed in analyzing any classifications based upon race or alienage, the classification must further a compelling state interest by the most tailored means available).

¹⁸ *Bakke*, 438 U.S. at 320.

¹⁹ *Id.* Justice Powell delivered the opinion of the Court with separate opinions being filed by Justices Brennan, White, Marshall, Stevens and Blackmun. *Id.* at 272

²⁰ See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (stating "Justice Powell's argument in *Bakke* garnered only his vote and has never represented the view of the Court in *Bakke* or in any other case.").

²¹ *Bakke*, 438 U.S. at 316. The Court states that

In recent years Harvard College has expanded the concept of diversity to include students from disadvantaged economic racial and ethnic groups... In such an admission program race or ethnic background may be deemed a plus in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for available seats.

Id.

proposition that the educational benefits derived from a diverse student body were an *important enough* objective to satisfy the first prong of the test administered under the strict scrutiny standard?²²

While arguably obfuscating the decision reached in *Bakke*, the Court in *Fullilove v. Klutznick*²³ at least points out what it was *not* doing. Again without a majority, the plurality opinion was written by Chief Justice Burger who by “not adopting either expressly or implicitly”²⁴ the level of review required in analyzing race based classification preferences as expressed in *Bakke*, seems to be calling for a less stringent test for such classifications.²⁵ Unfortunately, those trying to understand (or worse, predict) the mindset of the Court at this time were left struggling to define just what exactly a “close examination” would entail.²⁶

²² Tribe, *supra* note 16, at 1001 (stating that the state interest must be compelling and narrowly tailored to satisfy strict scrutiny).

²³ 448 U.S. 448 (1979). In *Fullilove*, an association of construction contractors and subcontractors engaged in the ventilation and air conditioning business challenged on constitutional grounds the legality of a federal 10 % set aside program that earmarked federal funds used for local public work projects for businesses owned and controlled by members of statutorily identified minority groups. *Id.* at 453. The Supreme Court found that the program was valid in that Congress did have the ability under its Spending Powers to pass legislation that accomplished constitutional goals of economic opportunity. *Id.* at 490. Further, the Court stated that while its holding did not adopt the formulas expressed in *Bakke*, the *Fullilove* set aside program would have nonetheless survived either of the tests articulated in the several opinions. *Id.* at 492 (discussing the judicial standards of review of strict scrutiny and intermediate level scrutiny).

²⁴ *Id.* at 491.

²⁵ As opposed to strict scrutiny, a middle tier or intermediate level of scrutiny is here being called upon. *Id.* at 491-92. Intermediate level review requires that there must first be an important government interest and, second, the means chosen must be substantially related to achievement of that end. *Reed v. Reed*, 404 U.S. 71 (1971).

²⁶ *Fullilove*, 448 U.S. at 472. “A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination.” *Id.*

The 1986 Supreme Court decision in *Wygant v. Jackson Board of Education*²⁷ can be viewed as a precursor to the status of the Supreme Court's current attitude towards affirmative action. There, the petitioner at the Court of Appeals level successfully argued that maintaining the existence of minority teachers as role models served as a compelling state interest thereby justifying racial preferences in determining which people, regardless of seniority, could be laid off.²⁸ The Supreme Court disagreed, finding that such a policy conflicted with Constitutional guarantees - in this particular case "against whites and in favor of certain minorities."²⁹

Following *Wygant*, the Supreme Court in *City of Richmond v. J.A. Croson Co.*³⁰ distinguished between federal remedial powers (as seen in cases such as *Fullilove*) and the limits imposed upon the powers of the individual states.³¹ The Court invalidated an affirmative action plan designed to assist minority contractors that claimed an allowance of a "generalized assertion" that there has

²⁷ 476 U.S. 267 (1986). In *Wygant*, non-minority teachers brought suit in Federal District Court alleging equal protection violations in a collective bargaining agreement between the Jackson school board and a teacher's union. *Id.* at 271. In an effort to provide role models for minority children, that agreement contained a provision that provided in the circumstance of teacher lay-offs, non-minority teachers would be laid-off before minority teachers, regardless of seniority. *Id.* at 272. Finding that the provision "acts to maintain levels of minority hiring that have no relation to remedying employment discrimination," the Court held that the provision could not be adjudged to achieve its desired remedial purpose" and was thereby unconstitutional. *Id.* at 294.

²⁸ *Id.*

²⁹ *Id.* at 273.

³⁰ 488 U.S. 469 (1989). In *City of Richmond*, a contractor brought an action under 42 U.S.C. § 1983 complaining that the City's 30% set aside requirement for city construction projects to use minority owned businesses was unconstitutional on its face and as applied to him in this case. *Id.* at 483. The Supreme Court affirmed the lower court's finding that the set-aside program violated both prongs of the strict scrutiny standard imposed by Fourteenth Amendment protections in that the plan was not shown to redress prior discrimination, nor was it narrowly tailored to achieve a compelling governmental interest. *Id.* at 485.

³¹ *Id.*

been past discrimination has “no logical stopping point.”³² Claiming a preference for such action to come from the legislature, the Court in *Croson* tightened the reigns of the state’s abilities to fashion discrimination remedies.

At a time when the legal waters surrounding the affirmative action debate had seemed to settle, the Court decided *Metro Broadcasting, Inc., v. FCC*.³³ In *Metro Broadcasting*, Justice Brennan, in his majority opinion, was finally able to apply the standard he thought appropriate for “benign racial classifications.”³⁴ Substituting the “robust exchange of ideas”³⁵ created by the “benefits that flow from an ethnically diverse student body” found in *Bakke*³⁶ with the “diversity of view and information on the airwaves”³⁷ at issue in *Metro Broadcasting*, Justice Brennan justified the preferential treatment of a group based upon its race, and, perhaps more importantly, he did so with an intermediate level of judicial review. The Court’s new level of review for racial classifications, as expressed in *Metro Broadcasting*, would be short-lived.³⁸

In the period between *Metro Broadcasting* and the case that defines the current opinion of the Court towards affirmative

³² *Id.* at 488 (citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 275 (1986)).

³³ 497 U.S. 547 (1990). In *Metro Broadcasting*, plaintiffs challenged the constitutionality of two minority preference programs instituted by the Federal Communications Commission to promote diversity over the airwaves as being violative of the Fifth Amendment’s equal protection clause. *Id.* at 552. The Court ruled that such policies did not offend any Constitutional mandates against unequal treatment under the law in that the program served an important governmental interest in having a diverse broadcast community and the policies were “substantially related to the achievement of that goal.” *Id.* at 566.

³⁴ *Id.* at 565. Justice Brennan seems to be differentiating between what other commentators had termed as “soft” measures (here, the preferential treatment of minority members) with “hard” measures - ones that have a direct adverse effect against the group to which they are applied.

³⁵ *Bakke*, 438 U.S. at 306.

³⁶ *Id.*

³⁷ *Metro Broadcasting*, 497 U.S. at 548.

³⁸ *Adarand Contractors v. Peña*, 115 S. Ct. 2097 (1995) (overruling *Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990)).

action, *Adarand Contractors v. Pena*,³⁹ both the Court's composition and its attitude towards affirmative action changed once again. The three Justices who most ardently favored benign or remedial legislation (Justices Marshall, Brennan, and Blacken) had left the Court.⁴⁰ The remaining Justices who favored strict scrutiny (Justices Scalia, Kennedy and Chief Justice Rehnquist) were able to apply the standard of review that they felt was appropriate in both federal and state actions with regard to reviewing race-based classifications.⁴¹ In *Adarand*, Justice O'Connor, who had delivered the opinion in *Croson*, handed down the opinion of the Court and was joined by Justice Kennedy and concurred in part and concurred in the judgment by Justices Scalia and Thomas.⁴² The opinion overruled *Metro Broadcasting*, holding that all racial classifications are subjected to strict judicial scrutiny.⁴³ The Court took pains to state that while this standard is indeed a high hurdle to overcome, it is one that is not impossible to meet.⁴⁴ The holding in *Adarand* gives us the state of the law as it exists today in regard to affirmative action programs.

³⁹ 115 S. Ct. 2097 (1995). In *Adarand*, a contractor attacked the constitutionality of the Federal Government's practice of providing financial incentives to contractors that hired subcontractors of "socially and economically disadvantaged individuals" as well as the use of race-based presumptions in the categorizing of such groups. *Id.* at 2100. The Supreme Court disagreed with the Court of Appeals rejecting the claim of unconstitutionality and remanded the case for further proceedings. *Id.* Speaking of the importance of clearly identifying the reasons for racial classifications, Justice O'Connor wrote "we think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination both as to ends and as to means." *Id.* at 2117. Further, such examination will "ensure that [the] most exact connection between justification and classification" is met. *Id.*

⁴⁰ MARIE T. FINN, *THE AMERICAN BENCH: JUDGES OF THE NATION* 19-22, 52 (8th ed. 1995-96).

⁴¹ *Id.*

⁴² *Adarand*, 115 S. Ct. at 2100.

⁴³ *Id.* at 2127.

⁴⁴ *Id.* at 2097. "When race based action is necessary to further a compelling state interest such action is within constitutional constraints if it satisfies the narrow tailoring test this Court has set out in previous cases." *Id.*

Following the clear message sent out in *Adarand*, the lower courts have not had the problem of inconsistency that could have been said to have once plagued the different jurisdictions. In 1996, the United States Court of Appeals for the Fifth Circuit applied the *Adarand* standard in a closely watched decision that took place on the familiar affirmative action fighting ground of admissions programs to institutions of higher education. In *Hopwood v. Texas*,⁴⁵ the Fifth Circuit found that there was not sufficient evidence presented to show “present effects of past discrimination”⁴⁶ and that the law school’s broad affirmative action program for admissions that “swept in all minorities”⁴⁷ regardless of whether or not a particular group was harmed in the past was overreaching, and, in consequence, violative of the Equal Protection Clause of the Fourteenth Amendment.⁴⁸ With the various interested parties anxiously watching and waiting, the Supreme Court denied certiorari to the petitioners - an act viewed by many to signify that the attitude of the Supreme Court toward affirmative action plans has changed little since the decision in *Adarand*.⁴⁹

⁴⁵ 78 F.3d 932 (5th Cir. 1996). In *Hopwood*, a group of non-minority students sued the University of Texas Law School claiming its admission policy violated their rights under the Fourteenth Amendment as well as other derivative violations. *Id.* at 938. The admission policy created different standards for black and Mexican students than the standards placed upon white students. *Id.* The Court of Appeals for the Fifth Circuit reversed the lower court’s upholding the admission policy stating that, although done with the best intentions, the Fourteenth Amendment nonetheless does not allow discriminating in favor of certain favored classes of minority students to the detriment of white and non-preferred minorities. *Id.* at 934. The Court concluded that the school may not use race as a factor in its admissions. *Id.* at 935.

⁴⁶ *Id.* at 939.

⁴⁷ *Id.*

⁴⁸ U.S. CONST. amend. XIV. The Fourteenth Amendment provides in pertinent part: “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . nor deny to any person within its jurisdiction the equal protection of its laws.” *Id.*

⁴⁹ 78 F.3d 932 (5th Cir.), 116 S. Ct. 2580 (1996).

RESPECTIVE POSITIONS OF THE SUPREME COURT JUSTICES

The fragmented decisions in race based classification cases that have come before the Court demonstrate the tenuous position that any *current attitude* of the court holds. At the moment, there is a tilt away from raced-based classifications finding support from the nation's highest court. With the opinions so closely decided, the Court's position could easily shift back towards a more lenient standard of review. The composition of the Court could change. A current Justice's attitude towards race-based classifications could swing in the other direction. In the affirmative action debate, a single vote could change the outcome of a case. A brief assessment of the *leanings* of each of the current Justices of the Court is perhaps instructive in weighing the constitutionality of the various law school admission policies that contain provisions for consideration of an applicant's race.

While not as extreme in the condemnation of affirmative action plans as Justices Scalia and Thomas, Justice O'Connor, the author of *Adarand*, nonetheless advocates the use of the strictest level of judicial scrutiny when reviewing such plans. In *Adarand*, Justice O'Connor pointed out that the notion of strict scrutiny being "strict in theory, but fatal in fact" is erroneous,⁵⁰ and in support of this contention she cites to the case of *United States v. Paradise*⁵¹ wherein "every Justice of this court agreed that the Alabama Department of Public Safety's pervasive, systematic and obstinate discriminatory conduct justified a narrowly tailored raced-base remedy."⁵² Justice O'Connor's

⁵⁰ *Adarand*, 115 S. Ct. at 2117 (stating that "we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact.").

⁵¹ 480 U.S. 167 (1987). In *Paradise*, the Court reviewed a "one-black-for-one-white" promotion requirement instituted by a District Court against the Alabama Department of Public Safety after having found that the Department had systematically excluded blacks from employment. *Id.* at 153. The Court found that the District Court's plan was "effective, temporary, and flexible" and was "amply justified and narrowly tailored to serve [its] legitimate and laudable purposes." *Id.* at 186.

⁵² *Id.* at 196.

opinions have been consistent in this area and clearly advocate the use of the strictest level of judicial scrutiny when reviewing policies that take race into consideration.

Justice Scalia, who concurred in part and concurred in the judgment in *Adarand*, would certainly be a tougher nut to crack from a pro-affirmative action perspective in that he believes that the Constitution of the United States does not allow a "creditor or a debtor race."⁵³ Justice Scalia maintains this position even while stating that individuals wronged by unlawful racial discrimination in the past should be made whole.⁵⁴ In his view "[g]overnment can never have a compelling interest in discriminating on the basis of race in order to make up for past racial discrimination in the opposite direction. We are one race here. It is American."⁵⁵

The sentiments of Justice Thomas echo those of Justice Scalia. Justice Thomas argued that affirmative action programs "undermine the moral basis of the equal protection principle."⁵⁶ Further Justice Thomas rejected differentiating programs which are benign and programs which are invidiously discriminatory, "in my mind, government sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance it is racial discrimination, pure and simple."⁵⁷

Chief Justice Rehnquist did not file separately in *Adarand*, but joined Justice O'Connor's opinion, as he had done in *Croson*.⁵⁸ In *Fullilove*, then Justice Rehnquist joined Justice Stewart's dissent which argued that the set aside program at issue in that case was odious to the Constitution.⁵⁹ Justice Stewart's wrote that the elimination of detrimental classification based on race was frustrated by the government's granting of "privilege based on birth."⁶⁰ With little direct testimony to go on, Chief Justice

⁵³ *Adarand Constructors v. Peña*, 115 S. Ct. 2097, 2118 (1995).

⁵⁴ *Id.*

⁵⁵ *Id.* at 1118-19.

⁵⁶ *Id.* at 1119.

⁵⁷ *Id.*

⁵⁸ *Id.* at 2100.

⁵⁹ *Fullilove*, 448 U.S. at 522 (Stewart, J. dissenting).

⁶⁰ *Id.* at 530 (Stewart, J. dissenting).

Rehnquist has consistently sided with those who call for an exacting scrutiny when reviewing racial classifications.

Justice Kennedy did not file a separate opinion in *Adarand* but, as he had done in *City of Richmond* six years earlier, joined in the opinion written by Justice O'Connor.⁶¹ In *City of Richmond*, Justice Kennedy, concurring in part, opted for strict judicial review as the desirable standard to be applied when reviewing race based classifications. For Justice Kennedy this standard was more appropriate than a rule of "automatic invalidity for racial preferences" at which other judges were hinting.⁶² In his view strict scrutiny, while rigorous, nonetheless still allows "as a last resort"⁶³ race conscious remedies when they provide the only adequate remedy.⁶⁴ Further Justice Kennedy holds the strict scrutiny standard for race conscious remedies to be consistent with the precedents set by the Court.⁶⁵ In joining with Justice O'Connor's opinion in *Adarand*, one can summarize that Justice Kennedy's position on affirmative action programs remains consistent with the thoughts he expressed in *City of Richmond*.

In contrast, Justice Souter has urged upholding racial classifications in certain prescribed situations. In a separate dissenting opinion filed in *Adarand*, Justice Souter, joined by Justice Ginsburg and Justice Breyer,⁶⁶ felt that the scheme challenged in *Adarand* was constitutional under *Fullilove*.⁶⁷ Additionally, in light of the fact that *Adarand* did not distinguish any differences from his case to that of the "factual premises" of *Fullilove*, the *Fullilove* holding would be controlling and applicable to the scheme at issue in *Adarand*.⁶⁸ Justice Souter, desiring to quell the effects of "lingering discrimination"⁶⁹ wrote that employing remedial programs that might adversely effect

⁶¹ *Croson*, 488 U.S. 469, 518 (1989).

⁶² *Id.* at 519.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 518.

⁶⁶ *Adarand*, 115 S. Ct. at 2131 (Souter, J., dissenting).

⁶⁷ *Id.* (Souter, J., dissenting).

⁶⁸ *Id.* (Souter, J., dissenting).

⁶⁹ *Id.* at 2133. (Souter, J., dissenting).

members of a historically favored group should be allowed as the reasonable price to be paid for a worthwhile goal. Further, the reasonableness of such action “is in part because it is a price to be paid only temporarily.”⁷⁰ Justice Souter opined that eventually “the effects will themselves recede in to the past becoming attenuated and finally disappearing.”⁷¹

Justice Ginsburg’s *Adarand* opinion (joined by Justice Breyer) agreed with Justice Souter and advocates the *catch up* ideals that remedial plans, such as that found in the government’s challenged plan in *Adarand*, provide.⁷² She wrote that “(b)ias ... keeps up barriers that must come down if equal opportunity and non discrimination are ever genuinely to become part of this country’s law and practice.”⁷³ Admonishing this bias, Justice Ginsburg was critical of the lead opinion’s interference with what she believes is the permissible power of Congress to “help realize, finally the equal protection of the laws the Fourteenth Amendment has promised since 1868.”⁷⁴ Further, allowing such plans, even at the temporary expense of a particular group, should be permissible because court review can insure that preferences “are not so large as to trammel unduly upon the opportunity of others, or interfere too harshly with legitimate expectations of persons in once preferred groups.”⁷⁵

On the Supreme Court bench today, perhaps the loudest voice advocating affirmative action is that of Justice John Paul Stevens.⁷⁶ While conceding that racial characterizations “seldom provide a relevant basis for disparate treatment,”⁷⁷ and that the standard of review for such characterizations must be “clearly

⁷⁰ *Id.* (Souter, J., dissenting).

⁷¹ *Id.* (Souter, J., dissenting).

⁷² *Id.* at 2135. (Ginsburg, J., dissenting).

⁷³ *Id.* (Ginsburg, J., dissenting).

⁷⁴ *Id.* at 2136. (Ginsburg, J., dissenting).

⁷⁵ *Id.* (Ginsburg, J., dissenting).

⁷⁶ Finn, *supra* note 40 at 82-83. Justice Stevens was appointed to the Supreme Court of the United States by Gerald R. Ford for the term beginning Dec. 19, 1975. *Id.*

⁷⁷ *Adarand Constructors v. Peña* 115 S. Ct. 2097, 2120 (1995) (Stevens, J., dissenting).

identified and unquestionably legitimate”⁷⁸ Justice Stevens warned that “[w]hen a Court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.”⁷⁹ Further, Justice Stevens stated that although there is substantial agreement on the standard to apply regarding classifications based upon race, that does not necessarily lead to an agreement on “how those cases should or will be resolved.”⁸⁰ He wrote:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the government’s constitutional obligation to “govern impartially” . . . should ignore this distinction.⁸¹

The influence of one of the founders of the affirmative action movement can be seen in opinions such as Justice Stevens’ and warrants a brief discussion on its effect on the Court today. In his writings, Justice Marshall⁸² proposed that affirmative action

⁷⁸ *Id.* (Stevens, J., dissenting).

⁷⁹ *Id.* at 2122. (Stevens, J., dissenting).

⁸⁰ *Id.* (Stevens, J., dissenting). Here, Justice Stevens expressed his reservation about the Court’s desire to maintain “consistency” and “congruence” in their decisions (*stare decisis*) and suggests that the court employ the same sort of skepticism for these goals that they advocate for the underlying issue in *Adarand*. *Id.* (Stevens, J., dissenting).

⁸¹ *Id.* (citation omitted).

⁸² MARIE T. HOUGH, *THE AMERICAN BENCH: JUDGES OF THE NATION*. 52 (6th ed. 1991-1992). Justice Marshall was appointed to the Supreme Court of the United States by President Lyndon B. Johnson in 1967. Considered to be one of the greatest actors in the modern civil rights movement, Justice Marshall was the also the Director and Counsel Defense Legal Defense and Educational Fund from 1940-61 and U.S. Solicitor General from 1965-67. *Id.*

was not irreconcilable with constitutional mandates.⁸³ Citing from court decisions of the past century,⁸⁴ Justice Marshall posited that one ought to look at affirmative action as “not rebutting the claim of special treatment, but by pointing to the need for such treatment.”⁸⁵ Justice Marshall found that bringing into the mainstream of American life those who were disadvantaged in the past to clearly be a compelling state interest and one that is “of the highest order.”⁸⁶ As a way of achieving this goal Justice Marshall advocated applying an intermediate standard of judicial review to measures that took race into consideration.⁸⁷ He also sought to further distinguish between governmental actions that are themselves racist and those that seek to remedy “prior racism or to prevent neutral government activity from perpetuating the effects of such racism.”⁸⁸ Upon his passing, the affirmative action movement lost one of its greatest and most ardent supporters.

THE STATUS OF AFFIRMATIVE ACTION PLANS TODAY

While heralding *Hopwood* as the death knell for affirmative action plans amounts to media fed catastrophizing, the effect of the decision should not be underestimated. The decision of the Fifth Circuit is legally binding only upon those states within its boundaries.⁸⁹ However, in the absence of any direction from the Supreme Court in this specific area since the convoluted *Bakke*

⁸³ See generally *Bakke*, 438 U.S. 265 (1978), *Croson*, 488 U.S. 469 (1989), *City of Richmond v. United States*, 422 U.S. 358 (1975).

⁸⁴ *Bakke*, 438 U.S. at 396. Justice Marshall cites the 1873 *Slaughterhouses Cases*, 83 U.S. (16 Wall) 36, where it was stated, “in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose for which we have said was the pervading spirit of them all, the evil which they were designed to remedy.” *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Croson*, 488 U.S. at 551.

⁸⁸ Kennedy, *supra* note 2, at 1327 n.1 (distinguishing between “hard” and “soft” remedial measures).

⁸⁹ The Fifth Circuit is comprised of Mississippi, Louisiana and Texas.

decision twenty years prior, and with the case failing to be granted certiorari, the decision was likely to be noticed by the admission policy makers across the country. At the time the decision was handed down, one commentator stated that if extended nationally, *Hopwood* “would be a big deal indeed” and that at a minimum the decision “will force every college, every medical school, every law school . . . to review their procedures.”⁹⁰

In general terms, *Adarand* tells us quite clearly that strict scrutiny must be applied when assessing the constitutional validity of any race-based classifications. The crucial question thus becomes what goals are to be considered *compelling enough* and, further, what means will constitute a *tailored enough* plan used to achieve that classification’s ends? This is the precise location at which the various jurisdictions separate and end up with different results to essentially similar issues. For example, the *Hopwood* Court flatly rejected the goal of diversity to be, in and of itself, a compelling enough state interest to satisfy the first prong of the strict scrutiny standard. The *Hopwood* Court did not feel bound to follow Justice Powell’s solitary opinion in *Bakke* that promoted diversity of the student body as a sufficient governmental interest because they believed later cases rejected this idea.⁹¹

A Ninth Circuit District Court found diversity to be a compelling interest in an interesting case about a special elementary school’s race-based admission policy. In *Hunter v. Regents of the University of California*,⁹² the school’s admission policy was upheld as being necessary to achieve the school’s stated purpose of rendering scientific studies of educational techniques.⁹³ The *Hunter* court found a compelling state interest in allowing the school to operate as a “laboratory” for educational studies. In addition, the *Hunter* court felt that the school’s goals - namely to conduct research and disseminate

⁹⁰ Joseph Silver, *Law School Affirmative Action In Doubt*, ABA JOURNAL, June 15, 1990, at A1.

⁹¹ *Hopwood*, 78 F.3d at 945 (citing *Adarand*, 115 S. Ct. at 2097).

⁹² 971 F. Supp. 1316, 1328 (C.D. Cal. 1997).

⁹³ *Id.* at 1327.

information regarding potential innovations in urban elementary educational methods, were achieved by an admission plan that was narrowly tailored in that no other methods would work as effectively and that the plan didn't "unnecessarily trammel " the rights of others."⁹⁴ The *Hunter* court, after acknowledging the reasoning of the *Hopwood* Court, nonetheless declined to follow its predicts.⁹⁵ In *Podberesky v. Kirawan*,⁹⁶ the Fourth Circuit wrote that a University that had chosen a scholarship program that was open only to black applicants "stands before us burdened with a presumption that its choice cannot be sustained."⁹⁷ The *Kirwan* court ultimately found the scholarship plan to be unconstitutional in that it used a general societal discrimination as the basis of its justification.⁹⁸ Further, the scholarship program failed as being not narrowly tailored (under-inclusive) because it was designed to attract only high-achieving black students when "high achievers, whether African-American or not, are not the group against which the University was claimed to have been discriminatory in the past."⁹⁹

What then would a race based affirmative action plan consist of in order to survive a constitutional challenge? One would start with a recitation of basic factual principle regarding equal protection. Whenever persons similarly situated are treated differently on the basis of race under the law, the level of review employed by a reviewing court is that of strict scrutiny - the interest at stake must be a compelling state interest and the means chosen to achieve that interest must be narrowly tailored to that end.¹⁰⁰ The compelling state interest must be one that the reviewing court is willing to recognize.¹⁰¹ Further, the narrow tailoring prong of strict scrutiny review requires that the means chosen are necessary; the objective can be achieved in no other

⁹⁴ *Id.* at 1328.

⁹⁵ *Id.* at 1332.

⁹⁶ 38 F.3d 147 (4th Cir. 1994).

⁹⁷ *Id.* at 152.

⁹⁸ *Id.* at 155.

⁹⁹ *Id.* at 158.

¹⁰⁰ *Adarand*, 115 S. Ct. 2097 (1995).

¹⁰¹ See generally *Bakke*, 438 U.S. 265 (1995).

less obtrusive way. In order for a school to withstand a constitutional challenge to its admission policy, it must be able to show that both aspects of the test are satisfied. A compelling state interest put forth by the policy of "exposure to a wide variety of social and political interests to enhance the educational experience" will not suffice. Although *Bakke* was never expressly overruled, one nonetheless must adopt the logic of the Fifth Circuit in *Hopwood*, where it was noted by the court that Justice Powell's argument in *Bakke* "never represented the view of the Court in *Bakke* or in any other case."¹⁰² Further, the Supreme Court in *Adarand* flatly rejects Justice Powell's "formulas of analysis articulated in *Bakke*"¹⁰³ and expressly states that racial characteristics "seldom provide a relevant basis for disparate treatment."¹⁰⁴

From the various court decisions discussed it appears that the only forms of racial classifications that will survive the Court's strict judicial review would be instances which present the Court with a remedy for a specific racial group that had actually been harmed by the racist policies of the actor from which they seek redress. From *Croson* we know that a "generalized assertion" that there has been societal discrimination in the past will not be sufficient to establish a compelling state interest.¹⁰⁵ Further, the program would have to ensure that this group, and only this group, would receive assistance and then the assistance would last only until the harms suffered had been recompensed. Under *Adarand*,¹⁰⁶ any program that over compensates, or includes other groups not harmed in the past, would be held to be invalid.

The topicality of the affirmative action debate could not be greater, as evinced by the recent Time magazine cover story¹⁰⁷

¹⁰² *Hopwood*, 78 F.3d 932 (5th Cir. 1996).

¹⁰³ *Adarand*, 115 S. Ct. at 2117.

¹⁰⁴ *Id.* The Court goes on to say that "we think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and to means." *Id.*

¹⁰⁵ *Croson*, 488 U.S. at 498.

¹⁰⁶ *Adarand*, 115 S. Ct. 2097 (1995) (holding all racial classifications be subjected to strict scrutiny).

¹⁰⁷ TIME, June 23, 1997, at 48.

and a graduation address by President Clinton dedicated to expressing the need for continued affirmative action programs.¹⁰⁸ In the specific area of admission policies of institutions of higher education, *Bakke* remains problematic in that a clear direction cannot be extracted from its multiple opinions. For those who share President Clinton's view however, another case will have to come along to overrule, or at least modify, *Adarand* and its requirement that strict scrutiny be applied when analyzing race-based classifications. And, despite the Court's assurances otherwise,¹⁰⁹ this level of review, if not fatal, certainly has proven life-threatening.

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¹⁰⁸ See NEW YORK TIMES, June 15, 1997, at A1. Interestingly, President Clinton chose the University from which the *Bakke* litigation was born as the site at which to give this speech.

¹⁰⁹ See *Adarand*, 115 S. Ct. at 2117.

