

RACIAL DIVERSITY AS A COMPELLING GOVERNMENTAL INTEREST

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“I have a dream today that my four children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character.”

Martin Luther King, Jr.¹

INTRODUCTION

Is racial diversity a sufficient justification for affirmative action programs? More specifically, is the goal of diverse racial composition among college students, broadcast station license holders, government contractors, or similar groups a compelling governmental interest that would survive the strictest standard of scrutiny the U.S. Supreme Court can apply to racial preferences that have been challenged in court? Two simplistic possibilities present themselves: perhaps yes, and perhaps no.

As much of the law of affirmative action remains confused,² the Supreme Court has unfortunately provided little guidance for this issue, although it has late adopted a skeptical stance toward affirmative action in general.³ In the absence of specific guidance, institutions nationwide largely make their own determinations regarding affirmative action policy. On July 20, 1995, the Board of Regents of the University of California voted 14-10 to end consideration of race in the admissions process throughout their nine-campus system.⁴ After the vote, as about 200 chanting protesters headed toward downtown San Francisco, California Governor Pete Wilson referred to the Regents' action as “the beginning of the end of racial preferences.”⁵ Indeed, whether or not such a sweeping statement is at all accurate, the events in California⁶ do seem to herald a national

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1. Dr. Martin Luther King, Jr., *I Have a Dream*, Keynote Address of the March on Washington, D.C. for Civil Rights (Aug. 28, 1963) in 1 A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 217 (James M. Washington ed., 1986).

2. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 618 (2d ed. 1991); Patricia A. Celano, Comment, *A Cry for Help to the United States Supreme Court: What is the Constitutional Status of Affirmative Action in Higher Education?*, 3 SETON HALL CONST. L.J. 161 (1993).

3. See Kenneth Jost, *After Adarand*, A.B.A. J., Sept. 1995, at 70; see also Marcia Coyle, *Justices Revisit Explosive Issues of Race and Sex*, NAT'L L.J., Oct. 2, 1995, at A1.

4. See Michelle Locke, *California Regents Vote to End Affirmative Action*, INDIANAPOLIS STAR, July 21, 1995, at A1.

5. *Id.*

6. On November 5, 1996, the people of California, by adopting Proposition 209, amended the California Constitution. It now provides: “The state shall not discriminate against, or grant

trend, as the U.S. Supreme Court and the American public have shown increasing skepticism toward affirmative action.⁷ It is not surprising politically that Republican leaders recognized this as an issue whose time may well have come,⁸ as affirmative action became a sporadically invoked theme of the 1995-96 political season.⁹

With the divisive nature of affirmative action in mind,¹⁰ it is important to examine its possible constitutional justifications, or compelling governmental interests, such as racial diversity. This Note will apply a precedential analysis to the concept of racial diversity as a possible justification for affirmative action programs and attempt to predict how the Supreme Court will respond when faced with this issue in the future. The Court, with mixed results, has only faced the issue of racial diversity as a justification twice—in the contexts of higher education and broadcast licensing, respectively. The first opinion, *Regents of the*

preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.” CAL. CONST. art. I, § 31(a). The language of the provision closely resembles the color-blind language of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C.). One commentator has stated that this was a necessary reaffirmance because “federal bureaucrats and judges disobeyed statutory law and redefined discrimination as the absence of proportional representation by race and gender.” Paul C. Roberts, *Voters May Get a Shot at Quotas*, ROCKY MTN. NEWS, Feb. 10, 1996, at 47A; see also *infra* note 49.

Recently, the Ninth Circuit upheld this new provision of the California Constitution. *Coalition for Econ. Equal. v. Wilson*, 110 F.3d 1431 (9th Cir. 1997). The court specifically found that those opposing the provision had “no likelihood of success on the merits of their equal protection . . . claims” *Id.* at 1448. In reaching its conclusion that even if race-preferential treatment is permissible under the Equal Protection Clause in some cases, it is not constitutionally required in those cases, the court relied heavily on *Adarand Constructors v. Peña*, 115 S. Ct. 2097 (1995). *Id.* at 1446. *Cf.* *Omnipoint Corp. v. FCC*, 78 F.3d 620, 633-34 (D.C. Cir. 1996) (In carrying out statutory command to ensure that minorities and women are given opportunity to participate in bidding process, FCC did not have to give preferences to those groups.).

7. “Janice Franke, an assistant professor of business law at Ohio State University . . . , says public support for [affirmative action] policies has eroded because of the backlash against government intervention in economic matters.” Jost, *supra* note 3, at 72.

8. See William Rusher, *Affirmative Action On a Precarious Perch? Dwindling Popularity*, WASH. TIMES, Jan. 13, 1995, at A17.

9. See Nancy E. Roman, “Colorblind” Policy Unites GOP Hopefuls, WASH. TIMES, Feb. 21, 1995, at A1. “In the past several weeks, one Republican after another has criticized affirmative action. . . .” *Id.* It is notably ironic that the battle against racial discrimination is now being fought by conservatives rather than the liberals who took up the cause in the 1960s.

10. See Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297 (1990). “In a world where the dominant public ideology is one of non-racism, where the charge of racism is about as explosive a rhetorical move as one can make, disagreement about affirmative action often divides us in an angry and tragic manner.” *Id.* at 297-98.

University of California v. Bakke,¹¹ left no clear consensus to follow, as only Justice Powell addressed the issue, stating that race is an element of genuine diversity that may serve a compelling interest in the context of higher education.¹² The second opinion, *Metro Broadcasting, Inc. v. FCC*,¹³ held that racial diversity was an important interest in the context of awarding broadcast licenses to applicants,¹⁴ but *Metro Broadcasting* was recently overruled by *Adarand Constructors, Inc. v. Pena*,¹⁵ which applied strict scrutiny to all governmental preferences based upon race. Recently, the Court denied certiorari to a case which would have given it the opportunity to decide whether racial diversity is a compelling interest.¹⁶ In *Hopwood v. Texas*, the Fifth Circuit held that racial diversity in the student body is not a compelling interest under the Fourteenth Amendment and therefore does not justify discrimination among applicants based upon race.¹⁷ Though *Hopwood* seemed poised to provide the Supreme Court with an historic opportunity to decide the fate of most affirmative action programs,¹⁸ the Court noted in its denial of certiorari that, although this is "an issue of great national importance," the 1992 admissions program at issue had long since been discontinued, and there was, therefore, no "final judgment on a program genuinely in controversy" to review.¹⁹

Part I of this Note briefly provides background information and outlines the strict scrutiny standard of review that now applies to all governmental classifications based on race, and which requires a compelling governmental interest in order for a racial classification to survive. Part II analyzes the precedential value of *Regents of the University of California v. Bakke* concerning racial diversity as a compelling governmental interest in the context of affirmative action. Part III examines Supreme Court opinions since *Bakke* which address compelling governmental interests in the affirmative action context. Part IV focuses on the current makeup of the Supreme Court and its recent hostility to affirmative action programs. Part V discusses *Hopwood* as a recent opportunity, declined by the Court, to decide this issue. Finally, Part VI concludes by predicting that the Court will hold that racial diversity is not a compelling

11. 438 U.S. 265 (1978).

12. *Id.* at 311-15 (opinion of Powell, J.); *see infra* Part II.C.

13. 497 U.S. 547 (1990), *overruled by* *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097 (1995).

14. *Id.* at 567; *see infra* Part III.A-B.

15. 115 S. Ct. 2097 (1995). *See infra* Part IV.B.

16. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

17. *Id.* at 944; the district court held otherwise, finding racial diversity in higher education to be a compelling interest. *Hopwood v. Texas*, 861 F. Supp. 551, 570-71 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996).

18. Arleen Jacobius, *Affirmative Action on Way Out in California*, A.B.A. J., Sept. 1995, at 22, 22-23; *see generally* William M. Adler, *Evening the Score*, ROLLING STONE, Aug. 10, 1995, at 35; Jeffrey Rosen, *Law on Racial Preferences is Unraveling*, SACRAMENTO BEE, Nov. 6, 1994, at FO1.

19. *Hopwood*, 116 S. Ct. at 2581-82 (Ginsburg, J., joined by Souter, J.).

governmental interest, when the Court chooses to address this issue.

I. STRICT SCRUTINY

A. Background

In the context of equal protection methodology, government classifications of people who are not members of a "suspect" class are subject to a "low level" or "rational basis" review and are usually upheld.²⁰ Under this minimal standard of scrutiny, the Equal Protection Clause is satisfied as long as the classification is "rationally related to a legitimate state interest."²¹ Government classifications based upon race, however, have long been considered suspect classifications,²² subject to varying degrees of heightened review and are therefore frequently invalidated.²³

Richmond v. J.A. Croson Co.,²⁴ involved a challenge to Richmond, Virginia's reservation of 30% of its contracting work for minority-owned businesses. In that case, a majority of the Supreme Court agreed for the first time on the standard of review for affirmative action measures.²⁵ There, the Court adopted the standard of strict scrutiny for governmental classifications based on race,²⁶ based on this holding, whenever the government treats two classes of people differently based upon their respective races, a constitutional challenge to that policy would require the Court to subject the classification to a strict scrutiny review. However, this holding only applied to state and local governments; *Croson* gave the Court no occasion to declare the standard of review required for such action taken by the federal government.²⁷

Only one year later, the Court abruptly changed course with *Metro Broadcasting, Inc. v. FCC*,²⁸ an equal protection challenge of two FCC policies that favored minority applicants for broadcast licenses. The Court, in *Metro Broadcasting*, held that federal racial classifications are subject only to intermediate scrutiny.²⁹ To satisfy an intermediate scrutiny review, the race-

20. STONE ET AL., *supra* note 2, at 532-33.

21. *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

22. *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *see also* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Marshall, J., dissenting) ("The highly suspect character of classifications based on race, nationality, or alienage is well established.") (footnotes omitted).

23. *See* STONE ET AL., *supra* note 2, at 532; Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

24. 488 U.S. 469 (1989).

25. *See* STONE ET AL., *supra* note 2, at 674.

26. *Croson*, 488 U.S. at 493-94.

27. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2110 (1995).

28. 497 U.S. 547 (1990).

29. *Id.* at 564-65. The Court does qualify this by stating that the racial classification at issue must be "benign," but it does not clearly explain when a given racial classification should be

conscious measures at issue must serve an important governmental objective and must be substantially related to the achievement of that objective.³⁰ These decisions left differing standards of review, with state and local governmental policies subjected to strict scrutiny, and federal governmental policies subjected merely to intermediate scrutiny.

Finally, in the summer of 1995, the Court decided *Adarand Constructors, Inc. v. Pena*,³¹ a challenge to a federal highway construction contract policy that awarded financial incentives to contractors for subcontracting to disadvantaged³² business enterprises. *Adarand* overruled *Metro Broadcasting*, held that strict scrutiny to be applied to federal government's racial classifications as well as state and local governments' race-based classifications.³³ At present, all governmental classifications based upon race must satisfy a strict scrutiny review in order to be valid.

B. The "Two-Prong" Test

Strict scrutiny is not an easy standard to satisfy³⁴—it is usually fatal to government classifications brought under its review.³⁵ The test, as enunciated by the Supreme Court, requires that two prongs be met. First, the classification at issue must be justified by a compelling governmental interest, and second, the means chosen to achieve that interest must be narrowly tailored.³⁶ The

deemed "benign." *Id.*; *Adarand*, 115 S. Ct. at 2112.

30. *Metro Broad.*, 497 U.S. at 564-65. Justice Rehnquist has duly criticized the subjectivity inherent in the vague language of the intermediate scrutiny test: "Both of the phrases used are so diaphanous and elastic as to invite subjective judicial preferences or prejudices relating to particular types of legislation, masquerading as judgments whether such legislation is directed at 'important' objectives or, whether the relationship to those objectives is 'substantial' enough." *Craig v. Boren*, 429 U.S. 190, 221 (1976) (Rehnquist, J., dissenting). This criticism is equally true for the strict scrutiny test. *See infra* Part I.B.

31. 115 S. Ct. 2097 (1995).

32. "The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(2), (3)(C) (ii) (1994).

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

34. *See* Roy L. Brooks & Mary J. Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 813 (1994) ("Surviving strict scrutiny is like climbing Mount Kilimanjaro two times." *Id.*).

35. *Id.*; *Adarand*, 115 S. Ct. at 2120 n.1 (Stevens, J., dissenting) ("[Strict scrutiny] has usually been understood to spell the death of any governmental action to which a court may apply it."); *see also* Gunther, *supra* note 23; *but see Adarand*, 115 S. Ct. at 2117; Jost, *supra* note 3, at 71 ("'Strict scrutiny expresses a mood,' says Kenneth Karst, a professor of constitutional law at the University of California at Los Angeles. 'It doesn't decide a case.'").

36. *See Adarand*, 115 S. Ct. at 2117; *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 485-86

requirement of a compelling interest serves as a useful mechanism for balancing the state's interest against the rights of the individual in equal protection cases,³⁷ and the requirement of narrow tailoring means that the government must use the least restrictive means available by which it may achieve its compelling interest.³⁸

The rationale for such exacting scrutiny lies in the idea that "any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees."³⁹ Because "immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision,"⁴⁰ the Constitution seeks to protect any individual burdened by the government's use of immutable characteristics in its decision making. Such an individual is entitled to a judicial determination that the burden is justified by a compelling governmental interest and is precisely tailored⁴¹ or "narrowly tailored to the achievement of that goal."⁴²

Narrow tailoring notwithstanding, it is clear that without a compelling governmental interest, no affirmative action program can survive an equal protection challenge. To explore the possibility of racial diversity as a compelling governmental interest, it is necessary to delve into the tangled and confusing web of relevant Supreme Court opinions,⁴³ beginning seventeen years ago with what is probably the most famous affirmative action case yet decided, *Regents of the University of California v. Bakke*.⁴⁴

(1989). ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 25-33 (1990).

37.

[W]henver the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. . . . The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Adarand, 115 S. Ct. at 2114. See Tania Saigon, *Restoring Obscurity: The Shortcomings of the Religious Freedom Restoration Act*, 28 COLUM. J.L. & SOC. PROBS. 653, 673 (1995). Free speech cases also employ this balancing test. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

38. See Wendy Hernandez, *The Constitutionality of Racially Restrictive Organizations Within the University Setting*, 21 J.C. & U.L. 429, 447 (1994); see *Croson*, 488 U.S. at 507-08.

39. *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980).

40. *Id.* at 496 (Powell, J., concurring).

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

42. *Fullilove*, 448 U.S. at 480.

43. See Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 389 (1989) ("The constitutionality of affirmative action has been perhaps the most divisive and difficult question of contemporary constitutional jurisprudence.").

44. 438 U.S. 265 (1978).

II. BAKKE

A. *The Facts*

At the time of this case, the Medical School of the University of California—Davis had 100 available seats for the entering class, sixteen of which were reserved for special admissions. The special admissions applicants did not have to meet the regular admissions minimum grade point average of 2.5 on a scale of 4.0, nor did they have to compete with the regular admissions applicants. In order to qualify for the more lenient special admissions standards, an applicant had to be a member of a designated minority group.⁴⁵

Allan Bakke, a white male, applied to the medical school in 1973 and 1974 and was rejected both times. Because Bakke could not qualify for special admissions consideration, other applicants in both years with grade point averages and MCAT scores “significantly lower” than Bakke’s were admitted under the special admissions program.⁴⁶ After his second rejection, Bakke sued the medical school, alleging that its special admissions program excluded him from the school on the basis of his race in violation of his rights under the California Constitution,⁴⁷ the Equal Protection Clause⁴⁸ and section 601 of Title VI of the Civil Rights Act of 1964.⁴⁹ In its defense, the medical school claimed, *inter alia*, that its goal of racial diversity in each class of entering medical students justified

45. *Id.* at 274. The medical school defined the members of a “minority group” as “Blacks,” “Chicanos,” “Asians,” and “American Indians.” It is interesting to note that Asians, although still numerically a minority group, are not now so readily included in or benefited by affirmative action programs and have actually challenged aspects of such programs in court on reverse discrimination grounds. See Selena Dong, “*Too Many Asians*”: *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027, 1027-29 (1995).

The qualification for the special admissions program at issue differed in the years at issue in this case: 1973 and 1974. In 1973, an applicant had to be “economically and/or educationally disadvantaged,” while in 1974 an applicant explicitly had to be a member of a “minority group” as defined above. *Bakke*, 438 U.S. at 274. In 1973, although disadvantaged whites applied to the special admissions program in large numbers, none received offers through that process. *Id.* at 276.

For a recent twist on qualification as a “designated minority group,” see *infra* text accompanying note 169.

46. *Bakke*, 438 U.S. at 277. “Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the [benchmark scores] apparently gave credit for overcoming disadvantage.” *Id.*

47. CAL. CONST. art. I, § 21 (repealed 1974) (current version at *id.* § 7).

48. “[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

49. “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” 42 U.S.C. § 2000d (1994).

the use of race as a distinguishing factor among applicants.

Bakke ultimately reached the U.S. Supreme Court, and, in deciding the case, the nine Justices wrote six separate opinions, with no majority opinion emerging because only four Justices at a time could agree upon any given rationale.⁵⁰

B. *The Opinions*

Though by different routes, a majority of the court agreed five-to-four that the University of California's special admissions program was illegal and that Bakke was entitled to admission into the medical school. In announcing the judgment of the Court, Justice Powell found the program illegal because it failed to satisfy the second leg of the strict scrutiny analysis because its use of quotas was not narrowly tailored to achieve the compelling interest Powell found to be present.⁵¹ As the first Supreme Court Justice to do so, Justice Powell found genuine diversity, of which race is an element, to be a compelling governmental interest, at least in the context of higher education, thus satisfying the first leg of the strict scrutiny analysis.⁵² The problem with this, precedentially, is that none of the other Justices concurred with Justice Powell's reasoning on this issue or with this conclusion. In these concurrences-in-the-judgment-in-part and dissents-in-part, Justices Brennan, White, Marshall, and Blackmun's opinions joined Justice Powell's opinion only in Parts I and V-C.⁵³ Chief Justice Burger, and Justices Stewart, Stevens, and Rehnquist's opinion only joins Justice Powell's opinion inasmuch as it affirmed the judgment of the Supreme Court of California declaring the program illegal and admitting Bakke to the school.⁵⁴

50. Justice Powell announced the judgment of the Court. *Bakke*, 438 U.S. at 269. Justices Brennan, White, Marshall and Blackmun concurred in the judgment in part and dissented in part. *Id.* at 324. Justice White wrote separately to explain his involvement in his joint opinion. *Id.* at 379-80. Justice Marshall also wrote separately to illuminate his position. *Id.* at 387-88. Justice Blackmun likewise added to his joint opinion some "general observations that hold particular significance" for him. *Id.* at 402. Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist concurred in the judgment in part and dissented in part. *Id.* at 408.

51. *Id.* at 314-17.

52. *Id.* at 311-14. Justice Powell's muddled prose appears to use the terms "permissible," "substantial" and "compelling" interchangeably in referring to the governmental interest in question. Because he embraces in his opinion the standard of strict scrutiny for all governmental distinctions based upon race, these terms, as currently understood, clearly refer to the *compelling* governmental interest necessary under strict scrutiny. *Id.* at 290.

53. *Id.* at 328. Part I of Powell's opinion was merely a recitation of the facts and case history. *Id.* at 272-81. Part V-C emphasized that the State may consider race and ethnic origin in the admissions process. *Id.* at 319. Justices Brennan, Marshall, and Blackmun also agreed with Justice Powell's conclusion in Part II of his opinion "that this case does not require us to resolve the question whether there is a private right of action under Title VI." *Id.* at 284, 328. Justice White wrote separately to address this issue. *Id.* at 379.

54. *Id.* at 421. Chief Justice Burger, and Justices Stewart, Stevens, and Rehnquist believed that the admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke

C. *The Precedent, or Lack Thereof*

In the words of one constitutional commentator, this decision represents “a disturbing failure by the Court to discharge its responsibility to give coherent, practical meaning to our most important constitutional ideals.”⁵⁵ Authoritatively, it stands for very little as a whole, because the “Court reached no consensus on a justification for its result.”⁵⁶

Although Justice Powell’s lone affirmance in *Bakke* of diversity in higher education as a compelling governmental interest is important in opening up future possibilities for defenses of affirmative action,⁵⁷ it bears the mark of dicta in this case.⁵⁸ Justice Powell reiterated his conclusion two years later in his concurrence in *Fullilove v. Klutznick*,⁵⁹ although he seemed to contradict or limit the idea in the same concurrence by stating that “[r]acial preference never can constitute a compelling state interest.”⁶⁰ In any case, *Bakke* remains a starting point for tracing this issue, although it did not set widely recognized precedent.⁶¹

III. SINCE BAKKE

A. *Racial Diversity Resurfaces as a Governmental Interest—Metro Broadcasting, Inc. v. Federal Communications Commission*

Twelve years after *Bakke*, the Supreme Court again considered the issue of racial diversity as a compelling interest in the case of *Metro Broadcasting, Inc. v. FCC*.⁶² After being passed over in favor of a broadcasting company with a higher percentage of minority ownership, Metro Broadcasting, Inc. sued the FCC over

due to his race; therefore the constitutional question of whether race can ever be used as a factor in admissions was not necessary to the decision of this case. *Id.* at 411, 421.

55. Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21 (1979).

56. *Hopwood v. Texas*, 78 F.3d 932, 941 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996); see Kent Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CAL. L. REV. 87, 88 (1979).

57. *Hopwood*, 78 F.3d at 941 (“Justice Powell’s separate opinion in *Bakke* provided the original impetus for recognizing diversity as a compelling state interest in higher education.”).

58. *Id.* at 944 (“Justice Powell’s argument in *Bakke* garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case.”); see Kathleen A. Kirby, *Shouldn’t the Constitution Be Color Blind? Metro Broadcasting Inc. v. FCC Transmits a Surprising Message on Racial Preferences*, 40 CATH. U. L. REV. 403, 418 (1991).

59. 448 U.S. 448, 498 (1980).

60. *Id.* at 497.

61. Justice Powell’s *Bakke* holding concerning diversity has been recognized *ex post* by some Justices as precedent though it was joined by no other Justice when written. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 568 (1990), *overruled by Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995).

62. 497 U.S. 547 (1990).

two racially discriminatory policies that favored minorities in the granting of broadcast licenses. The Court, finding for the FCC, applied mere intermediate scrutiny to racial classifications by the federal government though state and local governments were subject to strict scrutiny,⁶³ and held that the interest of enhanced broadcast diversity was an important governmental interest, justifying the discriminatory policies.⁶⁴ It is crucial, in considering what follows, to recall the distinction between an important governmental interest and a compelling one;⁶⁵ intermediate scrutiny requires an important interest and strict scrutiny requires a compelling interest to successfully defend whatever governmental action is being challenged.

Within the limitations of the broadcast licensing context in *Metro Broadcasting*, the Court did not elevate the interest of racial diversity to the status of a compelling governmental interest. However, in defining this interest, the Court did say that “at the very least” broadcast diversity is an important governmental objective, leaving open the possibility of a later majority holding that racial diversity is a compelling governmental interest.⁶⁶

Metro Broadcasting does provide some support for the concept of racial diversity as a compelling interest by analogizing its holding, concerning broadcast diversity, to Justice Powell’s *Bakke* opinion, concerning diversity in higher education.⁶⁷ The majority in *Metro Broadcasting* seems to accept the *Bakke* opinion as precedent. The only other support *Metro Broadcasting* offers for diversity as a compelling interest is the Court’s obvious hint when it stated, “[E]nhancing broadcast diversity is, at the very least, an important governmental objective.”⁶⁸ The words “at the very least” convey a definite impression that the diversity mentioned is probably also a compelling interest as far as this majority is concerned, but the words also bear the scent of dicta.⁶⁹ Overruled as to the proper standard of review, what *Metro Broadcasting* adds to Justice Powell’s *Bakke* opinion is weak and inferential, except for its broadening of the contexts in which diversity is valuable to include broadcast licensing.⁷⁰

63. Less than one year earlier, the Court applied strict scrutiny to racial classifications by state and local governments in *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). See *supra* Part I.A.

64. *Metro Broad.*, 497 U.S. at 566-68.

65. See *supra* Part I.

66. *Metro Broad.*, 497 U.S. at 567. But see *infra* Part III.B.2.

67. *Metro Broad.*, 497 U.S. at 568.

68. *Id.* at 567.

69. It is as if the Court, with the words “at the very least,” is anticipating a future case and trying “to figure it out in advance.” Robert Laurence, *On Worthen, Walker and Dicta: The Supreme Court Shoots the Breeze About Exemption Law*, 1993 ARK. L. NOTES 73, 73. This does not mean that the Court’s words are “worthless,” just that they are “worth less.” *Id.*

70. Until *Metro Broadcasting*, the only context in which the Court had previously considered racial diversity as a governmental interest was that of higher education admissions. See *supra* discussion Part II.

B. *The Metro Broadcasting Dissents*

The Supreme Court's strongest positions against racial diversity constituting a compelling interest have been taken by Justices O'Connor⁷¹ and Kennedy⁷² in their dissents in *Metro Broadcasting*. Justice O'Connor's dissent was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy; Justice Kennedy's dissent was also joined by Justice Scalia. Chief Justice Rehnquist and Justice Scalia's positions seem predictable, being two of the Court's "hard-core conservatives,"⁷³ but Justices O'Connor and Kennedy are "swing" Justices in affirmative action cases,⁷⁴ so their positions are more influential on a possible revisit of this issue by the Court.

1. *Justice O'Connor's Dissent.*—With her dissent in *Metro Broadcasting*, Justice O'Connor seems to have shifted positions from her stance four years earlier in her concurrence in *Wygant v. Jackson Board of Education*.⁷⁵ In that concurrence, Justice O'Connor stated:

[A]lthough its precise contours are uncertain, 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. . . . And certainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently "important" or "compelling" to sustain the use of affirmative action policies.⁷⁶

In *Wygant*, Justice O'Connor clearly supported racial diversity as a compelling interest where higher education was concerned, although she acknowledged its vague precedential support by pointing out that its "precise contours are uncertain."⁷⁷ She also opened the possibility of "other governmental interests," unreviewed by the Supreme Court, as candidates for compelling interests.⁷⁸

More recently, her dissent in *Metro Broadcasting* is not nearly as open-armed and broad in scope in recognizing compelling governmental interests. In her dissent, she states:

Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a

71. *Metro Broad.*, 497 U.S. at 602-31 (O'Connor, J., dissenting).

72. *Id.* at 631-38 (Kennedy, J., dissenting).

73. Marcia Coyle, *An Emboldened Majority Breaks Ground*, NAT'L L.J., July 31, 1995, at C2.

74. *Id.*

75. 476 U.S. 267 (1986).

76. *Id.* at 286 (O'Connor, J., concurring) (citations omitted).

77. *Id.*

78. *Id.*

compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications. The Court . . . [here] too casually extends the justifications that might support racial classification, beyond that of remedying past discrimination. 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.”⁷⁹

In *Metro Broadcasting*, Justice O’Connor pointed to one exclusive compelling governmental interest presently recognized by the Court—that of remedying past discrimination. By accepting broadcast diversity as such an interest, the *Metro Broadcasting* majority had, in her opinion, overstepped its constitutional bounds, due to the harmful nature of racial classifications and the very limited circumstances under which they can be safely employed.⁸⁰ In assessing the weight of Justice O’Connor’s dissent, aside from noting the Chief Justice and other Justices who joined her dissent,⁸¹ it is informative to note that she later wrote the *Adarand* opinion which overruled *Metro Broadcasting*.⁸²

Justice O’Connor’s dissent did not stop with noting that the Court has only recognized one compelling governmental interest supporting racial classification; she continued, taking pains to discredit the idea that diversity could be achieved through governmental racial classification.⁸³ The vexing problem is the obvious inference that there exists a “Black viewpoint” or a “minority viewpoint” which diversity will bring into contact and interaction with the established and separate “White viewpoint.” This invites criticism, heard equally among minorities and non-minorities, about racial stereotyping and racial essentialism.⁸⁴

Justice O’Connor declared:

Under the majority’s holding, the FCC may also advance its asserted interest in viewpoint diversity by identifying what constitutes a “black viewpoint,” an “Asian viewpoint,” an “Arab viewpoint,” and so on; determining which viewpoints are underrepresented; and then using that

79. *Metro Broad.*, 497 U.S. at 612-13 (O’Connor, J., dissenting, joined by Rehnquist, C.J., Scalia & Kennedy, JJ.) (quoting *Croson*, 488 U.S. at 493).

80. *Id.*

81. *See supra* note 79.

82. 115 S. Ct. 2097 (1995).

83. *Metro Broad.*, 497 U.S. at 614-17 (O’Connor, J., dissenting).

84. Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 WIS. L. REV. 105, 139.

Essentialism is the notion that a person’s “difference” determines her essential nature, governing the way a person feels, thinks, and acts. Thus, gender essentialism has been described as the notion that there is a “monolithic women’s experience” or viewpoint that exists despite differences in experiences based on race, class, and sexual orientation.

Id. at 139 n.136; *see also* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990). “A corollary to gender essentialism is ‘racial essentialism’—the belief that there is a monolithic ‘Black experience,’ or ‘Chicano experience.’” *Id.*

determination to mandate particular programming or to deny licenses to those deemed by virtue of their race or ethnicity less likely to present the favored views.⁸⁵

Her assessment of the interest in diversity of viewpoints is that it merely allows the government to make generalizations that impermissibly equate race with thoughts and behavior.⁸⁶ These generalizations permit unjustifiable governmental favoritism of certain races and racially-identified views, because it is “impossible to distinguish naked preferences for members of particular races from preferences for members of particular races because they possess certain valued views.”⁸⁷

Even the subjects of this essentializing⁸⁸—members of racial and ethnic groups⁸⁹—warn against homogenizing the experiences of persons of color and

85. *Metro Broad.*, 497 U.S. at 615 (O'Connor, J., dissenting).

86. *Id.*; Foster, *supra* note 84, at 139-40.

87. *Metro Broad.*, 497 U.S. at 615-16 (O'Connor, J., dissenting); Foster, *supra* note 84, at 140.

88. *See supra* note 84.

89. In an absolute sense, this includes us all—we are all members of a certain racial group or products of a certain racial mix; all of us have an ethnic origin, though perhaps compound and unnoticed as in some cases it may be. This raises an interesting, forward-looking problem of the interest in defining “diverse” viewpoints from a racial perspective. In America, as a “melting pot,” and the world, as a newborn “global village,” as interracial interaction begins to reach unprecedented dimensions (a fact of which this late twentieth century has every right to be proud), how are we to define diverse viewpoints sharply along racial lines as these lines, although slowly, become less and less solid, and we all begin to become more and more alike? *See Stanley Crouch, Race Is Over*, N.Y. TIMES, Sept. 29, 1996, § 6 (Magazine), at 1.

Already, President Clinton's Office of Management and Budget “is troubled by complaints made on behalf of what it provisionally calls ‘multiracial persons.’ . . . The 1990 Census counted at least four million children of mixed-race couples, children on whom the government now affixes an obviously arbitrary label.” David Tell, *Affirmative Action and the Black and Tan Fantasy*, WKLY. STANDARD, Feb. 12, 1996, at 29, 29. Finding an appropriate racial label for these persons will involve, according to the OMB's Sally Katzen, a “substantively complex and humanly sensitive journey.” *Id.*; *see infra* text accompanying note 95. Serious options for this new racial label range from “the startlingly retrograde ‘mulatto’ to the cosmically contemporary ‘TIRAH,’ which stands for ‘Tan InterRacial American Humankind.’” *Id.* (discussing options found in an August 1995 notice buried in the *Federal Register*). Notice, Standards for the Classification of Federal Data on Race and Ethnicity, 60 Fed. Reg. 44,686 (1995). Most surprisingly, the administration actually may “dispense with racial and ethnic categories altogether and employ something called a Skin-Color Gradient Chart instead. The chart would be a comprehensive color wheel of numerically identified skin tones, against which each Census respondent's flesh might be judged.” *Id.* Technical problems include individuals' changes in skin color over a lifetime due to sunlight or disease, and political problems include the tendency that such categorizations would undermine affirmative action. *Id.*

Consider the following quote from the front page of *USA Today*: “In one master stroke, Tiger Woods has exposed mainstream USA to what millions of multiracial Americans have felt for years:

minimizing the heterogeneity of opinions held and articulated in those communities.⁹⁰ “Social divisions generate radical differences in interests and consciousness within racial groups,” Professor Randall Kennedy points out, concluding that “racial groups are not monolithic.”⁹¹

Justice O’Connor’s stand against diversity as a governmental interest is largely in recognition of the diversity that exists within the various minority segments of the population, making these racial blocs unable to be effectively categorized each under a separate, unified viewpoint. Ironically then, it is those who march under the banner of “diversity” who most tend to repress the diversity of ways in which similarly situated people conceptualize the world.⁹²

2. *Justice Kennedy’s Dissent.*—Justice Kennedy joined Justice O’Connor’s *Metro Broadcasting* dissent along with Chief Justice Rehnquist and Justice Scalia, but also felt inclined to contribute his own dissent. His dissent, joined by Justice Scalia, attacked racial classifications and the interest in broadcast diversity as a trivial justification for such “benign” discrimination.⁹³ Justice Kennedy’s stance is important to consider in anticipating future cases, as, along with Justice O’Connor, he is presently considered a “swing” Justice in affirmative action cases, aligned exclusively with neither the left nor the right wings within the Supreme Court.⁹⁴

Beyond the difficulty in deciphering and favoring particular viewpoints of particular racial groups, Justice Kennedy illuminated the difficulty in the task of defining who is a member of a particular racial group—a task that the *Metro Broadcasting* decision and all other racial classifications by government require.⁹⁵

frustration at being pigeonholed into one race category.” Haya El Nasser, *Measuring Race: Varied Heritage Claimed and Extolled by Millions*, USA TODAY, May 8, 1997, at 1A. Desiring not be called “black,” Woods prefers the term “cablinasian,” which he created to express his Caucasian, black, American Indian, and Asian heritage. *Id.* In Congress, Republican Rep. Tom Petri of Wisconsin has introduced a bill asking for a multiracial box to be added among the other racial check-off boxes on federal forms. *Id.* Needless to say, leaders in minority communities feel threatened by this proposition, fearing the loss of “clout.” *Id.*

The confusion engendered by the multiracial debate is succinctly swept away by one statement from Kimberly Campbell, a 24-year-old black, American Indian, white, and Hispanic female—“I would prefer it if there weren’t any boxes at all.” *Id.*

90. Randall L. Kennedy, *Racial Critique of Legal Academia*, 102 HARV. L. REV. 1745, 1782 (1989); Foster, *supra* note 84, at 140.

91. Kennedy, *supra* note 90, at 1782-83. The assumption that racial oppression creates a single, distinct and common experience “wraps in one garment of racial victimization the black law professor of middle-class upbringing with a salary of \$65,000 and the black, unemployed, uneducated captive of the ghetto.” *Id.* at 1782. “There are . . . other important cross-cutting variables . . . that diversify the experiences of persons of color, including gender, region, and differing group affiliations within the catch-all category ‘people of color.’” *Id.* at 1783.

92. *Id.* at 1784.

93. *Metro Broad.*, 497 U.S. at 631-32.

94. Coyle, *supra* note 73, at C-2.

95. *Metro Broad.*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting, joined by Scalia, J.).

Though many members of racial groups may perhaps be easily identified, there are a great many people who do not fit easily into categories. Where do you draw the line? How many lines do you draw? The FCC, for example, “has found it necessary to trace an applicant’s family history to 1492 to conclude that the applicant was ‘Hispanic’ for purposes of a minority tax certificate policy.”⁹⁶

Justice Kennedy agreed that “the very attempt to define with precision a beneficiary’s qualifying racial characteristics is repugnant to our constitutional ideals.”⁹⁷ The policies that attempt such classification are justified by the *Metro Broadcasting* majority in this case as “benign” discrimination, substantially related to an important governmental interest.⁹⁸ But Justice Kennedy declared:

Policies of racial separation and preference are almost always justified as benign, even when it is clear to any sensible observer that they are not. The following statement, for example, would fit well among those offered to uphold the Commission’s racial preference policy: “The policy is not based on any concept of superiority or inferiority, but merely on the fact that people differ, particularly in their group associations, loyalties, cultures, outlook, modes of life and standards of development.”⁹⁹

Justice Kennedy used this quote from South African apartheid racial policies to show how dangerous the majority’s similar reasoning is in so cavalierly allowing governmental distinction and differentiated treatment between races in a context other than that of remedying past discrimination. “I regret,” he concluded, “that after a century of judicial opinions we interpret the Constitution to do no more than move us from ‘separate but equal’ to ‘unequal but benign.’”¹⁰⁰

Five years after *Metro Broadcasting*, the possibility alluded to therein¹⁰¹ of broadcast diversity as a compelling interest was greatly narrowed by *Adarand Constructors, Inc. v. Peña*.¹⁰² But *Adarand* did not entirely overrule *Metro Broadcasting*; *Adarand* only overruled it “[t]o the extent that [it] is inconsistent with” *Adarand*’s holding that strict scrutiny applies to all governmental racial classifications, whether imposed by state, local or federal governments.¹⁰³ Thus,

96. *Id.*; see *In re Storer Broad. Co.*, 87 F.C.C.2d 190 (1981).

97. *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting). Justice Stevens makes his point in a chilling fashion: “If the National Government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935, translated in 4 NAZI CONSPIRACY AND AGGRESSION, Doc. No. 1417-PS, pp. 8-9 (1946).” *Id.* Other, equally frightening examples exist. See Population Registration Act 30 of 1950, Statutes of the Republic of South Africa 71 (1985).

98. *Metro Broad.*, 497 U.S. at 564-65.

99. *Id.* at 635 (Kennedy, J., dissenting) (quoting South Africa and the Rule of Law 37 (1968) (official publication of the South African Government)).

100. *Id.* at 637-38.

101. See *supra* note 66 and accompanying text.

102. 115 S. Ct. 2097 (1995).

103. *Id.* at 2113.

Adarand seems to leave undisturbed the holding that broadcast diversity is at least an important governmental interest, but the point is moot because strict scrutiny requires a compelling interest and the *Metro Broadcasting* opinion did not consider whether the interest was compelling.

C. Remediating Past Discrimination as the Only Compelling Governmental Interest for Affirmative Action

Although the “forward-looking”¹⁰⁴ interest of diversity has been argued as a compelling interest before the Supreme Court,¹⁰⁵ it has never been found to be a sufficient justification on its own for affirmative action.¹⁰⁶ The Court seems inclined to approve affirmative action programs “only as precise penance for the specific sins of racism a government, union, or employer has committed in the past.”¹⁰⁷ Possibly, the Court has avoided forward-looking justifications like diversity in order “to protect affirmative action plans from charges that” those plans, because they seek increased minority representation through racially discriminatory means, “are a dangerous exercise in ‘social engineering.’”¹⁰⁸

As affirmative action cases began coming before the Supreme Court almost twenty years ago, the justification to which the Court repeatedly focused was a “backward-looking,” or strictly remedial, justification—remediating past discrimination.¹⁰⁹ “Thus[,] affirmative action was permissible to ‘remedy,’ ‘repair[,]’ or ‘cure’¹¹⁰ past sins of discrimination.”¹¹¹ Except for the short-lived detour the

104. Kathleen M. Sullivan, *The Supreme Court, 1985 Term—Comment: Sins of Discrimination: Last Term’s Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986). Foster, *supra* note 84, at 108.

105. *See supra* Part II.

106. Though in *Metro Broadcasting*, the interest in diversity justified an affirmative action program because it was an *important* governmental interest, it was not found to be *compelling*. *See supra* Part III.A.

107. Sullivan, *supra* note 104, at 80. “[T]he Court [has n]ever broken out of sin-based rationales to elaborate a paradigm that would look forward rather than back, justifying affirmative action as the architecture of a racially integrated future.” *Id.* This was written four years prior to *Metro Broadcasting*, which *did* elaborate on a forward-looking paradigm of sorts, but *Metro Broadcasting*’s overruling by *Adarand Constructors Inc. v. Pena*, 115 S. Ct. 2097 (1995), lends some credibility to this otherwise dated declaration.

108. Sullivan, *supra* note 104; *see also* Morris B. Abram, *Affirmative Action: Fair Shakers and Social Engineers*, 99 HARV. L. REV. 1312 (1986) (argues against “social engineers” requiring the attainment of predetermined ends rather than the abolition of barriers to fair participation).

109. Michel Rosenfeld, *Metro Broadcasting, Inc. v. FCC: Affirmative Action at the Crossroads of Constitutional Liberty and Equality*, 38 UCLA L. REV. 583, 585 (1991). Sullivan, *supra* note 104, at 81. Foster, *supra* note 84, at 107, 108.

110. *Fullilove v. Klutznick*, 448 U.S. 448, 520 (1980) (Marshall, J., joined by Brennan & Blackmun, JJ., concurring in the judgment); *id.* at 510 (Powell, J., concurring); *id.* at 484 (Burger, C.J. joined by White & Powell, JJ.).

111. Sullivan, *supra* note 104, at 83 (footnote omitted).

Court took with *Metro Broadcasting*, this focus has been singular in its effectiveness, and has of late begun to take on the flavor of an exclusive justification for affirmative action.¹¹² But one must first start at the beginning, in following this line of precedent.

In *Bakke*,¹¹³ discussed earlier, the medical school's admissions policy was held unconstitutional. But the four Justices who would have upheld the program would have done so because they reasoned that the policy was justified by the "articulated purpose of remedying the effects of past societal discrimination" which they felt was manifested in "minority underrepresentation [that] is substantial and chronic."¹¹⁴

In *United Steelworkers v. Weber*,¹¹⁵ a white employee filed suit against his employer and union, challenging the legality of a plan for on-the-job training which mandated a quota which provided that for every white worker admitted to the program, one minority worker would be admitted. The plan was upheld because it aimed "to break down old patterns of racial segregation and hierarchy"¹¹⁶ reflected in the employer's "traditionally segregated job categories."¹¹⁷ This discrimination was a past wrong of which it would have been "unfair" to "absolve" the employer, even if it no longer engaged in discriminatory practices.¹¹⁸ The plan surviving attack here "operate[d] as a temporary tool for remedying past discrimination."¹¹⁹ Although this case arose in the context of private, voluntary affirmative action programs, the Court's focus is illuminating as an example of judicial consistency, not in the scope of the interest, but in the focus on the interest in remedying past discrimination, however narrowly or broadly conceived.

In *Fullilove v. Klutznick*,¹²⁰ associations of construction contractors and subcontractors tried to prevent enforcement of the "minority business enterprise" provision of the Public Works Employment Act of 1977. The "minority business enterprise" provision required that, absent administrative waiver, at least 10% of federal funds granted for local public works projects must be used to procure services or supplies from businesses owned by minority group members. Past "private and governmental discrimination" had "contributed to the negligible

112. See generally Vonda L. Marshall, Note, *Race-Conscious Relief and the F.C.C.: Putting Race Discrimination Back in Its Historical Context*, 34 HOW. L.J. 367, 367 (1991); Stephen R. McAllister, *One Anglo-Irish American's Observations on Affirmative Action*, 5 KAN. J.L. & PUB. POL'Y 21, 23 (1996).

113. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). See *supra* Part II.

114. *Bakke*, 438 U.S. at 362 (Brennan, White, Marshall & Blackmun, JJ., dissenting in part and concurring in part).

115. 443 U.S. 193 (1979).

116. *Id.* at 208.

117. *Id.* at 209.

118. *Id.* at 214-15 (Blackmun, J., concurring); Sullivan, *supra* note 104, at 82.

119. *Weber*, 443 U.S. at 216 (Blackmun, J., concurring).

120. 448 U.S. 448 (1980).

percentage of public contracts awarded minority contractors"¹²¹ in the present, which this provision was intended to remedy. The provision survived attack due to its remedial nature as far as past discrimination is concerned.¹²² Even the three dissenting Justices agreed that eradicating "the actual effects of illegal race discrimination" qualified as a compelling governmental interest.¹²³

In *Firefighters Local Union No. 1784 v. Stotts*,¹²⁴ the complaint concerned a consent decree that had recently been entered into between a city fire department and a class of black firefighters, establishing hiring and promotional goals for minority firefighters, but not admitting past discrimination. When layoffs became necessary, it was clear that the recently hired minority firefighters would be the first to be laid off if the seniority system operated as usual. The district court that had approved the decree sought to preserve its success by enjoining the fire department's seniority system, thus requiring the layoffs of many white firefighters with greater seniority than remaining minority firefighters. One white firefighter sued to restrain the city from this enjoinder of the seniority system; he succeeded in his suit. The enjoinder of the seniority system failed as affirmative action because there was no finding that the minority firefighters were victims of past discrimination by the city.¹²⁵ The consent decree contained no admission of wrongdoing by the city, and no such finding had been made.

As cases continued to surface, the Court continued to focus on past discrimination as the appropriate justification for affirmative action. In *Wygant v. Jackson Board of Education*,¹²⁶ the plurality opinion stated that the "limited use of racial classifications" might be tolerated for the compelling purpose of remedying "prior discrimination by the governmental unit involved,"¹²⁷ although the racially-conscious layoffs at issue failed to survive. In *Local 28, Sheet Metal Workers' International Ass'n v. EEOC*,¹²⁸ a numerically-oriented hiring goal was upheld as one of the "tools for remedying past discrimination."¹²⁹ In *United States v. Paradise*,¹³⁰ a one-black-for-each-white promotion plan in a police department was upheld due to the department's "long and shameful record of delay and resistance" to equal opportunity for minorities.¹³¹

With *City of Richmond v. J.A. Croson Co.*,¹³² the Court strongly suggested that

121. *Id.* at 503 (Powell, J., concurring).

122. *Id.* at 479, 490.

123. *Id.* at 528 (Stewart, J., joined by Rehnquist, J., dissenting); *see id.* at 537-41 (Stevens, J., dissenting).

124. 467 U.S. 561 (1984).

125. *Id.* at 578-79.

126. 476 U.S. 267 (1986).

127. *Id.* at 274 (Powell, J., joined by Burger, C.J., Rehnquist & O'Connor, JJ.).

128. 478 U.S. 421 (1986).

129. *Id.* at 481 (plurality opinion); *see id.* at 487-89 (Powell, J., concurring in part and concurring in the judgment).

130. 480 U.S. 149 (1987).

131. *Id.* at 185 (plurality opinion).

132. 488 U.S. 469 (1989).

remedying past discrimination may be the only compelling interest for affirmative action. "Unless they are strictly reserved for remedial settings, [classifications based on race] may in fact promote notions of racial inferiority and lead to a politics of racial hostility."¹³³ Once the governmental interest in remedying past discrimination is triggered by the appropriate findings, "[o]nly then does the government have a compelling interest in favoring one race over another."¹³⁴ However, Justice Stevens, writing separately, did not agree "that a governmental decision that rests on a racial classification is never permissible except as a remedy for a past wrong."¹³⁵ However, one year later the dissent in *Metro Broadcasting* further supported the exclusivity of this interest.¹³⁶ "Modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination."¹³⁷

More recently however, in *Adarand Constructors Inc. v. Peña*,¹³⁸ Justice Stevens, dissenting, did not believe that *Adarand's* overruling of *Metro Broadcasting* diminished *Metro Broadcasting's* "proposition that fostering diversity may provide a sufficient interest to justify" affirmative action.¹³⁹ *Miller v. Johnson*,¹⁴⁰ a race-based legislative redistricting case, also provided at least some hint from the majority that remedial purpose may not be an exclusive justification. In striking down the redistricting plan at issue, the Court said, "Whether or not in some cases compliance with the Voting Rights Act, standing alone, can provide a compelling interest independent of any interest in remedying past discrimination, it cannot do so here."¹⁴¹ In addition, Justice Stevens' dissent again clearly recognized an interest in diversity though he did not qualify it with a label such as "compelling" or "important."¹⁴² So perhaps the Court has not closed the door on other possible compelling interests, such as compliance with the Voting Rights Act or racial diversity, but at present it seems that only those affirmative action programs that exist to remedy past discrimination will survive the requisite strict scrutiny review.¹⁴³

133. *Id.* at 493.

134. *Id.* at 497 (footnote omitted).

135. *Id.* at 511 (Stevens, J., concurring in part and concurring in the judgment).

136. 497 U.S. 547, 612 (1990) (O'Connor, J., dissenting, joined by Rehnquist, C.J., Scalia & Kennedy, JJ.).

137. *Id.*

138. 115 S. Ct. 2097 (1995).

139. *Id.* at 2127-28 (Stevens, J., dissenting, joined by Ginsburg, J.).

140. 115 S. Ct. 2475 (1995).

141. *Id.* at 2490-91.

142. *Id.* at 2498.

143. *But see Wittmer v. Peters*, 87 F.3d 916, 919 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 949 (1997). In *Wittmer*, Judge Posner points out that the Supreme Court has not definitively ruled on the question of whether the only type of "racial discrimination that can survive strict scrutiny is discrimination designed to cure the ill effects of past discrimination by the public institution that is asking to be allowed this dangerous cure." *Id.* In *Wittmer*, the court found that the Illinois Department of Corrections could take race into account when deciding whether to promote a black

IV. THE CURRENT SUPREME COURT

In order to accurately predict what the Supreme Court would hold concerning racial diversity as a compelling governmental interest, one must analyze the current makeup of the Court and general tendencies it has recently exhibited. Though predictions based on such an inquiry are hypothetical and uncertain, it seems clear that the Court, in the current politically volatile environment, is "poised to restrict affirmative action regardless of what the politicians do."¹⁴⁴

A. Supreme Court Composition

Gone are Chief Justice Burger, and Justices Stewart, Powell, Brennan, Marshall, White, and Blackmun, whose opinions have played a great part of the preceding precedential history. Thus, absent is the first Justice, Justice Powell, to find diversity in higher education admissions to be a compelling interest,¹⁴⁵ and all but one of the majority in *Metro Broadcasting*¹⁴⁶ who found that racial diversity in the broadcast licensing context was an important governmental interest. Remaining are Chief Justice Rehnquist and Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer. As far as their liberal or conservative tendencies are concerned,¹⁴⁷ the consensus seems to be that Chief Justice Rehnquist and Justices Scalia and Thomas form the Court's right wing of "hard-core conservatives;" Justices Stevens, Souter, Ginsburg, and Breyer tend to form more of a left wing, at least where affirmative action is concerned, and Justices O'Connor and Kennedy are the moderates or "swing voters"—the wavering center.¹⁴⁸

Justices Stevens and Ginsburg are on record as supporting the interest in diversity, though they have not gone so far as to call it "compelling."¹⁴⁹ It would not be surprising if Justices Souter and Breyer voted with Justices Stevens and

to a supervisory position. *Id.* at 920-21. It concluded that because the inmate population was predominantly black and the security staff was predominantly white, the department had a "powerful and worthy concern" about the race of the person filling the open slot. *Id.* at 919. The court accepted the idea that "black inmates are believed unlikely to play the correctional game of brutal drill sergeant and brutalized recruit unless there are some blacks in authority in the camp." *Id.* at 920. One wonders whether this decision can be squared with *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) wherein the Court stated, "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

144. Paul Gewirtz, *Rule of Law: Affirmative Action: Don't Forget the Courts*, WALL ST. J., Aug. 2, 1995, at A11; see also Jost, *supra* note 3; Coyle, *supra* note 3.

145. See *supra* Part II.

146. 497 U.S. 547 (1990) (opinion of Brennan, White, Marshall, Blackmun, & Stevens, JJ.).

147. "[E]ven if the Justices try self-consciously to banish politics to the margins of the mind . . . doing so paradoxically requires taking politics into account." Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 95 (1992).

148. See Coyle, *supra* note 73.

149. See *supra* notes 138-42 and accompanying text.

Ginsburg on this issue, since Justice Souter has agreed with Justice Breyer 85% of the time and Justice Breyer has agreed with Justice Ginsburg 86% of the time.¹⁵⁰ Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, has carefully attacked the idea of diversity as a compelling interest,¹⁵¹ as has Justice Kennedy, joined by Justice Scalia.¹⁵² Justice Thomas most often agrees with Justice Scalia and most often disagrees with Justice Stevens;¹⁵³ Justice Thomas' concurrence in *Adarand* makes clear his stance against affirmative action,¹⁵⁴ so he would likely align with Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy on the issue.

B. Recent Hostility to Affirmative Action

Demonstrating the alignments noted in the previous section, the Supreme Court, in its 1995 summer term, struck down all three of the affirmative action programs under attack. First, in *Missouri v. Jenkins*,¹⁵⁵ the State of Missouri appealed from orders entered in an eighteen year-old school desegregation case to fund salary increases for school employees and remedial "quality education" programs in the Kansas City school system. The salary increases, designed to attract non-minority students from the suburbs, were struck down as amounting to an impermissible interdistrict remedy for an intradistrict violation.¹⁵⁶ The "quality education" programs, mandated because student achievement levels were at or below national averages in many grade levels, were ordered by the Court to be reconsidered under the correct standard. The Court held that the state is responsible for lower student achievement levels only to the extent that segregation caused the underachievement and not to the extent that "numerous external factors" may be responsible.¹⁵⁷

Second, in *Adarand Constructors, Inc. v. Pena*,¹⁵⁸ a subcontractor that was not awarded the guardrail portion of a federal highway project sued, challenging the constitutionality of the federal program designed to provide highway contracts to business enterprises deemed disadvantaged. This case made the largest recent splash in the law of affirmative action because it overruled *Metro Broadcasting's* application of intermediate scrutiny to federal racial classifications and applied in

150. See Coyle, *supra* note 73, at C2; see also Marcia Coyle, *How They Divided*, NAT'L L.J., July 31, 1995, at C3. "Justices Souter, Breyer and Ginsburg also tended to vote together." *Id.*

151. See *supra* Part III.B.1.

152. See *supra* Part III.B.2.

153. See Coyle, *supra* note 150, at C3.

154. *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in the judgment). "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. . . . In each instance, it is racial discrimination, plain and simple." *Id.* (footnote omitted).

155. 115 S. Ct. 2038 (1995).

156. *Id.* at 2051.

157. *Id.* at 2055-56.

158. 115 S. Ct. 2097 (1995). *Adarand* was decided on the same day as *Jenkins*.

its place strict scrutiny; affirmative action by federal, state, and local government bodies are now all subject to the same level of review.¹⁵⁹ The Supreme Court vacated and remanded the case to determine whether the challenged program satisfied the strict scrutiny review.¹⁶⁰

Adarand made it clear that the future of affirmative action is more likely to be decided in the courts than in the political arena.¹⁶¹ It also illuminated the effect Presidents Reagan and Bush have had on the Court through the appointments of Justices O'Connor, Kennedy, Scalia, and Thomas, and, ultimately, denoted the apex of the "conservative" Rehnquist Court.¹⁶² *Adarand's* "primacy and recency" will likely prompt federal judges, many of whom acknowledge the flaws in affirmative action on an intellectual level but are still reluctant to incur the social and political fallout that often stems from rulings adverse to these programs, to be more receptive to lawsuits challenging racial preferences.¹⁶³

Finally, in *Miller v. Johnson*,¹⁶⁴ the Court ventured into the deep waters of racial gerrymandering. The Georgia residents in this case successfully brought an action challenging the constitutionality of race-conscious redistricting legislation and seeking an injunction against its further use in congressional elections. First, the Court held that "parties alleging that a State has assigned voters on the basis of race are neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness."¹⁶⁵ Second, it found that race was "the predominant, overriding factor" of the redistricting, and thus, the plan could not be upheld unless it satisfies strict scrutiny, "our most rigorous and exacting standard of constitutional review."¹⁶⁶ Finally, because the plan was not intended to remedy past discrimination but rather to satisfy the Justice Department's misguided preclearance demands,¹⁶⁷ it did not survive the strict scrutiny review.

Each of these cases was decided by the same 5-4 vote, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority, and Justices Stevens, Souter, Ginsburg, and Breyer dissenting. Taken together, these decisions indicate the trouble that governmental race-conscious measures are likely to face in the Supreme Court in the near future. One case, from the Fifth Circuit, was the best opportunity the Court had to decide whether the government has any interest in racial diversity, and if so, the extent of that interest.

159. See *supra* Part I.

160. *Adarand*, 115 S. Ct. at 2055-56.

161. See Jost, *supra* note 3, at 70.

162. See Kenneth A. Martin et al., *Is This the End of Federal Minority Contracting?*, 42 FED. LAW. 44, 48 (1995). President Bush also appointed Justice Souter, but Justice Souter dissented in *Adarand*.

163. See Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759, 769 n.64 (1995).

164. 115 S. Ct. 2475 (1995).

165. *Id.* at 2488.

166. *Id.* at 2490.

167. *Id.* at 2490-93.

V. *HOPWOOD V. TEXAS*¹⁶⁸: AN OPPORTUNITY DECLINEDA. *The Facts*

Cheryl Hopwood, a white female with a 3.8 grade point average and an LSAT score in the 83rd percentile, and three other plaintiffs, white males, all applied to the University of Texas School of Law and were denied admission; minority applicants with lower grade point averages and LSAT scores than the plaintiffs were admitted. The applicants' grade point averages and LSAT scores were computed into a single number known as the Texas Index (TI) and then divided into two pools of applicants: minority and non-minority. The Law School's admissions policy provided for different standards for minorities than for non-minorities in that the TI score at which white applicants were presumptively denied admission was higher than the TI score for which minorities were presumptively admitted.¹⁶⁹ Hopwood sued, alleging violations of the Fourteenth Amendment¹⁷⁰ and Title VI of the Civil Rights Act of 1964.¹⁷¹

B. *In the District Court*

Hopwood v. Texas first went before the U.S. District Court for the Western District of Texas, which applied strict scrutiny to the admissions program in accordance with Supreme Court precedent.¹⁷² As noted earlier, this entails a "determination of whether the . . . process [in issue] served 'a compelling governmental interest' and whether the process is 'narrowly tailored to the

168. 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996).

169. The presumptive-admit score for whites and nonpreferred minorities was 199, and the presumptive-admit score for preferred minorities was 189, three points lower than the presumptive-deny score for whites which was 192. *Id.* at 936. Note the distinction between preferred and non-preferred minorities: "The beneficiaries of this system are blacks and Mexican Americans, to the detriment of whites and non-preferred minorities." *Id.* at 934.

With "a certain through-the-looking-glass quality," this situation has recently been undergoing a reversion at certain historically and predominantly black schools across the nation, as white students are being given "minority presence" grants to attend these schools under federal or state mandate. Elizabeth Tennyson, *Longtime Black Schools Are Now Luring Whites*, INDIANAPOLIS STAR, Apr. 1, 1996, at A1. In these schools, due to the pursuit of racial diversity, "minority" now means "non-black." "Students fought for desegregation," pointed out Dr. Reginald Wilson, senior scholar at the American Council on Education, "I suppose it comes as a shock to some that the rule applies to black schools as well." *Id.*

170. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

171. "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1994).

172. *Hopwood v. Texas*, 861 F. Supp 551, 568-69 (W.D. Tex. 1994), *rev'd* 78 F.3d 932 (5th Cir. 1996).

achievement of that goal.’”¹⁷³

The defendants asserted four goals of the admissions policy as compelling governmental interests, only two of which the court accepted as compelling: “[t]o achieve . . . diversity of background and experience in its student population” and “[t]o assist in redressing . . . decades of educational discrimination . . . in the public school systems of the State of Texas.”¹⁷⁴ The plaintiffs cited *Richmond v. Croson*¹⁷⁵ and the dissents from *Metro Broadcasting v. FCC*¹⁷⁶ for the proposition that the only compelling interest recognized for race-conscious programs is remedying past discrimination. However, the court said, “none of the recent opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society.”¹⁷⁷ Therefore, the court held that, absent an “explicit statement from the Supreme Court overruling [*Regents of the University of California v. Bakke*],”¹⁷⁸ racial diversity in law school student body was a compelling interest sufficient to support the use of racial classifications. The court went on to uphold also the school’s goal of remedying past discrimination in the broad sense of societal discrimination,¹⁷⁹ but then found that because white and minority applicants were evaluated separately, the admissions process was not narrowly tailored to achieve its goal; it thus violated the Constitution, although the use of racial preferences to further diversity would be acceptable where all applicants are evaluated together.¹⁸⁰ Although Hopwood won the case, in that the admissions process was struck down, the court refused to order the University of Texas to admit the plaintiffs and awarded each plaintiff only one dollar in damages and the right to reapply without paying the standard fifty-dollar fee.¹⁸¹

C. In the Fifth Circuit

Reversing the district court on appeal, the Fifth Circuit, surrounded by “an

173. *Id.* at 569 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)).

174. *Id.* at 570.

175. 488 U.S. 469 (1989); *see supra* notes 131-35 and accompanying text.

176. 497 U.S. at 613-15; *see supra* Part III.B.1.

177. *Hopwood*, 861 F. Supp. at 570.

178. *Id.* at 570-71; *see supra* Part II.

179. *Hopwood*, 861 F. Supp. at 571-72; *but see Croson*, 488 U.S. at 499. “Like the claim that discrimination in primary and secondary school justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.” *Id.*

180. *Hopwood*, 861 F. Supp. at 578-79. Because the law school had already changed its admissions procedure shortly after the suit was filed, no court order was necessary to effectuate such a change. Of course, later the Fifth Circuit struck down the law school’s new admissions procedure also, because it still discriminated on the basis of race to further diversity. *Hopwood v. Texas*, 78 F.3d 932, 962 (5th Cir. 1996).

181. “‘Basically, he agreed my civil rights were violated, but I get nothing for it,’ Cheryl [Hopwood] said at the time.” Adler, *supra* note 18, at 69.

aura of inevitability,”¹⁸² held that the University of Texas School of Law could not continue to use race as a factor in admissions in order to achieve a diverse student body.¹⁸³ “[A]ny consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”¹⁸⁴ The court reasoned that “there [had] been no indication from the Supreme Court, other than Justice Powell’s lonely opinion in *Bakke*, that the state’s interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not.”¹⁸⁵ Indeed, “the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.”¹⁸⁶

Diversity among individuals, the court explains, is a proper goal in higher education admissions.¹⁸⁷ But the use of race as a proxy for individual characteristics “treats minorities as a group, rather than as individuals.”¹⁸⁸ “To believe that a person’s race controls his point of view,” the court explains, “is to stereotype him.”¹⁸⁹ Thus, such an approach “simply replicates the very harm that the Fourteenth Amendment was designed to eliminate.”¹⁹⁰ The court quotes

182. Marcia Coyle, *Fifth Circuit Takes Shot at Diversity*, NAT’L L.J., Apr. 8, 1996, at A1.

183. *Hopwood*, 78 F.3d at 962.

184. *Id.* at 944.

185. *Id.* at 945.

186. *Id.* at 944; *see supra* Part III.C.

187. *Hopwood*, 78 F.3d at 946.

A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant’s home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant’s parents attended college or the applicant’s economic and social background.

Id. The court points out the plaintiff’s own unique background of raising a severely handicapped child. *Id.*

188. *Id.* at 945; *see supra* Part III.B.

189. *Hopwood*, 78 F.3d at 946. “[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America.” Richard A. Posner, *The DeFunis case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12 (1974). The Supreme Court “has remarked a number of times, in slightly different contexts, that it is incorrect and legally inappropriate to impute to women and minorities ‘a different attitude about such issues as the federal budget, school prayer, voting rights, and foreign relations.’” Michael S. Paulsen, *Reverse Discrimination and Law School Faculty Hiring: The Undiscovered Opinion*, 71 TEX. L. REV. 993, 1000 (1993) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 627-28 (1984)).

190. *Hopwood*, 78 F.3d at 946.

Justice O'Connor's dissent in *Metro Broadcasting* for illumination; although "[s]ocial scientists may debate how peoples' thoughts and behavior reflect their background, . . . the Constitution provides that the government may not allocate benefits or burdens among individuals based on the assumption that race or ethnicity determines how they act or think."¹⁹¹

D. Certiorari Denied

Hopwood could have given the Supreme Court a chance to rule on the interest in diversity, at least in the context of higher education admissions.¹⁹² But the Court, on the last day of its 1995-96 term, declined the opportunity to do so.¹⁹³ In an "unusual, brief opinion explaining their interpretation of the court's denial,"¹⁹⁴ Justice Ginsburg, joined by Justice Souter, provided a rare glimpse into the reason certiorari was denied. According to these two Justices, because the 1992 admissions program at issue had long since been discontinued, and because the State of Texas did not defend that program but instead "challenge[d] the rationale relied on by the Court of Appeals," there was no "final judgment on a program genuinely in controversy."¹⁹⁵ "[The Supreme] Court . . . reviews judgments, not opinions."¹⁹⁶

Whether or not the reasoning of Justices Ginsburg and Souter reflects the reasoning of the rest of the Court, in denying certiorari to *Hopwood*, the Supreme Court let the Fifth Circuit ruling stand, which means that racial diversity is not a compelling governmental interest in the Fifth Circuit, composed of Texas, Louisiana, and Mississippi. In those states, at least, it is unconstitutional for any state schools to discriminate or offer preferential treatment on the basis of race among its applicants.

This is the second consecutive case involving affirmative action in the context of higher education to which the Supreme Court has denied certiorari. In 1995, the Court refused to hear the appeal of *Podberesky v. Kirwan*,¹⁹⁷ a Fourth Circuit case which struck down a race-specific University of Maryland scholarship. Thus, race-specific scholarships offered by state-funded schools are unconstitutional in the Fourth Circuit, composed of Maryland, Virginia, West Virginia, North Carolina, and South Carolina. No Justices provided any glimpse into their reasons for denying certiorari in *Podberesky*. Though *Hopwood* and *Podberesky* involve separate constitutional issues, these denials of certiorari to two flagship cases for

191. *Id.* (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 564-65 (1990), *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995)).

192. *See Coyle, supra* note 182, at A22.

193. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996) (mem.).

194. *See* Judy Wiessler, *Supreme Court/Anti-affirmative action ruling stands/Supreme Court won't consider UT case*, HOUS. CHRON., July 2, 1996, at 1.

195. *Hopwood*, 116 S. Ct. at 2581.

196. *Id.* (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

197. 38 F.3d 147 (1994), *cert. denied*, 115 S. Ct. 2001 (1995).

both sides of the affirmative action battle¹⁹⁸ leave a disheartening gap of silence in the state of current constitutional law.

VI. A PREDICTION

Admittedly, it is an open question whether the Supreme Court will find that there is a compelling governmental interest in racial diversity.¹⁹⁹ But this does not mean that predictions should not be made. It seems highly likely, from all of the foregoing material in this note, that when the Court does reach this issue, the proposed interest in racial diversity will not be held to be a compelling interest, because of the following reasons.

First, there is no strong precedent. Justice Powell alone backed his proposition in *Bakke* that diversity in higher education is a compelling interest.²⁰⁰ In *Metro Broadcasting*, diversity in broadcasting was held an important interest such as would satisfy an intermediate scrutiny review,²⁰¹ but that classification is moot now that all governmental classifications based on race are subject to strict scrutiny. Also in *Metro Broadcasting*, two dissents comprising four Justices vigorously attacked the idea of an interest in diversity.²⁰² In *Hopwood*, the Fifth Circuit extended this attack specifically to the context of higher education.

Second, in affirmative action cases the focus has been almost exclusively on remedying past discrimination.²⁰³ Furthermore, *Croson* and the dissents in *Metro Broadcasting* point to remedying past discrimination as the only compelling interest recognized in modern equal protection doctrine.²⁰⁴ Beyond *Bakke* and *Metro Broadcasting*, only one concurring and two dissenting opinions by Justice Stevens²⁰⁵ blatantly look beyond remedying past discrimination for compelling interests.²⁰⁶

Finally, the current composition of the Supreme Court and its recent hostility to affirmative action programs militate against a decision that diversity is a compelling interest.²⁰⁷ A possible vote strictly on the issue of racial diversity would be five-to-four against its status as a compelling interest, with Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas in the majority and Justices Stevens, Souter, Ginsburg, and Breyer dissenting.²⁰⁸

198. See Ken Myers, *Cert Denial of Scholarship Case Leaves Some Officials Wondering*, NAT'L L.J., June 12, 1995, at A13; Coyle, *supra* note 182, at A22.

199. Coyle, *supra* note 182, at A22.

200. See *supra* Part II.

201. See *supra* Part III.A.

202. See *supra* Part III.B.

203. See *supra* Part III.C.

204. See *supra* notes 132-37 and accompanying text.

205. Justice Ginsburg joined one of the dissents.

206. See *supra* notes 135, 138, 142 and accompanying text.

207. See *supra* Part IV.

208. See *supra* Part IV.A. Professor Paul D. Gewirtz of Yale Law School believes it probable that a rough count of Supreme Court votes as the court is presently composed would show a

CONCLUSION

The atmosphere has changed for affirmative action now that all governmental classifications based on race, and thus all affirmative action programs, are subject to strict scrutiny. The necessity of a compelling interest for surviving strict scrutiny is an imperative consideration in defending affirmative action from constitutional attack. Though some precedent supports racial diversity as a compelling interest, there is more support for excluding it from that category, such as the *Metro Broadcasting* dissents and more recent cases. Only remedying past discrimination has become a compelling interest with a strong line of precedent in affirmative action cases. Furthermore, the current Supreme Court's marked tendency to limit affirmative action whenever possible leaves little chance for a holding that racial diversity is a compelling interest, should the appropriate opportunity for such a decision present itself to the Court.²⁰⁹

Perhaps then, it is time to regard more literally the values of equality codified in the Civil Rights Act of 1964: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."²¹⁰

majority declining to endorse diversity as an affirmative action rationale, except possibly in the education arena, which of course is exactly the arena where it is most strongly proposed as such a rationale. See Coyle, *supra* note 182, at A22.

209. The Supreme Court recently accepted this opportunity. *Taxman v. Board of Educ.*, 91 F.3d 1547 (3d Cir. 1996), *cert. granted*, 65 U.S.L.W. 3354 (U.S. June 27, 1997) (No. 96-679).

210. 42 U.S.C. § 2000d (1994).