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Paul J. Mishkin

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Foreword: The Making of a Turning Point—Metro and Adarand

Paul J. Mishkin†

The history of race-based affirmative action in the Supreme Court has been one of uncertain trumpets.¹ In 1974, the Court began by first entertaining and then openly ducking the merits.² For many years, it went on to produce a series of results determined only by vote tallies, with no single opinion expressing definitive doctrine or a controlling rationale.

Yet in each case opinions were based on the idea that race was ultimately to be understood in a remedial context. From Brown v. Board of Education³ on into the affirmative action cases, race was something to be overcome, at least as a criterion for official action. While decisions on the basis of race might be necessary and proper for remedial purposes, the fundamental constitutional concept presupposed an individualist society in which government (at least) was “color blind.”⁴

¹ Emanuel S. Heller Professor of Law, Boalt Hall School of Law, University of California, Berkeley.

² For a similar perception, developed into a different analysis, see the article in this Symposium by Cass Sunstein, Public Deliberation, Affirmative Action, and the Supreme Court, 84 CALIF. L. REV. 1179 (1996).


⁴ In Regents of the University of California v. Bakke, 438 U.S. 265 (1978), the first case to address affirmative action on the merits, Justice Powell was the casting vote in the 4-1-4 decision. Though his rationale accepting educational diversity as a compelling constitutional purpose did not necessarily presuppose an individualist, remedial conception, his insistence on a single admissions process with applicant-by-applicant comparison leaves little room for doubt that this was his view.
It is only in recent years that we have seen a consolidation of the Court's doctrine regarding race-based affirmative action. In 1989, in City of Richmond v. J.A. Croson Co., a majority of the Justices invalidated a city ordinance setting aside thirty percent of its contracting work for minority-owned businesses and—more importantly—agreed on the doctrinal standard of "strict scrutiny" to gauge the constitutionality of state set-aside programs. This standard requires that the legislation aim to achieve a "compelling state interest" and be "narrowly tailored" to serve that interest. It is by its terms the same standard applied to race-based laws that are invidious or cannot claim to be benign.

In June 1995, in Adarand Constructors, Inc. v. Pena, the Supreme Court faced an issue of federal government preferences or set-asides, and a five-four majority squarely held that the Croson "strict scrutiny" standard applied to Congress and the federal government as much as to state and municipal legislatures. Justice O'Conner's opinion for the Court specifically pronounced that the criterion applicable to race-defined programs remains the same whether they are intended to serve a "benign" purpose or any other. It also made clear that the mode of approaching the resolution of questions under that standard will follow the patterns indicated in Croson, including requiring evidence of specific relevant discrimination to justify affirmative action.

In my judgment Adarand represents the decisive moment of consolidation. I say this principally because of the extent to which Adarand restricts the power of Congress. This is striking because it represents a total reversal of the direction the Court had previously taken on distinguishing federal power from that of the States. The dominant theme theretofore, though expressed in vague and varying formulations, was clear deference to congressional choice.

In the first of the federal law cases, Fullilove v. Klutznick, the Court upheld a preferential set-aside in the award of public construction contracts. The leading plurality opinion by Chief Justice Burger, joined by

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See also John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 487-88 (1994) (regarding Powell's strong view as to the temporary, remedial nature of these programs); infra note 30 and accompanying text.

The principal later cases are discussed in text below.

6. However, Justice O'Connor's repeated emphasis in the more recent cases that the test would not always be "fatal in fact" suggests that the application may not be identical. It seems possible that acceptable compelling interests may be more readily found in particular affirmative action contexts. See, e.g., Bakke, 438 U.S. at 311-13 (Powell, J.) (university education); supra note 4.
8. It is impossible to say how much significance there may be in Justice Scalia's unusual joinder in Justice O'Connor's opinion, "except insofar as it may be inconsistent with" his separate opinion on one point. Adarand, 115 S. Ct. at 2118. This action enabled the O'Connor opinion to speak generally as the opinion of the Court.
Justices Powell and White, explicitly deferred to powers unique to the federal legislature. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees."10

The Burger opinion went out of its way to find evidence of congressional attention to the history of racial discrimination in the nation's construction industry, quoting at length from subcommittee reports on earlier bills.11 Even though, as Justice Stevens' dissent points out, Congress' actual deliberations on the particular legislation in the case were very limited,12 the Court chose to defer to Congress' decision. The Court viewed Congress' experiment with affirmative action as a necessary effort to address a contentious political issue and social problem. It thus warranted judicial deference, even though it "may press the outer limits of congressional authority."13

The deference afforded Congress in Fullilove stands in marked contrast to the approach the Court has taken to non-federal affirmative action. In his pivotal opinion in Bakke, Justice Powell declared that a state authority's race-based remedy must be predicated on "proved constitutional or statutory violations."14 The defendant state university in that case was "in no position" to make such findings.15 In Wygant, a plurality held that local authorities could not employ racial classifications to remedy societal discrimination, insisting instead upon "some showing of prior discrimination by the governmental unit involved."16 The Croson majority reaffirmed Wygant's rejection of societal discrimination as a basis for state affirmative action. Justice O'Connor's opinion expressly distinguished the broad remedial authority afforded Congress in Fullilove: the fact "[t]hat Congress may identify and readdress the effects of society-wide discrimination does not mean that, a fortiori, the States and their political subdivisions are free to decide that such remedies are appropriate."17

10. Id. at 483; see also id. at 503, 506, 508-10 (Powell, J., concurring) (urging deference to Congress' authority to identify discrimination and select remedies).
11. Id. at 463-67.
12. Id. at 549-50; see also City of Richmond v. J.A. Croson Co., 488 U.S. 469, 547 n.10 (1989) (Marshall, J., dissenting) ("[T]he federal set-aside program upheld in Fullilove was adopted as a floor amendment ‘without any congressional hearings or investigation whatsoever.’") (citation omitted)).
13. Fullilove, 448 U.S. at 490.
15. Id. at 309. Congress, on the other hand, has "special competence... to make findings with respect to the effects of identified past discrimination and... discretionary authority to take appropriate remedial measures." Id. at 302 n.41.
17. Croson, 488 U.S. at 490.
When the Court revisited federal affirmative action in *Metro Broadcasting*, it began its analysis by noting that "it is of overriding significance" that the programs at issue had "been specifically approved—indeed, mandated—by Congress."18 Once again, the Court deferred to Congress, in this case explicitly adopting an intermediate scrutiny standard. As noted above, five years later the Court reversed course, overruled *Metro*, and unified the standard of review for state and federal race-based remedies. In *Adarand*, the Court embraced a principle of congruence, under which the equal protection analysis that applies to the States must also be applied to the federal government.19 The Court ruled that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed . . . under strict scrutiny."20

What makes this particularly significant is that there are good legal, institutional, and policy reasons to support a less restrictive judicial scrutiny for federal legislation, as distinguished from state law. The basic anti-discrimination provision in the United States Constitution is, of course, the Equal Protection Clause of the Fourteenth Amendment.21 Adopted after the Civil War ended with a Union victory and the abolition of slavery, the Amendment was directed specifically at the States. Moreover, the last section of the Amendment (Section 5) explicitly provides that Congress shall have the power to enforce the Amendment by appropriate legislation. Historically, the immediate purpose of the Fourteenth Amendment was to make sure that acts of Congress seeking to wipe out the continuing effects of slavery (and undo the efforts of some States to preserve them) were valid. The courts were certainly expected to enforce the Amendment's anti-discrimination provisions, but the basic thrust was to empower Congress.22

Currently, race may well be perceived as a national issue, and Congress as the natural fulcrum for dealing with it. There is also substantial reason to believe that there is less risk of harm or abuse in race-based affirmative action programs emanating from Congress than in those enacted by state or local governments. This is partly a matter of the simple fact that the national electoral base is so much broader. The

20. Id. at 2113.
21. The Amendment literally applies only to state, not federal, action. Of course, the due process clause of the Fifth Amendment has been construed as embodying an equal protection component. See, e.g., Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954); see also *Adarand*, 115 S. Ct. at 2106-08 (describing the Court's history of applying identical equal protection standards to state and federal actors).
22. The *Fullilove* plurality also rested its position on the interstate commerce and spending powers of the federal government, and these have occupied a marginal role in subsequent debates. They do not appear to me to affect the general analysis, and will not be considered further here.
dominant national majority would still have to be convinced that special preferences for minorities are justified, and they are not likely to support those too easily when it is they and their children who will be giving up what others receive. The chance that a majority of the Congress (as distinguished, for example, from a city council) would be composed of minority representatives is small. And, finally, there is the natural respect owing to a coordinate branch of government.

These reasons have all been apparent at least as early as *Fullilove*, and they have been reiterated since. They were set out in prevailing opinions in *Croson* as a basis to distinguish *Fullilove*, and then quoted prominently by Justice Brennan in *Metro* to confront the dissenters with their previous declarations. The major reversal of direction in *Adarand* is thus especially significant.

What accounts for the change? On the most obvious level, it can be attributed to the intervening changes in the Court's membership. But while this might account for the difference in specific outcomes, it does not in my view quite explain the coalescence of the Court majority on the application of the *Croson* strict scrutiny test to Congress and the federal government.

In my judgment, *Adarand* also reflects a loss of trust in Congress when dealing with race. Judicial deference to a lawmaking body presupposes trust in that body, and the very meaning of strict scrutiny is that deference will not be extended to the lawmaker. In a constitutional context such as this one, as Robert Post has pointed out, judicial deference ultimately also presupposes that the decisionmaker to whom the court is deferring is deciding according to essentially the same standards as the reviewing court. We can, then, interpret *Adarand* as the Court losing confidence that the Congress had been applying the standards

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23. This is, of course, not a full guarantee. There have been many instances of small but deeply motivated minorities carrying a disproportionate weight in the legislature because of their intense commitment combined with a political leverage position. Indeed, some federal affirmative action legislation may well have come about that way.

24. 488 U.S. at 486-91 (O'Connor, J.); id. at 521-23 (Scalia, J., concurring in judgment).

25. 497 U.S. at 564-65.

26. Four members of the *Metro* majority (Justices Brennan, Marshall, White, and Blackmun) retired before *Adarand*. They were succeeded in the latter case by one member who joined the majority there (Justice Thomas) and three dissenters (Justices Souter, Ginsburg, and Breyer).

27. It is worth noting that in *Croson* Justice Scalia's separate opinion elaborated strong arguments for greater deference to federal race-based legislation, going even beyond the plurality opinion in distinguishing *Fullilove*. See supra note 24.

28. Compare Justice O'Connor's opinion in *Croson*, supporting strict scrutiny on the basis that § 1 of the Fourteenth Amendment "stemmed from a distrust of state legislative enactments based on race." *Croson*, 488 U.S. at 491.

considered appropriate by the Court. Even further, I believe it may well represent a loss of confidence that the courts (including the Supreme Court) can be relied upon to check congressional deviations under any doctrinal formulation less demanding than that applied to state and municipal governments.

What might have led to this loss of confidence? The answer appears to be found in Metro Broadcasting, Inc. v. FCC, decided the year after Croson. Until Metro, the Court as a whole conceived of race-based affirmative action as remedial, temporary measures to achieve an individualist society in which race would be irrelevant to governmental action. Justice Blackmun's oft-quoted passage in Bakke seemed to sum it up: "In order to get beyond racism, we must first take account of race. There is no other way."

When, in dissent in Wygant, Justice Marshall (joined by Justices Brennan and Blackmun) first advanced an explicit group rights analysis, he nevertheless supported the challenged race-based action as a temporary, remedial measure toward the "longstanding goal of civil rights reform, that of integrating schools." And Justice Stevens' separate dissent in that case saw the measure in question as "a step toward the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race."

Justice Brennan's opinion for the Court in Metro Broadcasting took an entirely different tack, ruling that race-based affirmative action programs could survive judicial scrutiny even if the goal were not remedial. Indeed, the opinion is most remarkable in that it expressly dispensed with any need to characterize Congress' doings as an intended remedy for past discrimination. Justice Brennan considered, and then shelved, a remedial justification in favor of the asserted interest in diversity. At the same time, he accepted a definition of diversity predicated on racial identity per se. The result is that the opinion clearly set out a position that would allow Congress to use federal money and power to promote a racially pluralist society.

Only the Justices themselves could fully explain (assuming they knew) this shift in approach. To the extent that they expressed a long perspective, all the opinions in Bakke and for some time thereafter implied or said that the Fourteenth Amendment ultimately posits an integrated society in which an individual's race is of no legal significance.

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The four-justice opinion supporting the Davis program clearly evinces this general remedial view. Although Justice Powell's "diversity" rationale does not necessarily imply the same remedial approach, his whole opinion does. See also supra note 4.
32. Id. at 320.
On that premise, race-based affirmative action must be a transitional mechanism that will not be permitted to become permanent. Alternative conceptions are possible, including the ultimate creation of "a plural society in which racial groups such as African Americans have an official status (like native American tribes) as collectivities to which individuals belong"; in that view, race-based affirmative action can be accepted as "a permanent feature of our society that will accommodate competition between contending racial and ethnic groups."34

Between Bakke and Metro there had been a substantial rise in prominence and political strength of the notion of a "multiracial" society as one including a government role in recognizing and maintaining (if not promoting) separately identifiable racial groupings and ensuring that racially identified groups were given both equal treatment and proportionate shares of social goods. Metro was the first opinion of the Court to uphold a racial preference program in terms consistent with the latter conception; it did so on a basis that explicitly was not seen as remedial of past discrimination, and that accepted as justification a concept of "diversity" that was not individualist, but group-based and implicitly representational (or proportional) on that group basis. Moreover, it did so, not by finding any "compelling interest" but by applying only the criteria of "intermediate scrutiny," held to be applicable because the program was seen as "benign."

My hypothesis is that Metro Broadcasting made it unmistakably clear that federal affirmative action (including specifically acts of Congress) had gone beyond using race only "to overcome race" as a dividing line. Its holding, and especially the terms in which it was cast, provided ready future authority for sustaining government race-line programs—including particularly those based on the group "multiracial" concept—so long as a court characterized them as benign. There was no way the Adarand majority could overlook this.

The Metro case itself involved two minority preference policies of the Federal Communications Commission, endorsed by congressional action.35 One awarded an enhancement for minority ownership in comparative proceedings for new licenses. The other was a "distress sale" program that in particular circumstances allowed existing radio and

34. The statement of alternatives here reflects questions formulated by Randall Kennedy for a somewhat different context. Randall Kennedy, Yes and No, AM. PROSPECT, Spring 1992, at 13, 116-17.

35. Congress adopted the programs thirdhand when it attached a rider to an appropriations bill barring the FCC from reevaluating or repealing its affirmative action policies. Metro, 497 U.S. at 560 & n.9, 576-77. The racial assumptions underlying the program were never examined by and did not even originate with the FCC, which accepted them only at the insistence of a federal court. Id. at 627-28 (O'Connor, J., dissenting). Indeed, the congressional action was prompted by an FCC move to assess its policies.
television broadcast stations to be transferred exclusively to minority-controlled firms. For these purposes minority was defined to mean "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." Justice Brennan's opinion for the five-vote majority announced as the governing standard not "strict" but only "intermediate" scrutiny: requiring an important state interest and means substantially necessary to serve it. He accepted the objective of the program to be increasing "diversity" in the content of broadcasting. And he held that objective by itself sufficiently "important," and the means sufficiently adapted to it, to satisfy his stated constitutional standard.

Metro's use of the diversity rationale is striking because it represents the first time that the Court embraces a theory supporting race-based government action that is neither individualist nor remedial but racially pluralist. The connection the Court finds between diversity of programming and minority ownership of broadcasting facilities apparently assumes that views and tastes are identified by race. Justice Brennan cites studies identifying a nexus between minority ownership and broadcasters' efforts to target programming at minorities or address topics of minority interest. Of course, to accept the validity of such studies, one must first accept the notion that certain topics or viewpoints can be characterized as "minority" in nature. The opinion does not dwell on this point, apparently accepting as true beforehand that there is an authentic minority perspective to be identified and studied. The Court's whole exercise in assessing the validity of racial assumptions is thus predicated on the notion of a per se racial identity.

Metro also fails to provide a rationale why a program for increased diversity in broadcasting is limited to the named groups—the usual "suspect" ones—and not others. Once remedial justification is set aside, there appears to be no explanation why the goal of greater variety in broadcast content would not be equally (or better) served by including among the preferred groups others not defined by race—e.g., older people or Polish-Americans (who may be able to claim even less presence on the airwaves).

Justice Brennan's defense of the assumptions behind the diversity rationale only makes the programs (and the Court's standard) all the more problematic. He defends the policy against the charge of impermissible stereotyping by replying that it does not assume each minority owner will produce more minority-oriented programming, or "that all programming that appeals to minority audiences can be labeled 'minority programming.'" Instead, he assumes that greater minority

36. Id. at 553 n.1.
ownership will increase minority content “in the aggregate.” In other words, the opinion replies to arguments that the stereotypes are not accurate by saying they do not always have to be. Overbreadth and underbreadth are both tolerated so long as, to some extent, the classification serves its asserted purpose. The standard the Court thus set in Metro for “benign” race-conscious measures falls far short of the traditional requirement of a tight fit between means and ends.

The unprecedented leniency of the Court’s approach is brought into greatest relief by the analysis of the “distress sale” policy. In specific circumstances, that program permitted existing radio and television broadcast stations to be sold only to minority-controlled firms, at a price no higher than seventy-five percent of market value. Racial preference programs that fixedly exclude all others from competition have consistently been abjured by the Court. The analogy to disfavored “quotas” is hard to avoid. Indeed, it seems fair to say that, while the program of enhancement for minorities in comparative proceedings might have passed muster under Justice Powell’s opinion in Bakke, the “distress sale” program would have fallen for the same reason that the Davis Medical School program was held invalid. Rather than a “plus” in an overall individual evaluation, it made race an absolute gateway to special consideration and possible preferential treatment. Yet in Metro both programs were upheld.

Finally, there is nothing in the nature of these programs or their rationale that makes the preferences temporary. The Court simply expresses confidence that because Congress had extended the FCC policy for finite durations, there would be adequate future reevaluations of its need. Other than that, the goal of diversity “carries its own natural limit, for there will be no need for further minority preferences once sufficient diversity has been achieved.” Given the assumed concept of proportional racial representation, there is surely no reason to suppose that that goal would ever be fully served by the vagaries of individual choice combined with even perfect free market forces (let alone imperfect ones). Continual intervention by government could always be justified (and necessary).

The Adarand majority clearly identified and rejected the thrust of the Metro decision. Justice O’Connor’s opinion criticized Metro’s pluralist underpinnings as in conflict with “the basic principle that the Fifth

37. Id. at 579.
and Fourteenth Amendments to the Constitution protect persons, not groups." The Adarand opinion also manifests a loss of faith in the ability of Congress to deal with race. It rejects Metro's deference to "benign" federal racial classifications, noting that "it may not always be clear that a so-called preference is in fact benign." No longer would the Court be willing to presume Congress' good intentions when it acts with regard to race.

The Court's new distrust also extended to its own role in reviewing race-conscious affirmative action. When, in the past, the Court had employed vague and undefined standards like the one in Fullilove, it not only deferred to Congress; it also gave itself leeway in exercising judicial review, backed by confidence that future Courts would stop something that was really wrong. However, the Adarand majority now voiced the same concern Croson had raised in the state and local context: that anything but strict scrutiny would lead to mischief. It adopted Croson's stand that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." The Court not only rejected the notion that Congress always acts in good faith with attention to constitutional principle; when it saw all that Metro would carry, it also stopped believing that the judiciary will always sort the good from the bad, unless it is bound to an inflexible standard of review.

Beyond that, Metro was a broad precedent that could be extended to stand for even more. Not only was it structured to support an exceedingly wide range of race-based preferences by congressional action. The opinion's interpretation and application of the "intermediate scrutiny" standard surely did that. But it also could well be seen as an entering wedge to apply that lenient test to state or municipal actions. After all, this was the same scrutiny formula proposed for state action in Bakke by Justices Brennan and three others of the Metro majority. That was the standard by which they would have upheld Davis Medical school's set-aside and separate channel for minority applicants. A sequence like this would hardly have been the first time that such a strategy was employed. And whether or not that was intended, the fact remained that anything less than direct repudiation of the Metro precedent could later have been used to support its authority.

41. Id. (quoting Bakke, 438 U.S. at 298).
42. Id. (quoting Croson, 488 U.S. at 493).
43. Bakke, 438 U.S. at 359 (quoting Califano v. Webster, 430 U.S. 313, 317 (1977)).
The Adarand Court overruled the Metro majority analysis and standard and turned away from deference to its coordinate branch of government. By extending the scrutiny and interpretive doctrines of Croson without significant distinction at the national level, the Court affirmed an even more solid commitment to strict scrutiny for all affirmative action, thereby limiting use of race-based lines to remedial efforts to overcome race as the crucial discriminator among people.

This consolidation may, of course, be ephemeral. One need only consider the possible effects of the upcoming election. It is almost certain that the next president will have one or more Supreme Court openings, and it would be fatuous or worse not to recognize the possible impact of new appointees. I also include the impending votes on proposed legislation, such as the California Civil Rights Initiative, and the impact of the presidential campaign in framing and resolving the issues. It is hardly a secret that the Court’s and the nation’s views tend to go in long-term synch. Mr. Dooley’s epigram has it that the Supreme Court follows the election returns. The history of civil rights (including the “right of privacy”) since World War II surely demonstrates that at times the Court also leads. Adarand poses a distinct challenge for us to decide how we as a society should use race.

On July 1, 1996, after the essay above was written, the Supreme Court denied certiorari to review Hopwood v. Texas. That Fifth Circuit decision invalidated a University of Texas Law School affirmative action program, in an opinion arguing that the Court never adopted the Powell rationale in Bakke as controlling authority and holding that, in view of Croson and Adarand, any university admissions program taking race into account violates the Constitution.

Justice Ginsburg, joined by Justice Souter, issued an opinion expressing their view that review was correctly denied because the particular case did not present the constitutional issue in an appropriate form for Court consideration. The other seven Justices, following the usual practice, gave no reasons for their vote. It is in any event true that denial of certiorari, though it leaves the Fifth Circuit decision intact and fully effective, does not amount to Supreme Court approval or affirmation on the merits of the opinion’s rationale or statements.

44. For a trenchant examination of the need for a coherent theory of affirmative action, see David Hollinger, Group Preferences, Cultural Diversity, and Social Democracy: Notes Toward a Theory of Affirmative Action, 55 REPRESENTATIONS 31 (1996).
45. 78 F.3d 932 (5th Cir. 1996), cert. denied, 116 S. Ct. 2581 (1996).
Official doctrine is that a denial of certiorari has no precedential value and signifies nothing. But that has never stopped speculation. My own view as to the likely source of the Hopwood denial is that (at least) one “centrist” member of the Court was not ready to resolve the affirmative action question on the merits at this point. In that circumstance, no four Justices were willing to force the issue.

As suggested previously, I believe it remains possible even after Croson and Adarand that key members of the Court may be willing to consider affirmative action in university admissions—or perhaps education more generally—as specially justifiable, more readily sustainable even under strict scrutiny. This hypothesis might explain the unreadiness of one or more Justices.

That is surely not the only possibility. At the least, however, the denial of certiorari in Hopwood does imply that the Court as an institution is not eager to rush to judgment on all race-based affirmative action.

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46. See supra note 6.