

BAKKE'S FATE

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INTRODUCTION	1745
I. PRECEDENT	1746
A. <i>Adarand</i> (At First)	1746
B. <i>Bakke</i>	1750
C. <i>Wygant</i>	1754
D. <i>Croson</i>	1756
E. <i>Metro Broadcasting</i>	1759
F. <i>Adarand</i> (Again)	1767
II. POLICY AND STRUCTURE	1771
A. Quotas Versus Pluses	1772
B. Democratic Diversity in Education	1773
CONCLUSION	1779

INTRODUCTION

Bakke,¹ it seems, now hangs by a thread. Will the thread hold? Should it? To answer these questions, we must reconsider various possible meanings of the concept of "affirmative action," a phrase that today conjures up images of everything from set-asides for government contractors to diversity programs for college students. In this Article, we propose that these two particular domains be analyzed separately.² In the former, affirmative action guarantees minority firms "a piece of the action" in getting government business. In the latter, affirmative action brings young adults from diverse backgrounds together into a democratic dialogue where they will learn from each other.

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1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

2. Cf. MICHAEL WALZER, *SPHERES OF JUSTICE* (1983) (identifying different domains of life governed by different ordering principles).

In a trio of recent cases—*City of Richmond v. J.A. Croson Co.*,³ *Metro Broadcasting, Inc. v. FCC*,⁴ and *Adarand Constructors, Inc. v. Pena*⁵—the Supreme Court has said a lot about contracting and rather little about education. Energized by these decisions, some opponents of contracting set-asides have now set their sights on educational diversity programs. But one can agree with the reasoning and results of the anti-affirmative action contracting opinions and still share the vision of *Bakke*: Because our public universities should be places where persons from different walks of life and diverse backgrounds come together to talk with, to learn from, and to teach each other, each person's unique background and life experience may be relevant in the admissions process—thus, absolute color-blindness is not constitutionally required in the education context. In the course of elaborating *Bakke*'s vision, and pondering *Bakke*'s fate, we shall journey first through Supreme Court precedents and then through various policy-based and structural arguments about the importance of democratic dialogue and diversity in public universities.⁶

I. PRECEDENT

A. *Adarand* (At First)

Our examination begins with the Court's most recent affirmative action case, *Adarand*,⁷ where a white contractor challenged a federal program that set aside contracts for minority-owned construction companies. The contractor argued that his bid to install a guardrail on a federal highway was lower than the bid of the contract-winning, minority-owned company, and that the set-aside thus violated his constitutional right to equal protection of the laws. The Court, by a five-to-four vote, called for strict scrutiny and hinted that the program was unconstitutional.⁸ With Justice O'Connor writing for the majority, the Court overruled its 1990 decision in

3. 488 U.S. 469 (1989).

4. 497 U.S. 547 (1990).

5. 115 S. Ct. 2097 (1995).

6. Because arguments based on the text and history of the Fourteenth Amendment seem largely indeterminate, we do not consider them here at length. See *infra* text accompanying note 129.

7. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

8. Contrary to many reports, the Court did not rule that the program was unconstitutional; rather, it remanded the case to a lower court to decide that issue.

Metro Broadcasting, which had held that federal set-asides should receive only intermediate scrutiny from the judiciary.⁹

Yet *Adarand* said next to nothing about *Bakke*. In that famous 1978 case, Allan Bakke, a white candidate who had been rejected twice by U.C. Davis Medical School, filed suit contending that the school's special admissions program for minorities was a rigid quota that excluded him on the basis of his race. A fractured Court struck down the Davis program but held that Davis could still use race as a factor in its admissions decisions.¹⁰ The future of *Bakke* has obvious importance to state colleges and universities across America: All these schools are directly governed by the Supreme Court's interpretation of the Fourteenth Amendment.¹¹ And the Court's interpretation of the Fourteenth Amendment may have a staggering impact on private colleges and universities as well.¹²

Thus, after *Adarand*, a huge question remains: What happens to *Bakke*? Put another way, though *Adarand* said virtually nothing about education, did the Court somehow overrule *Bakke sub silentio*?

There are different ways to read *Adarand*. Read one way, the Court was insisting on "race neutrality" across the board. On this view, the Court was saying that the government could never take race into account, except in narrowly defined remedial contexts. At first glance, this reading might seem compelling. The Court laid down a harsh test: "[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."¹³ But other language reveals the Court's unwillingness to demand complete race neutrality. As the Court later said, "strict scrutiny does take 'relevant differences' into account"¹⁴—an open rejection of race-neutrality absolutism. Further, *Adarand* explicitly rejected the notion that strict scrutiny is

9. *Adarand*, 115 S. Ct. at 2113.

10. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.).

11. Some states are considering the abolition of all racial preferences. The University of California's Regents have already passed such a ban, though it has not yet been implemented. See B. Drummond Ayres Jr., *Board Delays Ban on Affirmative Action, but Discord Persists*, N.Y. TIMES, Feb. 16, 1996, at A24 (noting delay in Regents' implementation of policy that the University "shall not use race, religion, sex, color, ethnicity or national origin as a criterion for admission to the university").

12. Title VI of the 1964 Civil Rights Act prohibits schools that receive federal funds from discriminating on the basis of race. 42 U.S.C. § 2000d (1994). Because, post-*Bakke*, Title VI is to be interpreted in line with the Equal Protection Clause, see *infra* note 54, a reversal of *Bakke* may doom all race-conscious diversity programs in private colleges that accept federal funds.

13. *Adarand*, 115 S. Ct. at 2113.

14. *Id.*

"strict in theory, but fatal in fact."¹⁵ For example, the Court noted that affirmative action may be justified by the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country."¹⁶ In another key passage, the Court pointedly left open the possibility that in applying strict scrutiny judges could seek to distinguish between a race-conscious "No Trespassing" sign and a race-conscious "welcome mat."¹⁷ In fact, only two Justices, Thomas and Scalia, sounded the theme of absolute color-blindness.¹⁸ (Scalia was aware that he was rejecting the race-consciousness of the majority opinion; he concurred "except insofar as it may be inconsistent with the following: In my view, government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction.")¹⁹

A different reading of *Adarand* could stress its context: government contracts for things like guardrails. The Court was not making wholesale social policy in the case; rather, it was interpreting the Fourteenth Amendment in one particular, and particularly troubling, setting. On this reading, the differences between contracts and education suggest that *Adarand* did not change *Bakke*. First, many government contracts are highly susceptible to fraud, since contracts may be awarded to "minority" firms where minorities are "owners" on the books but not in reality, or are present only as corporate figureheads. By contrast, the opportunities for sham and fraud in education are constrained by high school guidance counselors and parents, as well as by the university, which has four years to verify an individual applicant's claims about who he is and where he comes from.²⁰ In addition, the millions of dollars that may be at stake in any given contract can be a juicy inducement for corruption of a more general variety. Moreover, a wider range of people benefits from preferences in education than from contracting set-asides, which are notorious for helping the well-off and the

15. *Id.* at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment)).

16. *Id.*

17. *Id.* at 2114.

18. *Id.* at 2118-19 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment).

19. *Id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment).

20. Admittedly, both schemes pose thorny issues of proof of minority status: How does one prove that she is really one-eighth black? Should Aleuts count? But as we shall see, *infra* note 131, university admissions committees can be much more nuanced in considering a whole person, and her unique background, than can a contracting set-aside program in which a bureaucrat requires a contractor to check a racial box on a form.

well-connected.²¹ How many minorities own construction companies? Also, contracts are awarded to people throughout their adult years and have no logical stopping point short of perpetual proportionality in all sectors of the economy. University education, however, typically occurs early in life and then ends. Higher education, by making up for educational inequities at early stages in life, can be the ramp up to a level playing field—with no further affirmative action—for the rest of one's future. What's more, affirmative action may partially correct the racial skew of what are, quite literally, educational grandfather clauses—the admissions preferences some schools award alumni offspring.²²

In the end these differences may not be entirely convincing. After all, Allan Bakke and other whites may still feel victimized by virtue of their race. But, before agreeing with them, we should stop to ponder the biggest difference of all. Contracting set-asides mean that "minority firms" win some projects and "white firms" do not; this can balkanize the races by encouraging their segregation. Education, in contrast, unites people from different walks of life. Instead of insular corporations performing various discrete contracts in isolation—the "minority firm" adds the guardrail after the "white firm" lays the asphalt—universities draw diverse people into spaces where they mingle with and learn from *each other*. Set-asides can go to a wholly unintegrated firm and therefore do not always help bring Americans together.²³ Integrated education, on the other hand, does not just benefit minorities—it advantages *all* students in a distinctive way, by bringing rich and poor, black and white, urban and rural, together to teach and learn from each other as democratic equals.

If a far-flung democratic republic as diverse—and at times divided—as late twentieth-century America is to survive and flourish, it must cultivate some common spaces where citizens from every corner of society can come together to learn how others live, how others think, how others feel. If not in public universities, where? If not in young adulthood, when?

21. See, e.g., Evan Gahr, *FCC Preferences: Affirmative Action for the Wealthy*, INSIGHT MAG., Feb. 22, 1993, at 1 (describing how Vernon Jordan, Quincy Jones, O.J. Simpson, and others may benefit from FCC preferences).

22. UCLA is apparently one such school. See, e.g., Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2068 (1996).

23. One can argue that contracting set-asides might "integrate" minorities into the middle and upper classes; but without more this "integration" might occur with minorities and whites living in "separate but equal" segregated middle-class neighborhoods, worshipping in separate churches, working in separate jobs, and never coming together in common citizenship. Educational diversity, done right, is inherently integrating. See *infra* text accompanying notes 134–148.

B. *Bakke*

This vision of university diversity, we submit, is the heart and soul of *Bakke*. In that case, four Justices (Brennan, Blackmun, Marshall, and White) said the Davis plan was constitutional.²⁴ Four Justices (Burger, Rehnquist, Stevens, and Stewart) said it violated Title VI of the 1964 Civil Rights Act.²⁵ And one Justice (Powell) held that the particular Davis scheme at issue was unconstitutional, but that other affirmative action plans based on diversity were not.²⁶ One certainty emerged from the splintered Court: Five Justices—the Brennan Four and Justice Powell—signed on to Part V-C of Justice Powell's opinion, which in its entirety reads as follows:

In enjoining [Davis] from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins [Davis] from any consideration of the race of any applicant must be reversed.²⁷

In his Foreword to the *Harvard Law Review* the year *Bakke* was announced, John Hart Ely quoted Part V-C and glowed: "That is the Opinion of the Court in *Bakke*. I'll take it."²⁸ But what, exactly, does it mean to "take" this package? The Court has at times been unclear, and scholars have not been entirely forthcoming. Yet, beneath the confusion lies a powerful theory—an argument put forth by the swing vote, Justice Lewis Powell.

Justice Powell argued that the benefits of integrated education accrue to *all* students,²⁹ and that some affirmative action to increase diversity was therefore appropriate. The goal of "a diverse student body," he said, "clearly is a constitutionally permissible goal for an institution of higher education. . . . [I]t is not too much to say that 'the nation's future depends upon leaders trained through wide exposure to' the ideas and mores of

24. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

25. *Id.* at 408 (Stevens, J., concurring in the judgment in part and dissenting in part).

26. *Id.* at 315-20 (opinion of Powell, J.).

27. *Id.* at 320.

28. John H. Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 10 n.33 (1978).

29. *Bakke*, 438 U.S. at 323 (appendix to opinion of Powell, J.).

students as diverse as this Nation of many peoples."³⁰ Diversity was not, however, a magical phrase that a university could incant whenever it found itself in trouble. After all, Justice Powell sided with Allan Bakke and struck down the Davis program. The Justice wrote that the program's "fatal flaw" was "its disregard of individual rights" because "[i]t tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class"³¹—in short, it was a rigid set-aside.

Justice Powell made three big points in *Bakke*. First, diversity may enable an educational affirmative action program to pass constitutional muster because democratic and dialogic educational benefits accrue to all students. To the Justice, such racial considerations were appropriate when, for example, blacks would not otherwise be admitted in sufficient numbers "to bring to their *classmates* and to each other the variety of points of view, backgrounds and experiences of blacks in the United States."³² Second, a university could not use a strict quota or a rigid set-aside in an attempt to enhance diversity. It must look instead to the whole person. These two points led Justice Powell to attach an appendix to his opinion that detailed the Harvard College Admissions Program. The Harvard program did not use quotas, but permitted race to "tip the balance" in some cases because "diversity adds an essential ingredient to the educational process."³³

The Harvard plan also satisfied a third aspect of Justice Powell's vision—an interest in nonracial diversity. He believed that the Davis plan was unconstitutional because "[n]o matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, [nonminority students] are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats."³⁴ Earlier in his opinion, Justice Powell had declared that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element" and that the Davis program, "focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity."³⁵ In the Harvard plan, by con-

30. *Id.* at 311–13 (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

31. *Id.* at 319, 320.

32. *Id.* at 323 (appendix to opinion of Powell, J.) (emphasis added).

33. *Id.* at 322, 323.

34. *Id.* at 319 (opinion of Powell, J.).

35. *Id.* at 315.

trast, "[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer."³⁶

Justice Powell's three arguments are tightly intermeshed. One reason that a university must not use a rigid quota is that doing so could lead the school to admit unqualified minorities who would undermine the school's educational mission. Racial quotas could also hamper the university's ability to admit nonracially diverse students.³⁷ And one reason that nonracial diversity was so important was to ensure that *all* students would be exposed to people different from themselves—African Americans who grew up in the inner-city, white farm boys from Idaho, and every permutation in between. Justice Powell stressed this point in a key footnote quoting the President of Princeton University:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world.³⁸

Did the four Justices who went along with Justice Powell's Part V-C in *Bakke* also embrace the diversity theory in which that Part was nested? Their opinion contained the following:

[T]he central meaning of today's opinions [is that] Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages

. . . .

. . . Since we conclude that the affirmative admissions program at the Davis Medical School is constitutional, we would reverse the

36. *Id.* at 316 (quoting *id.* at 323 (appendix to opinion of Powell, J)).

37. In Powell's words:

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed appropriate.

Id. at 317.

38. *Id.* at 312-13 n.48 (alteration in original).

judgment below in all respects. [Mr. Justice Powell] agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future.³⁹

They then dropped this footnote: "We also agree with [Justice Powell] that a plan like the 'Harvard' plan is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination."⁴⁰

There are two ways to read all this. The first is that this "approach" permits Harvard-style affirmative action only "so long as" it remedies the effects of past discrimination. The four Justices articulated a test that stressed remedies for past discrimination⁴¹ and then explained how the Davis plan met this test.⁴²

But, if anything, the Brennan Four's test was more permissive than Powell's. The Brennan Four said more than their Harvard footnote. They spoke the language of diversity as well, arguing that the Davis program "does not, for example, establish an exclusive preserve for minority students *apart from* and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by *bringing the races together*."⁴³ This language, combined with the caveat "at least" in their Harvard footnote, supports the diversity argument; the Brennan Four argued that affirmative action in education "bring[s] the races together" into "an integrated student body" and that this feature justified even the rigid Davis program.⁴⁴ As the most recent Foreword to the *Harvard Law Review*, written by Charles Fried, suggests, "it may not be wrong to say that the difference between Powell

39. *Id.* at 324–26 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (citation omitted). This statement was attacked by the Stevens Four, who argued that "only a majority can speak for the Court or determine what is the 'central meaning' of any judgment of the Court." *Id.* at 408 n.1 (Stevens, J., concurring in judgment in part and dissenting in part).

40. *Id.* at 326 n.1 (Brennan, White, Marshall, & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (citation omitted).

41. *Id.* at 369 (arguing that the "government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large").

42. *Id.* at 371–73 (looking to low percentage of "Negro physicians" in 1970 and 19th-century penal sanctions for educating slaves).

43. *Id.* at 374 (emphasis added).

44. These four Justices did not think that the plus/quota distinction mattered, stating that, for "purposes of constitutional adjudication, there is no difference between the two approaches." *Id.* at 378.

and Brennan in *Bakke* was one of degree"⁴⁵ The Brennan Four's hesitation about diversity, insofar as it existed, may have stemmed from a worry that the theory could be used to exclude "overrepresented" but historically victimized minorities (caps on Jews or Asians, for example)—and to make clear that the Court's standard could be applied differently in contexts where diversity served to limit the admission of such minorities. Also, the "at least" language may have hinted at temporal limits on diversity-based affirmative action: As university affirmative action achieves its long-run effect of healing racial separation, division, discrimination, and inequality in American society, race will gradually become irrelevant and—like eye color or blood type—will cease to be significant for university admissions.

Does the diversity vision still dwell in the hearts and minds of the Justices? No member of the original *Bakke* Five sits on the Court today, and of the four dissenters, only Chief Justice Rehnquist and Justice Stevens remain. The Supreme Court that decides the future of *Bakke* in the late 1990s will look very different from the one that decided the original case in the late 1970s. We thus must try to understand what the Justices have said about affirmative action since 1978, and whether their decisions cast doubt on the *Bakke* principle. To do this, we shall parse more recent cases by looking at the Justices individually, with a heavy emphasis on Justice O'Connor, who, we believe, may well hold the fate of *Bakke* in her hands.⁴⁶

Our survey of the post-*Bakke* affirmative action cases will demonstrate an important distinction between contracts and schools. We want to persuade readers that a wall between these two domains exists, and that this wall—at the base of *Bakke*—has not collapsed under the weight of the various post-*Bakke* contracting cases.

C. *Wygant*

We start with *Wygant v. Jackson Board of Education*,⁴⁷ a 1986 case in which the Court examined a school board's policy of retaining minority teachers over nonminority teachers in layoff decisions. Justice Powell,

45. Charles Fried, *The Supreme Court, 1994 Term—Foreword: Revolutions?*, 109 HARV. L. REV. 13, 48 (1995).

46. Cf. Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 122–23 (1989) (noting that, in 1989, Justice O'Connor held the fate of *Roe v. Wade*, 410 U.S. 113 (1973), in her hands).

47. 476 U.S. 267 (1986).

writing for a plurality, held that the plan violated the Equal Protection Clause and that the role-model theory used to justify the plan—based on the notion that minority students needed minority teachers as role models—“had no logical stopping point.”⁴⁸ Unlike the educational diversity theory, role-modelling could apply in virtually every sector of life and the economy, and seemed premised on segregationist rather than integrationist ideology: “Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*.”⁴⁹

Thus, Justice Powell's repudiation of the role-model theory in no way signalled a retreat from *Bakke*. As Justice O'Connor noted in her separate concurrence, “[t]he goal of providing ‘role models’ discussed by the courts below should not be confused with the very different goal of promoting racial diversity among the faculty.”⁵⁰ Both here and elsewhere in her concurrence, Justice O'Connor may have tipped her hand about *Bakke*. Earlier in her opinion, she stated—citing to Justice Powell's opinion in *Bakke*—that “a state interest in the promotion of racial diversity has been found sufficiently ‘compelling,’ at least in the context of higher education, to support the use of racial considerations in furthering that interest.”⁵¹ She nevertheless sided with the white plaintiffs because the school had not relied in the courts below on the “very different” and possibly winning rationale of promoting diversity.⁵²

Justice Stevens also played the diversity card in his dissent. He argued:

In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white, faculty. For one of the most important lessons that the American public schools teach is that the diverse ethnic, cultural, and national backgrounds that have

48. *Id.* at 275 (plurality opinion). Powell also found it significant that the policy concerned layoffs. *Id.* at 283 (“While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives.” (footnotes omitted)).

49. *Id.* at 267.

50. *Id.* at 288 n.* (O'Connor, J., concurring in part and concurring in the judgment).

51. *Id.* at 286 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (opinion of Powell, J.)).

52. *Id.* at 288 n.* (“Because this latter goal was not urged as such in support of the layoff provision before the District Court and the Court of Appeals, however, I do not believe it necessary to discuss the magnitude of that interest or its applicability in this case.”).

been brought together in our famous "melting pot" do not identify essential differences among the human beings that inhabit our land. It is one thing for a white child to be taught by a white teacher that color, like beauty, is only "skin deep"; it is far more convincing to experience that truth on a day-to-day basis during the routine, on-going learning process.⁵³

Note Justice Stevens' emphasis on the facts that diversity brings benefits "to the [entire] student body," that "white child[ren]" learn from diversity via "day-to-day" intermingling with others in an "ongoing learning process," and that American schools serve a vital function when they bring Americans of different backgrounds "together" in "integrated" settings.⁵⁴

D. *Croson*

Wygant was written the year before Justice Kennedy joined the Court, and the decision thus sheds no light on his thinking. We begin to understand Justice Kennedy, and the nuanced world of Justice O'Connor, by examining the 1989 contracting case, *City of Richmond v. J.A. Croson Co.*⁵⁵ In *Croson*, the Justices reviewed the constitutionality of Richmond's set-aside plan, which reserved thirty percent of the city's contracts for minority-owned businesses; at issue was a plumbing contract to install urinals and toilets in a city jail. Writing for the Court, Justice O'Connor applied strict scrutiny and found that the city set-aside violated the Equal

53. *Id.* at 315 (Stevens, J., dissenting) (footnote omitted).

54. By contrast, Justice Stevens's opinions during the 1970s were considerably more hostile to racial preferences. In *Bakke*, he argued that the Davis program violated Title VI of the 1964 Civil Rights Act. In the wake of *Bakke*, however, the law is settled: In public schools, Title VI protects only what the Fourteenth Amendment protects. Therefore, to understand how Justice Stevens would vote today, we must examine his approach to the Fourteenth Amendment. Soon after *Bakke*, he authored a highly influential dissent in *Fullilove v. Klutznick*, 448 U.S. 448, 532 (1980) (Stevens, J., dissenting), a dissent that became the basis for the Court's holding in *Adarand*. (Justice O'Connor's *Adarand* opinion repeatedly cited Justice Stevens's *Fullilove* dissent. See *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2109, 2113, 2117 (1995).) But in the post-*Fullilove* era, *Wygant* was one of many steps that Justice Stevens took in retreat from his 1970s race-neutrality vision.

Since *Bakke*, Justice Stevens has been the most forceful advocate on the Court for non-remedial affirmative action measures. He has consistently argued that affirmative action makes just as much sense when it promotes an interest in creating a more inclusive and diverse society for today and the future, as when it serves an interest in remedying past wrongs.

Memorandum from Walter Dellinger, Assistant Attorney General, U.S. Department of Justice, to General Counsels 18 (June 28, 1995), reprinted in Daily Lab. Rep. (BNA) No. 125, at D-33 (June 29, 1995).

55. 488 U.S. 469 (1989).

Protection Clause.⁵⁶ She suggested that “perhaps the city’s purpose was not, in fact, to remedy past discrimination”⁵⁷—the majority-black Richmond City Council was favoring blacks and other minority businesses—and found that the program was not “narrowly tailored to remedy the effects of prior discrimination.”⁵⁸ While she quoted different parts of Justice Powell’s *Bakke* opinion,⁵⁹ diversity was never an issue in the case.

Justice Stevens largely concurred, but went out of his way to suggest that *Croson* contracts could be distinguished from *Bakke* benefits:

[S]ome race-based policy decisions may serve a legitimate public purpose. I agree, of course, that race is so seldom relevant to legislative decisions on how best to foster the public good that legitimate justifications for race-based legislation will usually not be available. But unlike the Court, I would not totally discount the legitimacy of race-based decisions that may produce tangible and fully justified future benefits. See n.2, *infra*; see also Justice Powell’s discussion in *University of California Regents v. Bakke*, 438 U.S. 265, 311–19 (1978).⁶⁰

Stevens continued by emphasizing the difference between the contracting and education contexts, stating that “the city makes no claim that the public interest in the efficient performance of its construction contracts will be served” by the preference and that “[t]his case is therefore completely unlike *Wygant*, in which I thought it quite obvious that the school board had reasonably concluded that an integrated faculty could provide educational benefits to the *entire* student body that could not be provided by an all-white, or nearly all-white, faculty.”⁶¹ (Then-Judge Ruth Bader Ginsburg, while on the D.C. Circuit, explicitly endorsed Justice Stevens’ *Croson* concurrence and argued “that remedy for past wrong is not the exclusive basis upon which racial classifications may be justified.”)⁶²

Justice Kennedy also concurred, eloquently sounding the theme of race neutrality—a theme that Justice Scalia amplified in his own separate *Croson*

56. Although the portion of her opinion announcing a strict scrutiny test was technically only a plurality opinion representing four votes, *id.* at 493–96, Justice Scalia’s concurrence added, in effect, a fifth vote for (at least) strict scrutiny of state-initiated affirmative action, *id.* at 520–28 (Scalia, J., concurring in the judgment).

57. *Id.* at 506.

58. *Id.* at 508.

59. *Id.* at 493–94, 497, 506.

60. *Id.* at 510 n.1 (Stevens, J., concurring in part and concurring in the judgment).

61. *Id.* at 512 (emphasis added).

62. *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 429 (D.C. Cir. 1992) (Ginsburg, J., concurring).

concurrence.⁶³ In Justice Kennedy's soaring words: "The moral imperative of racial neutrality is the driving force of the Equal Protection Clause."⁶⁴ In general, we take Justice Kennedy's heartfelt vision here as a sign of his strong reluctance to accept diversity as a justification for taking race into account. He has not directly confronted the issue, but his passionate writings on race suggest that he is uncomfortable with the notion that government action should ever hinge on a person's race.⁶⁵ Yet perhaps he may be persuaded by the many differences between the Harvard and Richmond plans; and it remains to be seen what will happen when his race neutrality impulse confronts his strong affinity for precedent and his willingness to examine thorny race issues on a case-by-case basis. Indeed, in *Croson* itself, Justice Kennedy carefully trimmed his sails to take account of past precedent: "[G]iven that a rule of automatic invalidity for racial preferences in almost every case would be a significant break with our precedents that require a case-by-case test, I am not convinced we need adopt it at this point."⁶⁶

63. *Croson*, 488 U.S. at 520 (Scalia, J., concurring in the judgment).

64. *Id.* at 518 (Kennedy, J., concurring in part and concurring in the judgment).

65. For example, in one of the important voting rights cases decided last year, *Miller v. Johnson*, Justice Kennedy began his opinion by quoting Justice Powell's exhortation: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." 115 S. Ct. 2475, 2482 (1995) (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978) (opinion of Powell, J.)). This principle, Kennedy argued, "obtains with equal force regardless of the 'race of those burdened or benefited by a particular classification.'" *Id.* (quoting *Croson*, 488 U.S. at 494). This, once again, is the theme of race neutrality. See also *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (opinion of Kennedy, J., for the Court).

It is suggested that no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence.

Id.; cf. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (opinion of Kennedy, J., for the Court).

[D]iscrimination on the basis of race in selecting a jury in a civil proceeding harms the excluded juror no less than discrimination in a criminal trial. In either case, race is the sole reason for denying the excluded venireperson the honor and privilege of participating in our system of justice.

Id. (citation omitted).

66. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment).

E. *Metro Broadcasting*

We turn next to *Metro Broadcasting, Inc. v. FCC*,⁶⁷ where the 1990 Court examined the constitutionality of two policies adopted by the Federal Communications Commission. In one policy, the FCC gave preferences to minority-owned firms when it reviewed license applications for new radio or TV stations. In the other, the "distress sale" program, a radio or TV station whose license qualifications had come into question could transfer that license to another entity before the FCC resolved the matter, if and only if the transferee was a minority enterprise. The policies tried to blur the line between educational diversity and contracting; the FCC, relying on *Bakke*, claimed that the broadcast preferences were designed to ensure diversity in programming.

In upholding the FCC policies, Justice Brennan's opinion for the Court made two crucial moves. First, it argued that courts should defer to Congress because of Section 5 of the Fourteenth Amendment and other considerations.⁶⁸ Second, it found that Congress's broadcast policy was justified because racial preferences enhanced broadcast diversity. In elaborating the second argument, Justice Brennan tried to plant himself squarely on the shoulders of Justice Powell:

Against this background, we conclude that the interest in enhancing broadcast diversity is, at the very least, an important governmental objective and is therefore a sufficient basis for the Commission's minority ownership policies. Just as a "diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" on which a race-conscious university admissions program may be predicated, *Regents of University of California v. Bakke*, 438 U.S. 265, 311-313 (1978) (opinion of Powell, J.), the diversity of views and information on the airwaves serves important First Amendment values. Cf. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 314-315 (1986) ([Stevens], J., dissenting). The benefits of such diversity are not limited to the

67. 497 U.S. 547 (1990).

68. *Id.* at 563.

members of minority groups who gain access to the broadcasting industry by virtue of the ownership policies; rather the benefits redound to all members of the viewing and listening audience. As Congress found, "the American public will benefit by having access to a wider diversity of information sources."⁶⁹

Justice Stevens, concurring, found that the "public interest in broadcast diversity—like the interest in an integrated police force, diversity in the composition of a public school faculty or diversity in the student body of a professional school—is in my view unquestionably legitimate."⁷⁰ He then dropped a footnote here: "See Justice Powell's opinion announcing the judgment in *Regents of University of California v. Bakke*, 438 U.S. 265, 311–19 (1978)."⁷¹

But the majority's use of *Bakke* did not go unchallenged—Justice O'Connor, flanked by Chief Justice Rehnquist and Justices Scalia and Kennedy, dissented.⁷² Her opinion may be read to mean more, but it is at least an attack on the FCC's attempt to stretch *Bakke* to cover the broadcasting sphere. Early on, she stated that "the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think."⁷³ Such classifications "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict."⁷⁴ And she went on to attack the interest in diversity:

The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. . . . We have recognized that racial classifications are so harmful that "[u]nless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

69. *Id.* at 567–68 (footnote omitted) (citation omitted).

70. *Id.* at 601–02 (Stevens, J., concurring) (footnotes omitted).

71. *Id.* at 602 n.6.

72. *Id.* at 602 (O'Connor, J., dissenting).

73. *Id.*

74. *Id.* at 603 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989)).

... We determined [in *Croson*] that a "generalized assertion" of past discrimination "has no logical stopping point" and would support unconstrained uses of race classifications.⁷⁵

Now these are strong words about diversity. And some may think that these strong words doom *Bakke*. But, read closely, we believe that Justice O'Connor's words can be confined to the contracting sphere and the "diversity of *broadcast* viewpoints."

After all, Justice O'Connor both began and ended her dissent by appealing to precedent. Her first paragraph claimed that Brennan's deferential approach "finds no support in our cases"⁷⁶ and her last substantive sentence excoriated the majority's "break with our precedents."⁷⁷ *Nowhere* in her opinion did Justice O'Connor repudiate *Bakke*—she only repudiated an extension of *Bakke* beyond the education context. Indeed, in the course of explaining why *Bakke* cut against the FCC, she thrice explicitly cited with approval Justice Powell's *Bakke* opinion.⁷⁸ What's more, she never disavowed what she said in *Wygant*, and we should not lightly assume that her later *Metro Broadcasting* dissent took back her earlier statement sub silentio. In fact, she had gone out of her way in *Croson* to cite Powell's opinion in *Bakke*, and some of her most powerful language in *Metro Broadcasting*—about "racial hostility" often engendered by non-remedial affirmative action—came from the exact passage of her earlier *Croson* opinion where she cited Powell.⁷⁹

Indeed, Justice O'Connor's opinion highlighted five troublesome features of affirmative action in the contracting case before her, and these five do not apply straightforwardly to all educational diversity programs. First, as noted above, she argued that the FCC's theory lacked a logical stopping point and seemed to push hard toward strict racial proportional representation in broadcasting and elsewhere.⁸⁰ Second, she pointed out

75. *Id.* at 612–13 (first alteration in original) (quoting *Croson*, 488 U.S. at 493, 498).

76. *Id.* at 603. See also her statement that "modern equal protection doctrine has recognized only" the remedial interest as compelling, *id.* at 612, a statement that can be read at face value as merely describing past precedent.

77. *Id.* at 631.

78. *Id.* at 619, 621, 625.

79. *Croson*, 488 U.S. at 493–94 (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.)).

80. On stopping points in education, see *supra* text accompanying note 22 and *infra* text accompanying notes 142–145.

that FCC licenses are "exceptionally valuable property" and that "given the sums at stake, applicants have every incentive to structure their ownership arrangements to prevail in the comparative process"⁸¹—perhaps creating the possibility of sham and corruption.⁸² This concern was elaborated in a separate dissent by Justice Kennedy, who argued that the FCC programs "often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion."⁸³ Justice Kennedy added a pointed footnote here, noting that the beneficiary of the FCC policy in the case at hand was a company with a capitalization of \$24 million with only one minority investor who had contributed a paltry \$210.⁸⁴

Third, Justice O'Connor emphasized that diversity of ownership may not translate into diversity of programming. Explicitly invoking Justice Powell's opinion in *Bakke*, she argued that powerful market forces shape programming so that station owners tend to have only limited control over the ultimate form and content of their broadcasts.⁸⁵ (Her observation that the owner's racial identity often has little to do with the output and content of the broadcast has been powerfully confirmed by the recent experience of the Fox Television network—owned by a white, with programming that has attracted large black audiences.)⁸⁶ Fourth, Justice O'Connor found the FCC licensing scheme problematic because it operated by "identifying what constitutes a 'Black viewpoint,' an 'Asian viewpoint,' an 'Arab

81. *Metro Broadcasting*, 497 U.S. at 630 (O'Connor, J., dissenting).

82. By contrast, affirmative action in education operates on individuals, not corporations, and does not typically involve vast sums of money in any given case. See *supra* text accompanying notes 20–21.

83. *Metro Broadcasting*, 497 U.S. at 636 (Kennedy, J., dissenting).

84. *Id.* at 636 n.3. Elsewhere in his dissent, which was joined by Justice Scalia but—interestingly—not by Justice O'Connor, Justice Kennedy sounded strong themes of race neutrality. See, e.g., *id.* at 631–32 (comparing majority opinion to *Plessy v. Ferguson*, 163 U.S. 537 (1896)). This is itself, perhaps, revealing of a subtle difference of approach on this question between Justices Kennedy and O'Connor—a difference that may also be manifest in *Miller v. Johnson*, 115 S. Ct. 2475 (1995). Compare *supra* note 65 with *infra* text accompanying note 109.

In another key footnote in his *Metro Broadcasting* dissent, Justice Kennedy voiced concern about defining which minorities count and who counts as a minority—what we have called the "Aleut" and "Octoroon" problems. See 497 U.S. at 633 n.1 (Kennedy, J., dissenting); *supra* note 20. For an explanation of how the Harvard plan, sensitively administered, helps allay these concerns, see *infra* note 131.

85. *Id.* at 619 (O'Connor, J., dissenting) ("This strong link between race and behavior, especially when mediated by market forces, is the assumption that Justice Powell rejected in his discussion of health care service in *Bakke*."). By contrast, an individual student has more control over the "content" of the views he expresses in classes, cafeterias, dormitories, etc.

86. We thank Jim Chen for this reminder.

viewpoint,' and so on; determining which viewpoints are underrepresented; and then using that determination to mandate particular programming."⁸⁷

All of this suggests that Justice O'Connor in *Metro Broadcasting* did not repudiate Justice O'Connor in *Wygant*. And to these four reasons can be added a fifth—the Harvard plan. Justice O'Connor reserved her most powerful language for an attack on the FCC's "racial classifications." Her language must be understood in view of what she meant by that phrase. To us, these words reference her earlier excoriation of the FCC policies as a "direct[] *equat[ion of]* race with belief and behavior, for they establish race as a necessary and *sufficient* condition [for] securing the preference."⁸⁸ The key words here are "equation" and "sufficient"; the Justice was taking issue with the crude view that race is *by itself*—without ever looking at the whole person—enough to presume that one has a certain set of beliefs. Government may not presume that race *determines* how a person thinks or acts; but perhaps this is different from saying that government may not conclude that race *may influence* how a person thinks and that government must be utterly blind to race when looking at an applicant as a whole person.⁸⁹ The kind of wooden "racial classification" at issue in *Metro*

87. *Metro Broadcasting*, 497 U.S. at 615 (O'Connor, J., dissenting). This concern closely connects to a fifth, which we discuss in detail *infra* text accompanying notes 88–110. By contrast, a proper Harvard-style education plan does not assume that there is, say, only one way to be black. Cf. Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996). A follower of Thomas Sowell or Linda Chavez or George Will is no less authentically black than an adherent of Jesse Jackson. Justice Powell's *Bakke* Appendix pointedly quoted Harvard's recognition of the importance of intra- as well as inter-racial diversity:

The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower but who had demonstrated energy and leadership as well as an apparently abiding interest in black power. If a good number of black students much like A but few like B had already been admitted, the Committee might prefer B; and vice versa.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978) (appendix to the opinion of Powell, J.).

88. *Metro Broadcasting*, 497 U.S. at 618 (O'Connor, J., dissenting) (emphasis added); *see also id.* at 615 (condemning "generalizations impermissibly *equating* race with thoughts and behavior" (emphasis added)); *id.* at 629 (similarly condemning the "*equation* of race with behavior and thoughts" (emphasis added)).

89. *See also id.* at 618 (attacking notion that "a particular and distinct viewpoint *inheres* in certain racial groups" and that "race or ethnicity *alone*" guarantees diversity (emphasis added)); *id.* at 618–19 (noting that FCC assumes a "particularly strong correlation of race and behavior" and condemning this assumed "strong link between race and behavior"); *id.* at 619–20 (attacking the majority's willingness to uphold "*equation* of race with distinct views" because the "racial generalization inevitably does not apply to certain individuals" (emphasis added)).

Broadcasting, O'Connor felt, "may create considerable tension with the Nation's widely shared commitment to evaluating *individuals* upon their *individual* merit."⁹⁰ Indeed, in the very first sentence of her dissent, Justice O'Connor pointedly set the stage: "At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as *individuals*, not as simply components of a racial, religious, sexual or national class."⁹¹

On this reading, Justice O'Connor's analysis is quite similar to Justice Powell's approach in *Bakke*: When the government looks *solely* at race and admits people only because of their skin color, it violates equal protection.⁹² Indeed, on one occasion she cites Justice Powell's opinion in *Bakke* for the following proposition: "[R]ace-conscious measures might be employed to further diversity only if race were one of many aspects of background sought and considered relevant to achieving a diverse student body."⁹³ To be sure, this favorable citation can be construed narrowly—it is a carefully guarded statement, and even then perhaps only an argument in the alternative—but it tracks much of Justice O'Connor's own language. Two pages later, for example, she writes that "if the FCC believes that certain persons by virtue of their unique experiences will contribute as owners to more diverse broadcasting, the FCC could simply favor applicants whose particular background indicates that they will add to the diversity of programming, rather than rely *solely* upon suspect classifications."⁹⁴

Read this way, Justice O'Connor's opinion *supports* the need for a different contextual approach to education.⁹⁵ A college application allows an admissions office to look at the views and attitudes of a whole person in a way that the GSA cannot and the FCC did not. After an admissions office reviews an entire personal application file, with a personal statement, recommendations, and the like, it is much easier to tell whether a given

90. *Id.* at 604 (emphasis added).

91. *Id.* at 602 (quoting Arizona Governing Comm. for Tax Deferred Annuity & Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983)) (internal quotation marks deleted).

92. Recall that Justice Powell's opinion in *Bakke* featured passages sharply criticizing various types of affirmative action—passages that powerfully anticipated much of Justice O'Connor's language in *Metro Broadcasting*. See *Bakke*, 438 U.S. at 315–20 (opinion of Powell, J.).

93. *Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting); see also *id.* at 625 (citing Justice Powell in *Bakke* for the notion that government may not allocate benefits "simply on the basis of race" (emphasis added)).

94. *Id.* at 623 (emphasis added).

95. Her *Metro Broadcasting* dissent also expressed concern that allegedly "benign" theories like "role modelling" and broadcasting diversity could "justify limitations on minority members' participation in" affirmative action programs. *Id.* at 614–15 (emphasis added). On this concern, see *supra* text accompanying notes 45–50 and *infra* note 144.

applicant will bring diversity to a university than it is to tell whether a contractor will somehow "diversify" things. Put another way, Justice O'Connor in *Metro Broadcasting* was troubled by "[t]he ill fit of means to ends" in the FCC program.⁹⁶ In particular, she felt that the FCC's policy was "overinclusive" because "[m]any members of a particular racial or ethnic group will have no interest in advancing the views the FCC believes to be underrepresented," and that the policy was "underinclusive" because "[i]t awards no preference to disfavored individuals who may be particularly well versed in and committed to presenting those views."⁹⁷ Both underinclusiveness and overinclusiveness were, of course, factors that drove Justice Powell to strike down the group-oriented Davis plan and to support the individual-focused Harvard one. In short, we believe that Justice O'Connor's language attacked a program in which race was widely *equated*—categorically—with viewpoint, and *sufficient*, by itself, to win massive government largesse.⁹⁸ Thus, her language may be inapposite to Harvard-plan diversity in education.

This distinction can explain why, in *Wygant*, Justice O'Connor stated that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial *considerations* in furthering that interest."⁹⁹ To Justice O'Connor as well as Justice Powell, the diversity rationale may not be enough to uphold quotas and rigid set-asides, but it may be enough to uphold the use of race as a "*consideration*" or "plus" in admissions.

Justice O'Connor has pursued similar distinctions between classifications and considerations in other cases. In the 1987 Title VII case, *Johnson v. Transportation Agency*,¹⁰⁰ for example, she approved an affirmative action plan in which gender was used only as a "'plus' factor."¹⁰¹ She noted that if "an affirmative action program . . . automatically and blindly

96. *Metro Broadcasting*, 497 U.S. at 621 (O'Connor, J., dissenting).

97. *Id.* at 621.

98. Justice Brennan tried to portray the FCC policies as akin to the Harvard plan, with race as a mere "'plus' to be weighed together with all other relevant factors." *Id.* at 557 (opinion of the Court); see also *id.* at 597 & n.50. Justice O'Connor sharply disagreed, noting that one of the two FCC policies was the worst of all "rigid quota[s]"—"a 100% set-aside." *Id.* at 630 (O'Connor, J., dissenting). As to the second FCC policy, she found that "[t]he basic nonrace criteria are not difficult to meet" and that "race is clearly the dispositive factor in a substantial percentage of comparative proceedings"—perhaps "overwhelmingly the dispositive factor." *Id.* at 630–31.

99. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311–15 (1978) (opinion of Powell, J.)) (emphasis added).

100. 480 U.S. 616 (1987).

101. *Id.* at 656 (O'Connor, J., concurring in the judgment).

promotes those marginally qualified candidates falling within a preferred race or gender category," the program would violate Title VII.¹⁰² Because the facts of *Johnson* suggested that the applicant who won the promotion "was not selected *solely* on the basis of her sex," she voted to uphold the plan.¹⁰³ The Justice's views cannot be dismissed because *Johnson* was a statutory case; her concurrence explicitly stated that "the proper initial inquiry in evaluating the legality of an affirmative action plan by a public employer under Title VII is no different from that required by the Equal Protection Clause."¹⁰⁴

Two years later in her plurality opinion in *Croson*, Justice O'Connor used precise language in condemning Richmond's "rigid rule" denying whites "the opportunity to compete for a fixed percentage of public contracts based *solely* upon their race."¹⁰⁵ Similarly, in the 1993 voting rights case *Shaw v. Reno*,¹⁰⁶ Justice O'Connor, writing for a majority, declared it "antithetical to our system of representative democracy" when "a district obviously is created *solely* to effectuate the perceived common interests of one racial group."¹⁰⁷ Yet she cushioned her race neutrality with soft language about the permissibility of taking race into consideration, noting that "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors" and that "[t]hat sort of race consciousness does not lead inevitably to impermissible race discrimination."¹⁰⁸ Again, Justice O'Connor is contending that when race is one factor among many and is not—by itself—a sufficient factor, then taking race into account may be constitutional. This was also her message in the 1995 voting rights case, *Miller v. Johnson*.¹⁰⁹ In a separate concurrence (citing to the page from *Shaw* with the above language), she stated that the majority opinion "does not throw into doubt the vast majority" of the districts because "States have drawn the boundaries in accordance with their customary districting principles. . . . [E]ven though race may well have been *considered* in the redistricting process."¹¹⁰ The fifth factor, the con-

102. *Id.*

103. *Id.* (emphasis added).

104. *Id.* at 649.

105. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (emphasis added).

106. 113 S. Ct. 2816 (1993).

107. *Id.* at 2827 (emphasis added).

108. *Id.* at 2826.

109. 115 S. Ct. 2475 (1995).

110. *Id.* at 2497 (O'Connor, J., concurring) (emphasis added).

sideration/classification distinction, therefore, may be weighty enough to produce a fifth vote for *Bakke* today.

Our reading of the cases thus shows how Justice O'Connor has followed a consistent (yet nuanced) approach to affirmative action and racial issues—and not the unprincipled, ad hoc jurisprudence that some of her critics decry.

F. *Adarand* (Again)

With this quick trip through the pre-*Adarand* precedents now complete, let us return to *Adarand* itself. While we believe that the contracting cases, in general, do not say very much about education, we note that Justices Scalia and Thomas have chosen language in *Adarand* and elsewhere making clear their passionate belief in race neutrality across the board. Justice Thomas wrote that the “government may not make distinctions on the basis of race” and declared it “irrelevant whether a government’s racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged.”¹¹¹ Justice Scalia offered up a similar vision: “In the eyes of government, we are just one race here. It is American.”¹¹² While neither Justice has confronted diversity, neither has shown any sign of supporting *Bakke*. We strongly suspect that, despite the many significant differences in the education sphere, both Justices will be blinded by the color consciousness of diversity programs and will vote to overrule *Bakke*. And we expect that Chief Justice Rehnquist will follow their lead. While he did not join the rigid Scalia-Thomas approach in *Adarand*, his independence may reflect a

111. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment).

112. *Id.* at 2119 (Scalia, J., concurring in part and concurring in the judgment). This noble vision would have been more persuasive coming from Justice Scalia had he not contradicted it in his dissent in *Powers v. Ohio*, 499 U.S. 400, 423–26 (1991) (Scalia, J., dissenting) (arguing that government prosecutors could lawfully strike black jurors through the use of race-based peremptory challenges). For criticism of Justice Scalia’s *Powers* approach, see *id.* at 410 (majority opinion, per Kennedy, J.).

The suggestion that racial classifications may survive when visited upon all persons is no more authoritative today than the case which advanced the theorem, *Plessy v. Ferguson*, 163 U.S. 537 (1896). The idea has no place in our modern equal protection jurisprudence. It is axiomatic that racial classifications do not become legitimate on the assumption that all persons suffer them in equal degree. *Loving v. Virginia*, 388 U.S. 1 (1967). *Id.*; see also Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 50 n.246 (1995).

worry that their opinions were too broad for the facts in *Adarand*. William Rehnquist voted for Allan Bakke once, and his writings and opinions reveal no faith in Lewis Powell's diversity theory.

In his *Adarand* dissent, Justice Stevens once again showed his true colors. He pointed out that the decision said nothing about "fostering diversity" because the issue was not even "remotely presented" and that he did "not take the Court's opinion to diminish *that* aspect of our decision in *Metro Broadcasting*."¹¹³ Having earlier sided with Justice Stevens on the issue in the 1992 D.C. Circuit *O'Donnell* case,¹¹⁴ Justice Ginsburg unsurprisingly joined his *Adarand* dissent, and went on to write a separate dissent (joined by Justice Breyer) offering a hopeful reading of Justice O'Connor's majority opinion.¹¹⁵ Justice Souter likewise dissented, and his separate dissent (joined by Justices Breyer and Ginsburg), while saying nothing about diversity, rejected the idea of strict race neutrality and extolled the virtues of precedent.¹¹⁶

But are the *Adarand* dissenters right in suggesting that *Bakke* lives? Since *Adarand* overruled *Metro Broadcasting* in part, and *Metro Broadcasting* relied on *Bakke*, does this mean that the Court has overruled *Bakke*? No. The Court, we repeat, nowhere explicitly overruled *Bakke*, and so, under well established general principles, it clearly remains binding precedent for all lower courts, state and federal.¹¹⁷ Also recall that *Adarand* overruled

113. *Adarand*, 115 S. Ct. at 2127-28 (Stevens, J., dissenting) (emphasis added).

114. See *supra* text accompanying note 62.

115. *Adarand*, 115 S. Ct. at 2134-36 (Ginsburg, J., dissenting).

116. *Id.* at 2131-34 (Souter, J., dissenting).

117. As this Article was going to press, a panel of the Fifth Circuit struck down the affirmative action program adopted by the University of Texas Law School. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). The majority opinion held that "the law school may not use race as a factor in law school admissions" and that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny." *Id.* at 934, 948. Further language in the opinion suggested, however, that a school may enact racial preferences to redress "past wrongs at that school." *Id.* at 952. Judge Jacques Wiener, Jr., specially concurring, found that the majority's diversity conclusion may well be a defensible extension of recent Supreme Court precedent Be that as it may, this position remains an extension of the law—one that . . . is both overly broad and unnecessary to the disposition of this case. . . .
 . . . [I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.
Id. at 963.

There were reasons, under *Bakke*, why the Texas program—especially prior to 1994—may have been unconstitutional, see *infra* note 142. The *Hopwood* majority opinion, however, seems troubling to the extent that it reached out beyond these reasons to defy Part V-C of *Bakke* (curiously not mentioned anywhere in *Hopwood*)—a section that, we repeat, was an opinion of the Court. As Justices Kennedy and O'Connor have written for the Court, one thing that a lower court cannot do is to anticipate an overruling of an opinion of the Court by disregarding the

Metro Broadcasting only “[t]o the extent” that it “[was] inconsistent” with the holding that “strict scrutiny is the proper standard for analysis of all racial classifications, whether imposed by federal, state, or local actors.”¹¹⁸ While *Adarand* overruled one of the two crucial steps in *Metro Broadcasting*, the deference given to Congress, it did not pass judgment on the other, the diversity argument.

Perhaps most important, *Adarand* teaches us a valuable lesson about Justices O'Connor and Kennedy. Justice Kennedy has been a proponent of race neutrality but he has also been a proponent of precedent. So has Justice O'Connor. Joined at that point only by Justice Kennedy, she carefully crafted one section of *Adarand* in light of her 1992 *Casey* opinion (coauthored with Justices Kennedy and Souter),¹¹⁹ which cautioned against overruling hugely important cases around which major social expectations have crystallized.¹²⁰ *Casey* thus simultaneously affirmed *Roe v. Wade* and overruled more minor post-*Roe* cases. By the *Casey* test, *Bakke* is like *Roe* and should stand, even after the more minor *Metro Broadcasting* is tossed out. Only Justices O'Connor and Kennedy used this test in *Adarand*, presumably because Chief Justice Rehnquist and Justices Scalia and Thomas did not want to join anything that could be construed as support for *Roe*. Yet Justices O'Connor and Kennedy hold the two most crucial votes, as dramatized by *Casey* and *Adarand* themselves. Thus, a big “plus” for *Bakke* is its social importance. An entire generation of Americans has been schooled under *Bakke*-style affirmative action, with the explicit blessing of—indeed, following a how-to-do-it manual from—U.S. Reports.¹²¹ Only

opinion. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (Kennedy, J.) (“If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”); *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 180 (1990) (opinion of O'Connor, J., for the Court) (similar).

Admittedly, Part V-C presents thorny social-choice theory problems if its clear command—state universities may take race into account—were seen as resting on two inconsistent theories (the diversity theory and the remedial theory), neither of which, it might be argued, clearly commanded a majority of the *Bakke* Court. But surely these problems cannot be solved simply by ignoring Part V-C—which is, we repeat, the holding of *Bakke*. See also *supra* text accompanying notes 39–45 (suggesting that the Brennan Four opinion, read carefully, did embrace the diversity theory).

118. *Adarand*, 115 S. Ct. at 2113.

119. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

120. *Adarand*, 115 S. Ct. at 2114–17 (plurality opinion).

121. See Kenneth L. Karst & Harold W. Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.R.-C.L. 7, 7 (1979); cf. *Casey*, 505 U.S. at 868 (“[N]o Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.”).

a handful of modern Supreme Court cases are now household words in America. But *Bakke*—like *Brown* and *Roe*—is surely one of them. (And if overruling *Bakke* were also to mean suddenly that all federally funded private schools must never consider race in their admissions, a sharp resegregation of higher education might occur—the possible social upheaval is rather startling to contemplate.)¹²²

Thus, we sound a note of caution to those tempted to overread what Justices O'Connor and Kennedy may have said in their previous dissents. Both may write differently, as fifth votes for the Court, than they do when they write for themselves in dissent. Dissenters, of course, having lost the case at hand, may be tempted to let fly loose language ranging far beyond the facts before them, language that would, on more sober reflection, ill-suit a majority opinion of the Court. We do not deny that Justice O'Connor's *Metro Broadcasting* dissent does include strong language that, read in isolation, might seem to squint against *Bakke*. (So too, Justice Powell's opinion in *Bakke* itself contains much strong language that—read in isolation—might seem to squint against language later in his own *Bakke* opinion.)¹²³ But, in retrospect, it now seems clear that opponents of *Roe* read too much into Justice O'Connor's dissent in *City of Akron v. Center for Reproductive Health*,¹²⁴ only to be upset by *Casey*, and that proponents of school prayer wrongly extrapolated from Justice Kennedy's partial dissent in *County of Allegheny v. ACLU*¹²⁵ to be upset by *Lee v. Weisman*.¹²⁶ Critics of affirmative action in education should remember that much of the most pointed anti-affirmative action language from these Justices has likewise appeared in dissents.¹²⁷

A close comparison of Justice O'Connor's dissent in *Metro Broadcasting* and her majority opinion in *Adarand* highlights this difference in tone. Although her *Metro Broadcasting* dissent contains some sharp language, in *Adarand* she went out of her way to reassure readers with words

122. See *supra* note 12.

123. See Karst & Horowitz, *supra* note 121, at 8, 11.

124. 462 U.S. 416, 452–75 (1983) (O'Connor, J., dissenting). For a similar (and in retrospect, prophetic) warning against the overreading of *Akron Center*, see Estrich & Sullivan, *supra* note 46.

125. 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in judgment in part and dissenting in part).

126. 505 U.S. 577 (1992).

127. Another clue about a given judge or Justice's leanings on *Bakke* may perhaps be teased out of his or her own policies in hiring law clerks. Does a particular jurist—as a government actor—consider applications in an absolutely strict race-blind way? Or, instead, does the judge think about how a clerk with a particular racial identity and life experience might have something distinctive to teach the judge and fellow clerks?

that—though not invoking *Bakke* by name—left the door open for a reaffirmance of Justice Powell's approach:

According to JUSTICE STEVENS, our view of consistency "equates remedial preferences with invidious discrimination," and ignores the difference between "an engine of oppression" and an effort "to foster equality in society," or, more colorfully, "between a 'No Trespassing' sign and a welcome mat." It does nothing of the kind. . . . It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny.¹²⁸

If we seek an example of *this* brand of strict scrutiny, let us remember that Justice Powell's opinion in *Bakke* itself of course explicitly applied strict scrutiny and yet endorsed Harvard-style affirmative action in education.

II. POLICY AND STRUCTURE

Until now, we have simply been asking whether *Bakke's* fate is preordained by Justice O'Connor's opinions in *Croson*, *Metro Broadcasting*, and *Adarand*. Our negative answer naturally prompts us to ask whether *Bakke* makes good sense from a practical and structural perspective. Such an inquiry is more important here than in other constitutional contexts because the text and history of the Fourteenth Amendment seem rather open on the question of affirmative action. Textually, exactly what does *equal* protection require against a backdrop of historic racial *inequality*? Historically, does the race-consciousness of early bills to help the freedmen—passed by the same Congresses that gave us the Thirteenth and Fourteenth Amendments—permit similar race-conscious policies one hundred years later to eliminate the vestiges of a racial caste system?¹²⁹ While text

128. *Adarand*, 115 S. Ct. at 2114 (quoting *id.* at 2120, 2121, 2122 (Stevens, J., dissenting)) (citations omitted). For a similar suggestion, see *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion per O'Connor, J.).

129. Our diversity analysis does not focus on any particular race. Of course, the case for affirmative action is strongest for blacks, where the historical arguments for affirmative action (such as they exist) have the most force. See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985). But because all sorts of people contribute to diversity, drawing the line at African Americans will not achieve full diversity. For an analysis of affirmative action for people of other races, see Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995).

Because pluses in admissions are quite different from set-aside scholarships, we do not consider the implications of our theory for minority targeted scholarships. For an examination of these programs, see U.S. GEN. ACCOUNTING OFFICE, *HIGHER EDUCATION—INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS* (1994).

and history may not tell the Court what to do, however, policy and more general structural arguments might.

There are, after all, sound reasons why the Court should hesitate to repudiate *Bakke*—even in the post-*Adarand* era. To see this more clearly, let us return to two key ways in which Harvard-plan affirmative action differs dramatically from the rigid contracting set-asides struck down by the Supreme Court.

A. Quotas Versus Pluses

Our first point concerns quotas versus pluses, or to use Justice O'Connor's phraseology, classifications versus considerations. Race-based classifications impose wooden notions of what it means to be diverse; racial considerations, by contrast, permit and indeed require evaluation of a whole person. From a constitutional standpoint, the distinction between classification and consideration draws upon two separate fairness ideas. First, a classification is unfair to the Allan Bakkes of the world because it automatically excludes them on the basis of their skin color. Because of his pigmentation, Allan Bakke was not even allowed to *compete* for sixteen out of one hundred seats at U.C. Davis.¹³⁰ Second, classifications are stigmatizing to *minorities*. Quotas create the impression that minority students are admitted because of the seats wholly set aside for them and only them, and they imply that race is altogether different from other diversity factors in the "normal" and "pure" admissions process.

Using race as one consideration among many, however, minimizes both problems. Minority applicants are not segregated into a separate admissions compartment where their files sit with each other and compete only against one another;¹³¹ instead, they are treated just like other applicants and the kinds of diversity they may offer are assessed alongside other kinds of diversity (of musicians, Texans, chess players, French speakers, and so on). Background and life experience are positive attributes—like growing up Amish—and it is neither unfair to whites nor stigmatizing to minorities

130. See Laurence H. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness or Structural Justice?*, 92 HARV. L. REV. 864, 867-70 (1979).

131. A strict quota system exacerbates the "Octoroon" and "Aleut" problems noted earlier, *supra* notes 20 and 84, by in effect requiring an application form with a fixed number of racial boxes. By contrast, a sensitive plus system need not pigeonhole persons into boxes; the admissions committee can consider the entirety of a person's (perhaps complex) racial and social experience. For rich discussions of the complexity of "racial identity," see IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994).

to consider these factors so long as they do not become the only or the dominant things that admissions committees look at.¹³² If having a distinctive racial experience is viewed in the same way as being bilingual or a good violinist, then the Allan Bakkes of the world may have an easier time understanding the preference. (The bilingual analogy is, we submit, a rather precise one; many—not all, but many—black Americans today must in effect navigate “bilingually” through black America and white America.) If a given minority student understands that she is valued not because of what her ancestors went through two centuries ago, but rather because of what she goes through every day, she may feel less stigma and more self-esteem.

As a practical matter, admissions committees often inevitably know something about the race of an applicant because their goal is to look at a whole person. Just as it is permissible for legislatures to consider their knowledge about racial demographics when they create voting districts because they “always [are] aware of race”¹³³ in drawing boundaries, it may make sense to permit admissions committees to consider what they will know anyway. To demand otherwise will force admissions committees to evaluate an applicant without ever understanding who that applicant really is. Colleges do not accept an SAT score and a GPA; they accept a whole person.

B. Democratic Diversity in Education

The cornerstone of our argument remains democratic diversity. While diversity analogies can be drawn between education and other spheres (witness the FCC's attempt in *Metro Broadcasting*), we must not lose sight of Justice Powell's vision of the unique democratic value of diversity in *education*—a message sometimes missed by academics.¹³⁴ Kathleen Sullivan, for example, has written that if race is “used as merely one factor in the bidding process [for government contracts] without a preassigned weight,” then

132. Thus, as Justice Powell said in *Bakke*, affirmative action must not “insulate the individual from comparison with all other candidates for the available seats.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978) (opinion of Powell, J.).

133. See *supra* note 108 and accompanying text.

134. And perhaps even by Justice Powell himself. In *Johnson v. Transportation Agency*, 480 U.S. 616 (1987), the Court, in an opinion Powell joined, upheld the Santa Clara County Transportation Agency's affirmative action plan because it “resembles the ‘Harvard Plan’ approvingly noted by [Justice Powell] in *Regents of University of California v. Bakke*, which considers race along with other criteria in determining admission to the college. . . . Similarly, the Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration. . . .” *Id.* at 638 (citation omitted).

the "approach would be analogous to the Harvard College admissions plan praised by Justice Powell."¹³⁵ But diversity takes on a special meaning in the school. As *Brown v. Board of Education* put it, education is "the very foundation of good citizenship" and "a principal instrument in awakening the [student] to cultural values," preparing her for participation as a political equal in a pluralist democracy.¹³⁶ Moreover, university education typically occurs at a distinctive time of life—young adulthood—when people are particularly open to new ideas and when they have a tendency to bond with others. (For similar reasons, this bonding may also occur in places like the Army and the Peace Corps.)¹³⁷

In other words, much of the point of education is to teach students how others think and to help them understand different points of view—to teach students how to be sovereign, responsible, and informed citizens in a heterogeneous democracy. A school admits students, in large part, so that they will be teachers to other students. Again: SAT scores and grades are at best a crude proxy for a student's potential to teach other students—often, an applicant's background and life experience will also be vital components of this potential. If a university wants to teach people about France, the university should admit students from France; if a university wants to teach people about the South, it should admit students from the South. The university experience is thus quite different from the very attenuated interaction between the minority "owner" of a broadcast station and the public in *Metro Broadcasting*, and even more different from the largely nonexistent contact between the minority and nonminority contrac-

135. Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 TUL. L. REV. 1609, 1615-16 n.39 (1990).

136. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (quoting *Ambach* language linking "public education" to America's "democratic political system" and adding that such education should promote "tolerance of divergent political and religious views"); *Ambach v. Norwick*, 441 U.S. 68, 77 (1979) (opinion of the Court, per Powell, J.) (quoting *Brown* and then describing "public schools as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground . . . inculcating fundamental values necessary to the maintenance of a democratic political system" (quoting JOHN DEWEY, *DEMOCRACY AND EDUCATION* 26 (1929)) (emphasis added)).

137. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 500 (1991).

tors in *Croson* and *Adarand*. Integrated education democratically benefits students of all races, including white students, by providing a space for people of all races to grow together.¹³⁸

Thus, *Bakke* builds squarely on the rock of *Brown*. *Brown* held that education was sui generis and that even if racial segregation could be tolerated in other spheres, the school was different. Recall that, technically, *Brown* did not explicitly overrule *Plessy*, but simply said that the separate-but-equal rule had "no place" "in the field of public education."¹³⁹ Likewise, *Bakke* says that even if affirmative action is unconstitutional in other spheres, schools are different and may be able to take race into account to bring races together. Indeed, the entire structure of Justice Powell's opinion proclaims that education is special. In Parts IV-A, IV-B, and IV-C of his *Bakke* opinion, he crisply casts aside sweeping justifications for affirmative action that would radiate far beyond education: proportionality for its own sake, broad remediation of "societal discrimination," and facilitating the delivery of services to consumers. But in Parts IV-D and V, he embraces a diversity theory that paradigmatically applies to education.

138. As Duke President Nan Keohane recently remarked:

From where I sit, only one strategy for dealing with our increasingly diverse world appears likely to be successful for the long term—a strategy that deliberately takes advantage of the educational power of diversity. Such a strategy is not easy to design or implement, but the possible alternatives are ultimately sterile.

Return to the Good Ol' Days?, 6 J. BLACKS IN HIGHER EDUC. 90 (1994-1995); see also *Text of Affirmative Action Review Report to President Clinton*, Daily Lab. Rep. (BNA) No. 139 (Special Supplement) at D-30 (July 20, 1995) ("Virtually all educators acknowledge that a college is a better academic enterprise if the student body and faculty are diverse."); *Brest & Oshige*, *supra* note 129, at 863 ("We believe that encounters among students from different backgrounds—especially within an academic institution that seeks to encourage intergroup relations and discourse—tend to reduce prejudice and alienation."); cf. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 920 n.26 (D.C. Cir. 1989) (opinion of Silberman, J.) ("Unlike the state's goal in *Bakke*, which arguably served to break down racial and ethnic stereotypes, the FCC's policy does not reinforce the 'melting pot' because television viewers never have any knowledge of the race or ethnicity of the various station owners."), *rev'd sub nom. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

139. *Brown*, 347 U.S. at 495. Of course, soon after *Brown* came down, the Court invoked it to invalidate other vestiges of Jim Crow. See, e.g., *Gayle v. Browder*, 352 U.S. 903 (1956) (invoking *Brown* to invalidate bus segregation). Thus *Brown* quickly came to stand for more than educational desegregation. But it still does stand for the specialness of education. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 222-23 (1982) ("What we said 28 years ago in *Brown* [about education's special status] still holds true.").

Of course, a contracting set-aside may "diversify" an industry (as could integrated workplaces in the pre-*Brown* era),¹⁴⁰ but the democratic benefits of diversity may not be as strong outside the educational setting. The diversity-in-contracting argument assumes that mingling will somehow occur between firms—a rather heroic or impossible assumption in many contractual settings. In the school context, by contrast, people from different backgrounds are thrown together for four years, and they are there *to learn*.

Inherent in the concept of diversity-based affirmative action is a recognition of the positive educational value of race and life experience. This differs dramatically from contracting cases involving guardrails and urinals, where affirmative action has no such theory of value. In the contracting arena, a minority is valuable only because the person's race helps secure a contract. Whites may resent the fact that a minority, simply by virtue of her skin color, wins a contract when a white firm could have completed the job at a lower cost. Minorities, for their part, may internalize the belief that they need a handout in order to compete with whites. In education, by contrast, a minority can be intrinsically valuable if she brings a missing element to the school. Because the minority student must still be evaluated on other criteria besides diversity, the school can ensure that it is admitting a student who has the academic prowess to keep up with the rest of the student body—an important consideration because the goal is to encourage intermingling and learning from each other.

Of course, any form of affirmative action for nonwhites risks backlash from whites. But failure to do anything to integrate disadvantaged minorities into mainstream America risks minority backlash—race riots tomorrow, perhaps, and potential democratic breakdown in a generation or two. Affirmative action *in education* contains the best long-run antidote to backlash and enmity among races, by bringing diverse elements of society into a common space, a common conversation. (It is precisely in such spaces that the "Creolization" and "loving" Jim Chen celebrates can begin to take root.)¹⁴¹ What's more, diversity has a built-in stopping point, an inherent

140. The democratic value of integrated workplaces—bringing persons from different backgrounds to work together as a team—highlights the importance of laws like Title VII.

141. See Chen, *supra* note 131.

limit on the amount of permissible affirmative action: If a school admits minority students who are not roughly equal to white students, it may actually undermine the democratic benefits of diversity by reinforcing stereotypes of minority students as poor students.¹⁴² A critical mass of students of a particular group may be needed so that other students become aware of the group (and of the diversity *within* the group),¹⁴³ but this by no means requires exact proportionality—or anything like it.¹⁴⁴

142. See Lino A. Graglia, *Hopwood v. Texas: Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 82–83, 92–93 (1995).

Although Justice Powell in *Bakke* did not specify the precise amount of permissible weight to be given to race, he did make clear that race should not be a “decisive” “factor” that would “insulate” a person of one race from comparison with others, and that race must be “simply one element—to be weighed *fairly* against other elements.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317–18 (1978) (opinion of Powell, J.) (emphasis added). At some point, when a racial plus looms so much larger than other diversity factors, an admissions scheme would, it seems, violate the letter and spirit of *Bakke*. In this regard, universities that are designing affirmative action programs would do well to consider the following language from Justice O’Connor’s *Metro Broadcasting* dissent: “The Court’s emphasis on the multifactor process should not be confused with the claim that the preference is in some sense a minor one. It is not. The basic non-race criteria are not difficult to meet . . . [R]ace is clearly the dispositive factor in a substantial percentage of comparative proceedings.” *Metro Broadcasting*, 497 U.S. at 630 (O’Connor, J., dissenting).

143. On the huge importance of intra-racial diversity, see *supra* note 87.

144. Suppose, instead, that diversity is used to limit the representation of certain minorities—“minuses” rather than “pluses” for Asians or Jews, for example. In many cases, this may well be a smokescreen for prejudice against racial and ethnic outgroups, protection of whom is central to the history underlying the Fourteenth Amendment. Of course, this anti-minority program could derive little support from *Bakke* itself, in light of the Brennan Four’s language on this issue. See *supra* text accompanying notes 39–45. Here we see that in applying strict scrutiny to all racial preferences, courts may nonetheless be obliged to distinguish between true affirmative action and old-style racial discrimination.

This approach finds support in *Adarand* itself. In Justice Ginsburg’s words:

Properly, a majority of the Court calls for review that is searching in order to ferret out classifications in reality malign, but masquerading as benign. The Court’s once lax review of sex-based classifications demonstrates the need for such suspicion. Today’s decision thus usefully reiterates that the purpose of strict scrutiny “is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking,” “to ‘differentiate between’ permissible and impermissible governmental use of race,” to distinguish “‘between a “No Trespassing” sign and a welcome mat.’”

Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2136 (1995) (Ginsburg, J., dissenting) (quoting *id.* at 2112, 2113, 2114) (citations omitted).

Critics have portrayed diversity as a tool only to help whites understand blacks—or as an exploitative way of adding spice to a white mix.¹⁴⁵ We disagree. Minorities may benefit just as much from diversity as whites do. An African American from rural Georgia, after all, can learn from a white suburbanite from Phoenix, and the suburbanite can learn from the Georgian. We do not mean to glamorize; we recognize that affirmative action programs may not always work this way. If a diversity program does not, in practice, allow all students to learn from each other, then the program is not serving the state's interest in diversity—and the school should not use the "diversity" slogan to show how the program passes constitutional muster.

We would, for example, be troubled by de facto segregation in university dorms. If schools believe that minorities add to diversity, then they should not encourage different groups to cordon themselves off from each other. Diversity is often tough—it is only natural that people from different backgrounds may find it easier to stick with what is familiar. Doing so, however, blunts the point of diversity-based admissions in the first place—it inhibits the interactive learning process. All of this suggests that schools that permit de facto residential segregation may be estopped from pleading *Bakke* as a defense to affirmative action in admissions. Schools are not required to adopt affirmative action policies—nor are they constitutionally obliged to address self-segregated housing—but if they do choose to adopt diversity programs, then they should live up to the goal of encouraging people to learn from each other.

Of course, diversity cannot function the same way, or be as important, in every academic context. There may be settings where diversity may not have much educational importance at all (graduate school in math, perhaps) and other settings where it will matter a great deal (college, for example). And there is a wide range of places in the middle. But we must be careful not to underestimate the importance of diversity—even in educational settings that, at first blush, seem to have little to gain through diversity. As Justice Powell himself noted while justifying affirmative action for the Davis Medical School:

145. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 570 n.46 (1984):

In law school admissions, for example, majority persons may be admitted as a matter of right, while minorities are admitted because their presence will contribute to "diversity." . . . The assumption is that such diversity is educationally valuable to the majority. But such an admissions program may well be perceived as treating the minority admittee as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial.¹⁴⁶

Our democratic diversity point can perhaps also be recast into remedial language. The Court in *Adarand* and other anti-affirmative action cases has acknowledged that race can indeed be used in narrowly tailored remedies for discrete constitutional violations.¹⁴⁷ Diversity in education may not be narrowly tailored, nor does it respond to discrete violations; but the integration of our universities, great and small, may well be, in Ken Karst's nice phrase, "the best long-term remedy for the private beliefs and behavior that perpetuate the effects of racial caste."¹⁴⁸

CONCLUSION

Our trek through the contracting cases suggests that educational affirmative action on a Harvard-plan model may pass Supreme Court muster. There are sound reasons why this is so—reasons that we believe are at the heart of *Bakke* and at the core of much of Justice O'Connor's writings on race. There is a proud American tradition of treating education differently from other spheres: Education is different—special—because it teaches Americans how to become full citizens in a heterogeneous, pluralistic scheme of democratic self-government. As Justice Powell wrote in *Bakke*, "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."¹⁴⁹ *Adarand*-like set-asides set us apart, but *Bakke*-like affirmative action brings Americans together.¹⁵⁰ Under a Constitution that begins

146. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

147. *Adarand*, 115 S. Ct. at 2117; *United States v. Paradise*, 480 U.S. 92, 167 (1987) (plurality opinion of Brennan, J.); *id.* at 196 (O'Connor, J., dissenting).

148. Kenneth L. Karst, *Private Discrimination and Responsibility: Patterson in Context*, 1989 SUP. CT. REV. 1, 36. Note also how a social-remedy theory—though not, by itself, sufficient to justify affirmative action—can be added to a diversity theory both to explain the social difference between "welcome mats" and "No Trespassing signs" and to suggest a temporal endgame and exit strategy for affirmative action in education. See *supra* text accompanying note 46.

149. *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

150. Thus the key constitutional evil is not so much race-consciousness, as some seem to believe, but racial divisiveness, enmity, polarization, or subordination. For a somewhat similar suggestion, see Christopher L. Eisgruber, *Political Unity and the Powers of Government*, 41 UCLA L. REV. 1297, 1316–21 (1994).

with a vision of We the People coming together in order to form a more perfect union (*e pluribus unum*—out of many, one), this coming together of Americans to teach and to learn from each other is an inspiring event to behold.¹⁵¹

151. For a similar vision underlying the American jury, see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1182-99 (1991); Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 YALE L.J. 1283, 1287-89 (1984).