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Affirmative Action in the Marketplace of Ideas

Rodney A. Smolla*

I. INTRODUCTION

In *Metro Broadcasting, Inc. v. FCC*,¹ a majority of the Supreme Court for the first time approved an affirmative action program on the grounds that the program promoted "diversity" in the marketplace of ideas.

A great deal turns on whether promoting intellectual diversity is a sufficient basis for justifying affirmative action programs. Prior to *Metro Broadcasting*, the Court had approved affirmative action plans only as remedies for past discrimination. If the diversity rationale becomes an accepted element of affirmative action jurisprudence, institutions involved in activities that implicate the marketplace of ideas, particularly universities, may have wider latitude to implement affirmative action programs, for they will be liberated from the necessity of linking their programs to evidence of prior discrimination.

More poignantly, basing affirmative action plans on the notion of diversity is in many respects more attractive than basing such plans solely on remedying past discrimination; the diversity rationale tends to dissipate the stigma that sometimes attends remedial affirmative action. Remedial affirmative action programs have always been vulnerable to the argument that those who benefit from such programs "could not make it on their own merits," the implication being that the institution implementing the affirmative action plan is doing the applicant a favor, making up for past sins.

When the diversity rationale is applied, however, the tables of perception are somewhat turned. The applicant now

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1. 110 S.Ct. 2997 (1990).

does the *institution* a favor, enriches the institution, brings to it the positive asset of new perspectives. The diversity rationale thus frees affirmative action from its "necessary evil" label, instead placing upon it the upbeat rhythms of the first amendment. Applicants escape the taint of being "beneficiaries." Affirmative action programs designed to enrich institutions by enhancing diversity reverse the psychological equation of remedial plans. In remedial affirmative action plans, the institution's unstated message may be understood as: "You are deficient because you are the victim of the lingering effects of past discrimination, and therefore we are employing a remedy to make up for your deficiency." When the diversity rationale is used, however, the message shifts in emphasis: "Because *this institution* is deficient, in lacking sufficient diversity in its intellectual marketplace, we invite you to join us to remedy the institutional deficiency." When diversity is the rationale, the institution needs the applicant more than the applicant needs the institution.

While diversity is an appealing theory upon which to base affirmative action programs, it also presents a number of policy and legal difficulties. The notion of "diversity" in equal protection thinking, which may require intervention and regulation of the market, is in tension with the notion of "diversity" in classic free speech thinking, a legal arena that has always tended to treat government intervention in the marketplace as an anathema.

This article explores the idea of diversity from the equal protection and free speech perspectives and examines the constitutional and philosophical legitimacy of affirmative action in the marketplace of ideas.

II. THE METRO BROADCASTING DECISION

Two Federal Communication Commission (FCC) minority preference policies were at issue in *Metro Broadcasting*: the Commission's minority preference policies in comparative licensing proceedings and its minority preference policies for "distress sales."

In its comparative licensing process, the Commission grants "plus points" for minority ownership when evaluating competing applicants for new licenses. The FCC uses numer-

ous criteria when evaluating applicants for broadcasting licenses. Those criteria include the applicant's past broadcast record, character, and proposed program service, as well as the efficient use of the frequency.² In 1978 the Commission announced that minority ownership and participation in management would be considered as a "plus" factor, to be weighed with all other relevant factors, in comparative licensure hearings.³ The Metro Broadcasting Company competed with Rainbow Broadcasting Company for a license to construct and operate a new UHF television station in Orlando, Florida. Rainbow was ultimately awarded the license over Metro because Rainbow was ninety percent Hispanic-owned.⁴

The Commission's minority distress sale program permits certain licensees in jeopardy of losing their licenses to sell their licenses to minority-controlled firms. Normally, when a licensee's qualifications to continue to hold a broadcast license are questioned, the licensee is forbidden to assign or transfer the license until the FCC conducts a hearing resolving the licensee's qualifications. The minority preference distress sale policy is an exception to that general rule, allowing a broadcaster whose license or renewal application has been designated for a revocation hearing to assign the license to an FCC-approved "minority enterprise" at a distress sale price.⁵ The price of the distress sale must not exceed seventy-five percent of the fair market value. (Rather than endure a protracted hearing over its qualifications, the licensee may prefer to sell out to a minority enterprise, even though the licensee receives less than it might otherwise have obtained from the sale.) The assignee must meet the FCC's basic qualifications.⁶

2. See *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965).

3. See *WPIX, Inc.*, 68 F.C.C.2d 381, 411-12 (1978).

4. An FCC Review Board awarded Rainbow "substantial enhancement" because it was 90 percent Hispanic-owned. Rainbow's minority enhancement points outweighed Metro's local residence and civic participation points. *Metro Broadcasting, Inc.*, 99 F.C.C.2d 688 (Rev. Bd. 1984).

5. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 851 (1982). The minority ownership must exceed 50 percent or be controlling.

6. *Faith Center, Inc.*, operated a Hartford, Connecticut television station. Faith Center petitioned the FCC on three occasions for a distress sale. The first two attempts at the sale failed because the buyer could not obtain adequate financing. Between Faith

The United States Supreme Court upheld both FCC minority preference policies. In a 5-4 decision written by Justice William Brennan, the Court held that the FCC's policies should be judged by the "intermediate scrutiny" standard of equal protection review, rather than by "strict scrutiny."⁷ The application of the more lax intermediate scrutiny test was surprising, because the Court had appeared to be settling on the strict scrutiny test as the appropriate standard of review for racial affirmative action. This trend, first signaled in *Wygant v. Jackson Board of Education*,⁸ appeared to command a majority of the Court in *City of Richmond v. J.A. Croson Co.*⁹

Wygant involved a preferential layoff system by a school board. The Jackson Board of Education (Board) responded to racial tension in its schools by approving a layoff provision in the collective bargaining agreement with its teachers that favored minority teachers.¹⁰ When layoffs occurred in the academic years 1976-77 and 1981-82, the Board retained minority teachers but released non-minority teachers with

Center's second and third petitions, Shurberg Broadcasting of Hartford, Inc. applied to the FCC for a permit to build a television station in Hartford. Shurberg's application was mutually exclusive with Faith Center's renewal application. When Faith Center petitioned the FCC a third time, requesting permission to sell the station to Astroline Communications Company, a minority enterprise, Shurberg challenged the proposed sale, alleging that the distress sale program violated its rights to equal protection. See *Schuberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902 (D.C. Cir. 1989). The Court of Appeals invalidated the FCC minority distress sale program. The court held that the policy deprived Shurberg of its equal protection rights under the Fifth Amendment because the program was not narrowly tailored to remedy past discrimination, placed undue burdens on an innocent non-minority, and was not reasonably related to the interests it sought.

7. *Metro Broadcasting*, 110 S.Ct. at 3008-09. The strict scrutiny test requires a "compelling" government interest that is "narrowly tailored" to achieve the interest. "Intermediate scrutiny" requires only "important" governmental interests that are "substantially related" to the achievement of those interests. For a concise explication of these standards, see generally, J. NOWAK, R. ROTUNDA, & N. YOUNG, *CONSTITUTIONAL LAW* § 14.3, at 530-35 (3d ed. 1986).

8. 476 U.S. 267 (1986) (plurality opinion).

9. 488 U.S. 469 (1989) (plurality opinion). There was no five-Justice majority for all aspects of the *Croson* holding, which was announced in an opinion by Justice O'Connor. At least five Justices, however, endorsed "strict scrutiny or better" as the appropriate standard of review—with the "or better" encompassing the "absolute color-blind" position that would hold all affirmative action programs unconstitutional *per se*.

10. The layoff provision provided that teachers with the greatest seniority would be retained in the event of a layoff; however, at no time would the percentage of minorities laid off exceed the percentage of minority personnel employed at that time. *Wygant*, 476 U.S. at 270.

greater seniority.¹¹ The Board's decision was challenged and eventually invalidated by the Supreme Court.¹² Justice Powell, announcing the judgment of the Court, found that strict scrutiny applied to *any* racial classification, and did not differ in application when the racial classification was against a group not historically subjected to discrimination.¹³

11. Prior to these layoffs, the Board had laid off numerous teachers in 1974, but retained tenured non-minority teachers over probationary minority teachers, therefore violating the requirements of the collective bargaining agreement. The Union, together with two minority teachers who were laid off, sued under state contract law, the Equal Protection Clause of the Fourteenth Amendment, and Title VII of the Civil Rights Act of 1964. *Id.* at 271. The claims failed in federal district court and state court, but the layoff provision was upheld.

12. Both the district court and the circuit court held that racial preferences "were permissible under the Equal Protection Clause as an attempt to remedy societal discrimination by providing 'role models' for minority schoolchildren . . ." *Id.* at 272-73.

13. *Id.* at 273 (plurality opinion). Applying the first prong of strict scrutiny, Justice Powell held that the Court had never tolerated societal discrimination alone as a sufficient justification for racial classification. *Id.* at 274. The Court, he explained, has always required a showing of discrimination by the governmental unit involved. The role model theory advanced by the district court would create a snowball effect, he maintained, because it would allow the Board to engage in race-conscious hiring long past the time that the remedial effect of the program required. *Id.* at 275-76.

Justice Powell determined that less intrusive means than the layoff provisions existed to achieve any constitutionally valid purposes advanced by the Board. *Id.* at 283-84. Strict scrutiny requires that the means to accomplish a compelling interest must be narrowly tailored. Preferential layoff programs are particularly troublesome, Justice Powell asserted, because a small group of individuals bear the burden of the program. The non-minority teachers with greater seniority shoulder the entire load, Powell argued, whereas preferential hiring policies distribute the burden across the entire hiring pool. *Id.* at 282. "Denial of a future employment opportunity is not as intrusive as loss of an existing job." *Id.* at 282-83. Justice Powell ultimately found that because hiring goals were a less intrusive means of accomplishing legitimate purposes, the layoff program was not narrowly tailored to meet its ends. Justice O'Connor, otherwise joining with Justice Powell, rejected the layoff program because it had no legitimate ties to the purpose of remedying racial discrimination. *Id.* at 293-94 (O'Connor, J., concurring).

Dissenting, Justice Marshall stated that the Court should not have attempted to resolve the constitutional questions because the record before it was incomplete. *Id.* at 296 (Marshall, J., dissenting). Nonetheless, he phrased the issue on the merits as whether a union and a school board could develop a collective bargaining agreement that maintained a valid affirmative hiring policy by apportioning layoffs among minorities and non-minorities. *Id.* at 300.

Using the history of the provision, Justice Marshall determined that the purpose of the layoff provisions was to preserve the "integrity of a valid hiring policy-which in turn sought to achieve diversity and stability for the benefit of *all* students." *Id.* at 306. When viewed in this light, he argued, the layoff provision passed any standard of review or constitutional demands that the Court chose to apply. *Id.* at 303.

Referring to history, Justice Marshall concluded that the provision provided the best means for rectifying the situation of past discrimination. As long as layoffs contin-

Croson involved the City of Richmond's Minority Business Utilization Plan. This plan required that prime contractors who were awarded city construction projects to subcontract at least thirty percent of the dollar amount of each contract to Minority Business Enterprises (MBE).¹⁴ The Plan defined an MBE as a business from anywhere in the country that was at least fifty-one percent owned or controlled by minority owners.¹⁵ A prime contractor could apply for a waiver if it could not locate a qualified MBE after every feasible attempt to comply with the Plan.¹⁶ The Plan was intended to remedy past discrimination in the construction industry.

Justice O'Connor, writing for the Court, applied strict scrutiny to affirm the lower court finding that the City of Richmond lacked a compelling interest in remedying past discrimination within an entire industry.¹⁷ Justice O'Connor's opinion distinguished specific findings of past discrimination

ued to remove the last hired, which would be the minority teachers employed under the hiring goals, integration of the faculty would not be achieved. *Id.* at 307. Marshall argued that Justice Powell's hiring alternative lacked logic because those minorities hired under the policy would be the first to lose their jobs in a layoff. *Id.* at 307-08. One other method of preserving minority percentages on the faculties would be a random lottery system; this however would jeopardize every teacher and disturb the seniority system even further. *Id.* at 310.

Justice Stevens also dissented, arguing that instead of looking at the past, the Court should examine the Board's goals of future education for the students and consider whether that interest supported the program. *Id.* at 313 (Stevens, J., dissenting). He concluded that a school board may reasonably conclude that the student will receive a better education from a diverse faculty. *Id.* at 315. This argument, he maintained, would not empower a school board to determine that students would gain a better education from segregated classrooms and faculty, because a logical line can be drawn between programs that *include* a member of a minority group and programs that *exclude* a member of a minority group. *Id.* at 316. Turning to the burden on non-minorities, Justice Stevens argued that the Union represented all the teachers, and therefore the non-minority teachers constructively agreed to the burden. *Id.* at 318. He further maintained that the layoffs resulted from economic and contractual circumstances, not racial classifications. *Id.* at 318-19.

14. *Croson*, 488 U.S. at 477.

15. Minority owners were defined as United States citizens who are Black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleutian. *Id.* at 478.

16. *Id.*

17. *Id.* at 498-99 (plurality opinion). The case was brought by J.A. Croson, a prime contractor who was denied a waiver by Richmond. After the district court and the Fourth Circuit upheld the Richmond affirmative action program under the intermediate scrutiny standard, the Supreme Court granted certiorari and vacated and remanded the case for further consideration after its decision in *Wygant*. On remand, the Fourth Circuit struck down the Richmond plan for failing both prongs of the strict

by the governmental entity employing an affirmative action plan from generalized concerns about past societal discrimination, stating that "[a]n amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota."¹⁸ O'Connor concluded that no evidence existed to support any claim of past discrimination against minorities in Richmond's construction industry.¹⁹ Justice O'Connor further held that the Richmond plan failed the second prong of the strict scrutiny test due to its failure to narrowly tailor the remedy to achieve the purposes of redressing past discrimination.²⁰

scrutiny test. In a plurality opinion, the Supreme Court affirmed the Fourth Circuit's finding that the plan was unconstitutional.

In Parts II and III-A of her opinion, Justice O'Connor analyzed the standard of review for state and local set-aside programs. In *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the Court upheld a federal government minority set-aside. The principal opinion in *Fullilove*, written by Chief Justice Burger, did not apply strict scrutiny, on the theory that the Court was bound to grant appropriate deference to a co-equal branch of the federal government. Relying on *Fullilove*, the City of Richmond argued that it need not make a finding of specific discrimination to "engage in race-conscious relief." *Crosby*, 488 U.S. at 489. Justice O'Connor's opinion rejected this view. Congress, she argued, has a specific duty to enforce the fourteenth amendment and may therefore identify and remedy societal discrimination. *Id.* at 490. The state and local governments, however, do not have the same mandate and thus may not base race-conscious measures on general societal discrimination. *Id.* at 490-91. Quite the contrary, section 1 of the fourteenth amendment stemmed from a distrust of state governments' use of race classifications. *Id.* at 491. Justice O'Connor acknowledged that state and local governments do have an interest in eradicating past discrimination within its "own legislative jurisdiction." *Id.* at 491-91. Race-conscious measures, according to Justice O'Connor, carry "a danger of stigmatic harm," and therefore should be reserved for remedial purposes. *Id.* at 493. Strict scrutiny, Justice O'Connor argued, patrols the use of race-conscious measures by assuring that the state interest behind the measure is compelling and that the interest is narrowly tailored to achieve this interest.

18. *Id.* at 499.

19. *Id.* at 505-06. In O'Connor's view, the random inclusion of Aleuts and Eskimos demonstrated that Richmond did not develop the plan to remedy discrimination in its city's construction industry.

20. *Id.* at 507-08. O'Connor claimed that the Court could not really ascertain whether the plan was connected to the purpose of remedying past discrimination, because no real proof of past discrimination was in the record. *Id.* at 507. Further, O'Connor noted that Richmond did not attempt any race-neutral means before resorting to a set-aside. *Id.* Richmond simply employed a 30 percent set-aside without specific justification for that percentage, apparently assuming that the same proportion of minorities in a population will enter a particular trade. *Id.* at 507-08. Richmond's only interest in the quota system appeared to be administrative convenience, "obvious[ly] . . . not narrowly tailored to remedy the effects of past discrimination." *Id.* at 507-08.

The dissents, opinions by Justices Marshall and Blackmun, found the Court's inability to find a history of discrimination in the former capital of the Confederacy ironic.

In *Metro Broadcasting*, Justice Brennan distinguished *Croson* on the grounds that "benign" racial classifications, promulgated at the direction of Congress, required greater deference by the Court. Brennan's opinion relied heavily on the Court's 1980 decision in *Fullilove v. Klutznick*²¹ which sustained a congressional program setting aside federal construction grants for minority business enterprises.²² Against the backdrop of *Fullilove*, Justice Brennan in *Metro Broadcasting* declared:

benign race-conscious measures mandated by Congress — even if those measures are not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.²³

The Court in *Metro Broadcasting* thus distinguished the FCC's race-conscious policy from that in *Croson* on the theory that the minority set-aside program in *Croson* involved a municipal government, not the federal government. Applying the more deferential intermediate scrutiny standard to the

Id. at 528-29 (Marshall, J. dissenting); *id.* at 561-62 (Blackmun, J., dissenting). If Richmond could bring itself to admit to past discrimination, the dissenters argued, surely the Court should not second-guess its decision. According to Justice Marshall, the Court's attack on state and local affirmative action will chill attempts to "rectify the scourge of past discrimination." *Id.* at 529 (Marshall, J., dissenting).

Justice Marshall also dissented from Justice O'Connor's application of strict scrutiny. He would have applied intermediate scrutiny, upholding race-conscious classifications that served an important governmental goal and were substantially related to the achievement of that goal. *Id.* at 535. Applying this lower standard of review, Justice Marshall found the Richmond Plan easily valid. *Id.* at 535-61.

21. 448 U.S. 448 (1980).

22. *Fullilove* involved the validity of the Minority Business Enterprise (MBE) provision of the Public Works Employment Act of 1977, Pub. L. No. 95-32, 91 Stat. 116 (1977) (current version at 42 U.S.C. § 6705 (1988)). The MBE program set aside 10 percent of federal funds granted for public works programs for United States citizens who are Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts. The program provided for an administrative waiver mechanism. Seven Justices in the case voted to uphold the plan. While the plurality opinion of Chief Justice Burger, joined by Justices White and Powell, did not articulate any specific standard of review, the language of the opinion was extremely deferential to congressional power. Three other Justices, Marshall, Brennan, and Blackmun, upheld the program using the intermediate scrutiny standard. Justice Stevens upheld the plan, even though he applied a standard close to strict scrutiny.

23. 110 S. Ct. at 3008-09.

FCC's minority enhancement policies, the Court had no difficulty sustaining the preferences, finding that promotion of diversity in the broadcast spectrum was certainly an "important" governmental interest and that the FCC programs were "substantially related" to achieving that interest.²⁴

III. THE STANDARD OF REVIEW

A. The Subsidiary Questions

The Court has long been vexed over the appropriate standard of review for affirmative action, and *Metro Broadcasting* unsettled an issue that many had thought settled. The standard of review debate in *Metro Broadcasting* was wrapped up in a basketful of subsidiary questions:

(1) *Should affirmative action implemented by the federal government be treated more deferentially by courts than affirmative action at the state and local level?* The Court would have us believe that Congress is less threatening to equality than state legislatures. Our historical experience, the argument goes, is that official racism has been primarily practiced by state and local governments. The federal government has led the way toward racial equality, imposing equal protection of the laws on the states. This is the lesson of the Civil War, the thirteenth, fourteenth, and fifteenth amendments, the post-Civil War Civil Rights Acts, *Brown v. Board of Education* and its progeny, the integration of Little Rock Central High School, the passage of the Civil Rights Acts of 1964 and 1968, and so on. In our constitutional experience on race issues, the federal government has acted primarily as emancipator rather than repressor. Congress is less likely than the states to become an instrument of invidious discrimination, and when Congress engages in race-conscious measures, it is more likely to be motivated by benign objectives.

(2) *Should special judicial deference to federal affirmative action apply to all exercises of federal power, or only those actually mandated by Congress?* This question of constitutional policy is in turn complicated by a debate over the historical facts surrounding the FCC's program. Were the FCC minority enhancement policies purely the product of the agency's

24. *Id.* at 3009-26.

own policy decisions, or were the policies actually mandated by Congress?²⁵ The Court in *Metro Broadcasting* made it emphatically clear that Congress had mandated the preference plans. The actual historical record on this point, however, was somewhat more ambiguous than the Court made it out to be. Congress never actually instructed the FCC, in a statute, to implement its minority preference programs. On the other hand, in various appropriations statutes and other legislation enacted over the years, Congress far exceeded mere acquiescence to the Commission's policies. Congress appeared to voice its formal endorsement of these Commission's policies,

25. See Devins, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 TEX. L. REV. 125 (1990). Professor Neal Devins presents a forceful critique of the Court's methodology in *Metro Broadcasting*, concentrating on three critical features of the decision: the application of intermediate scrutiny rather than strict scrutiny, the characterization of the FCC policies as federally mandated, and the use of a diversity rather than remedial justification for the race-conscious policies. *Id.* at 129. Professor Devins takes issue with all three features.

First, Devins attacks the Court's characterization of the policies as congressionally mandated. *Id.* at 136-41. The source of the FCC's comparative hearing policy is rooted, he argues, in a court of appeals opinion, not a congressional mandate. See *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1979). Prior to this opinion, the FCC had determined that the Federal Communications Act was colorblind. The court disagreed and ordered the FCC to adopt policies to improve the diversity of content, by promoting diversity of ownership. *Id.* at 136. The distress sale policy grew out of a White House policy. *Id.* at 137. President Carter, in a speech, called for "full minority participation" in ownership of broadcasting stations and suggested that a distress sale policy was one avenue to this objective. *Id.* In taking issue with the Supreme Court's view that Congress "mandated" the FCC policies, Devins argues that a failure to enact legislation limiting the FCC policies did not amount to a mandate for those policies, and that the appropriations riders are not equivalent to a legislative authorization. *Id.* at 140.

Second, Devins faults the Court's approval of race-conscious measures that the FCC promulgated for reasons other than remedying past discrimination. *Id.* at 141-55. Using separation of functions and antidiscrimination jurisprudence, Devins contends that remedial objectives are the only justification for race classifications. *Id.* at 142-43. According to Devins, the diversity rationale adopted by the Court in *Metro Broadcasting* breaches the fundamental principle of antidiscrimination—to treat the individual as an individual and not as a member of a group. *Id.* at 144.

Third, Devins argues, the Court's application of intermediate scrutiny to a race-conscious policy was "pure sophistry," because the Court ignored its long history of applying strict scrutiny to equal protection cases irrespective of the state or federal nature of the legislating body. *Id.*

Devins concludes that *Metro Broadcasting* may do more harm than good for affirmative action because the underlying analysis is vulnerable. *Id.* at 155-56. The opinion invites the Court to distinguish between benign and pernicious classification, a move that Devins predicts will allow Congress to use race "as simply another bargaining chip in the legislative process." *Id.* at 155.

and attempted to block any effort by the agency to reconsider them. That the Court felt the need to massage this historical record into a finding that the FCC's programs were congressionally *mandated* might be understood as a signal that the Court would have been less deferential to an affirmative action plan created by an agency on its own frolic and detour.

(3) *If the FCC policies should be treated as congressionally mandated, were they mandated pursuant to Congress' "section 5 power" to enforce the fourteenth amendment, or were they mandated pursuant to Congress' more general legislative powers, such as the commerce clause?* The Court has held on a number of occasions that Congress has powers under section 5 of the fourteenth amendment that allow it to create rights and remedies that go beyond what the main body of the fourteenth amendment requires. Thus, it is argued, when Congress acts pursuant to its section 5 power, it may have greater authority, and be entitled to correspondingly greater deference by the Supreme Court, than when it is engaged in the exercise of its more mundane legislative powers, such as the regulation of interstate commerce.²⁶

B. The Artificiality of a Two-Tiered Standard

What are we to make of these subsidiary questions? We should make the harsh judgment that the Court was utterly wrong to ever get into them. These questions are peripheral. Nothing should have turned on any of them.

It is disappointing that the merits of the philosophical disputes posed by the use of diversity as a rationale for affirmative action should be so muddled by the standard of review debate and mired in this host of subsidiary factual and legal questions. For none of those subsidiary questions should have really mattered: the Court should apply the same standard of review to all affirmative action plans, whether enacted at the federal, state, or local level, and whether formally mandated

26. Linked to this argument is whether only "remedial" legislation may trace its constitutional source to section 5. This in turn implicates a debate over whether diversity in the broadcast spectrum was really the principle rationale for the FCC program. Professor Devins, for example, argues that it was a primarily remedial measure masquerading under the cover story of achieving diversity. See Devins, *supra* note 25, at 15-53.

by a legislative body or instead implemented by an administrative agency through traditional courses of the administrative process. Affirmative action poses profound moral and constitutional conflicts.²⁷ The resolution of those conflicts should not change with the arcana of separation of powers jurisprudence or the trivia of administrative law.

Affirmative action is too important an issue in contempo-

27. The academic literature in the area is rich. See, e.g., 1 CONSULTATION OF THE AFFIRMATIVE ACTION STATEMENT OF THE U.S. COMMISSION ON CIVIL RIGHTS, PAPERS PRESENTED (1981); B. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973); R. DWORKIN, *Reverse Discrimination*, in *TAKING RIGHTS SERIOUSLY* 223 (1977); N. GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHIC INEQUALITY AND PUBLIC POLICY* (1975); J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* at 661-82; *REVERSE DISCRIMINATION* (B. Gross ed. 1977); Balwin & Nagan, *Board of Regents v. Bakke: The All-American Dilemma Revisited*, 30 U. FLA. L. REV. 843 (1978); Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3 (1979); Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962); Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21 (1979); Boxhill, *The Morality of Preferential Hiring*, 7 PHIL. & PUB. AFF. 246 (1978); Brest, *The Supreme Court, 1975 Term Forward; In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Choper, *The Constitutionality of Affirmative Action: Views From the Supreme Court*, 70 KY. L.J. 1 (1981-82); Dixon, *Bakke: A Constitutional Analysis*, 67 CALIF. L. REV. 69 (1979); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559 (1975); Greenawalt, *The Unresolved Problems of Reverse Discrimination*, 67 CALIF. L. REV. 87 (1979); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection*, 86 HARV. L. REV. 1 (1972); Hastie, *Affirmative Action in Vindicating Civil Rights*, 1975 U. ILL. L. REV. 502; Kaplan, *Equal Justice in an Unequal World; Equality for the Negro—The Problem of Special Treatment*, 61 N.W. U.L. REV. 363 (1966); Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Karst & Horowitz, *Affirmative Action and Equal Protection*, 60 VA. L. REV. 955 (1974); Morris, *Equal Protection, Affirmative Action, and Bakke in Balance: Some Preliminary Thoughts*, 67 CALIF. L. REV. 143 (1979); O'Neil, *Racial Preference and Higher Education: The Larger Context*, 60 VA. L. REV. 925 (1974); Posner, *The Bakke Case and the Future of "Affirmative Action"*, 67 CALIF. L. REV. 171 (1979); Posner, *The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1; Ravenell, *DeFunis & Bakke. . . The Voice Not Heard*, 21 HOW. L.J. 128 (1978); Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343 (1974); Sandalow, *Racial Preference in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653 (1975); Sedler, *Racial Preference, Reality, and the Constitution: Bakke v. Regents of the University of California*, 17 SANTA CLARA L. REV. 329 (1977); Seeburger, *A Heuristic Argument Against Preferential Admissions*, 39 U. PITT. L. REV. 285 (1977); Tribe, *Perspectives on Bakke: Equal Protection, Procedural fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

rary American life to be relegated to the artificial distinctions of the legal technocrat. Is anyone's moral judgment about affirmative action really influenced one way or another by whether it is implemented by a federal agency rather than a state agency? Or by whether Congress actually instructed the FCC in clear legislation to undertake its programs, merely endorsed the Commission's plans after-the-fact, or simply instructed the Commission not to alter them? Does anyone, in taking stock of their constitutional and moral intuitions about affirmative action, draw distinctions between a federal policy enacted pursuant to section 5 of the fourteenth amendment and one enacted under the commerce clause?

There should be a single standard of review for all affirmative action plans implemented in the United States by government. It is true that throughout much of our history the principle of equal protection was enforced by the federal government against stubborn repositories of racism at the local and state level. And it may well be that in *applying* the standard, and putting the government to its proofs, courts will be influenced by the historical record on race issues of the particular governmental body that is attempting to defend its affirmative action plan. If there is doubt whether a plan is truly "benign" toward minority groups, for example, or has instead been created to advance some invidious hidden agenda, then the past actions of the institution might be admissible as evidence that all is not what it appears to be. But to treat federal affirmative action plans as enjoying blanket immunity from the level of judicial scrutiny to which such plans would otherwise be subject, on the cavalier assumption that the federal government is less dangerous as a potential discriminator, simply cannot be justified under our constitutional traditions and experience.

In measuring that experience, it is worth reflecting on the Supreme Court's 1944 decision in *Korematsu v. United States*,²⁸ a case that is usually regarded as among the Court's first applications of the now familiar strict scrutiny test. *Korematsu* arose from one of the most brazen and shameful violations of human dignity and equality in our modern experience:

28. 323 U.S. 214 (1944).

the federal government's internment of American citizens of Japanese descent during World War II. Americans of Japanese descent were interred in the camps, but not Americans of German or Italian descent—though we were also at war with Germany and Italy. The internment episode was infected throughout with racial stereotypes about the sly and insidious Japanese—a racism fueled by the hysteria of war, as racial and ethnic stereotypes so often are.

Korematsu yields two relevant lessons. First, we see that the federal government may not boast of an inviolate record on matters of equality. Here was an episode of federal violation of basic norms of equal protection. It should give us no comfort that the violation occurred during the inevitable paranoia of war, for war is uniquely the business of the federal government, not the states, and in our constitutional tradition the federal government, not the states, has been the primary villain in the never-ending temptation of governments to suspend civil rights and civil liberties for reasons of national security. *Korematsu* thus lends a hollow ring to the *Metro Broadcasting* decision's claim that we need not fear the feds.

The second lesson of *Korematsu* derives from the fact that the Court in that case *did*, after all, purport to apply strict scrutiny. Even strict scrutiny, however, proved impotent constitutional medicine, for the state upheld the internment. We should thus be circumspect about the importance of these elegant multi-part constitutional tests. It's not the labels or the language that give them genuine life, but their application in action.

With the sole possible exception of the *Fullilove* case that preceded it, *Metro Broadcasting* stands alone in its assertion that constitutional guarantees apply less rigorously to the federal government. In all Bill of Rights matters, indeed, the tradition has been quite the opposite. The Supreme Court has either applied the same standard to both state and federal action²⁹—the most common course—or it has applied a *less* rigorous standard to the states.³⁰

Now it might be objected that equal protection is differ-

29. The speech and religion clauses, for example, apply in the same manner to federal and state activity.

30. The seventh amendment's right to jury trial in civil cases exceeding twenty

ent, because the fourteenth amendment in language and history is targeted against the states, and section 5 of the fourteenth amendment explicitly grants Congress enforcement powers. But this argument is shot with holes. First, it proves too much, because if we are to be *that* literal in our constitutional jurisprudence, we would have to own up to the fact that there is no Equal Protection Clause *literally* binding the federal government at all. The only Equal Protection Clause is in the fourteenth amendment. When the Supreme Court struck down the system of segregated schools in Washington, D.C., a federal enclave, it made up for this constitutional embarrassment by reading an "equal protection component" into the fifth amendment's due process clause. In that decision, *Bolling v. Sharpe*,³¹ a companion case to *Brown v. Board of Education*,³² the Supreme Court opined that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."³³

The section 5 argument, however, has even more debilitating flaws. At best, section 5 would authorize greater deference to efforts by Congress to enforce equal protection values *against the states*. To the extent that the fourteenth amendment is properly understood as effectuating a "dramatic change in the balance between congressional and state power over matters of race,"³⁴ that change can only refer to the power of Congress to get tough with the states in securing the equal protection of the laws against state invasion.³⁵ When Congress or a federal agency indulges in race-based classifications as part of the administration of federal programs, however, section 5 is irrelevant.

Finally, it is worth examining the standard of review analysis in *Metro Broadcasting* from the wide-angle lens. The Court's repeated caveat that its decision applies only to "benign" racial classifications is ineffective and conclusory. Con-

dollars has been applied only to the federal government—the states are exempt from that amendment entirely.

31. 347 U.S. 497 (1954).

32. 347 U.S. 483 (1954).

33. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

34. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion) (O'Connor, J.).

35. See *Ex parte Virginia*, 100 U.S. 339, 346 (1879).

sider the curious asymmetry of equal protection law after *Metro Broadcasting*. Strict scrutiny applies to invidious state racial discrimination, and also to benign state affirmative action plans. Strict scrutiny similarly applies to invidious federal discrimination. Only benign federal discrimination gets the special treatment.³⁶

The Court's only defense of this asymmetry is its argument that somehow we should trust Congress' assurances that its motives are benign when it acts pursuant to section 5. We will know real discrimination when we see it, the argument goes, and will apply strict scrutiny when we do. But if the Court is confident that it can separate benign from invidious forms of discrimination, that at best supports treating all affirmative action plans, state *and* federal, more deferentially than invidious discrimination.

There is indeed a circular, question-begging quality to the whole analytic structure of the Court's standard of review argument in *Metro Broadcasting*. For even if Congress' section 5 power could be invoked legitimately, the critical question would merely be posed and left unanswered. In its interpretation of section 5, the Court clearly professed that Congress may only use its enforcement powers to *extend* rights guaranteed by the fourteenth amendment, not to retract them.³⁷ This is the "ratchet effect" of the fourteenth amendment: Congress may create causes of action or remedies that enhance the protection of the amendment, but it may never use its section 5 powers to roll back the substantive protection of the amendment. Congress may not use section 5, for example, to authorize sex discrimination that would otherwise be unconstitutional. Nor, back in the days in which *Roe v. Wade*³⁸ was still incontestably good law,³⁹ could Congress have used its section 5 powers to overrule *Roe* by declaring that life begins at conception, and that pursuant to section 5, it was extending the reach of the fourteenth amendment to

36. And, as far as one can tell from the Court's analysis, the question of what is or is not benign is judged only from the perspective of the minority group members who benefit from affirmative action plans, not from the majority group members who are displaced.

37. See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

38. 410 U.S. 113 (1973).

39. See *Webster v. Center for Reproductive Servs.*, 492 U.S. 490 (1989).

treat the fetus as a person. Although such a congressional enactment would have *extended* the rights of the fetus, it would have worked a corresponding retraction of the rights of the mother. Whether section 5 was being used to extend constitutional rights or recoil them would thus turn on who you asked.

Affirmative action works similarly. It, like abortion, is a zero-sum game. Real affirmative action programs work when they hurt; the racial preference granted to members of some groups necessarily creates racial disadvantages to members of other groups—the notion of a preference is meaningless unless someone is preferred.

IV. OF REMEDIES AND DIVERSITY, EUPHEMISM AND CANDOR

Perhaps the Court's argument that congressionally-mandated affirmative action should be judged by a different standard than state-mandated affirmative action cannot withstand analysis. But that does not by itself demonstrate that the Court was wrong in *Metro Broadcasting*. To the extent that *Metro Broadcasting* appears inconsistent with decisions applying strict scrutiny to affirmative action (such as the Court's decision the term before in *Croson*), we could just as plausibly decide that *Metro Broadcasting* got the standard right, and that *Croson* got it wrong. Alternatively, we might decide that the decision in *Metro Broadcasting* was correct even if the analysis was defective; we could, for example, reach the conclusion that the FCC's racial preference programs were constitutional even under the strict scrutiny test.

Despite everything I have said up to now about *Metro Broadcasting*, in my view the case was *rightly* decided on its merits. The FCC's use of racial preferences was correctly judged constitutional. As might be suspected, however, my reasons for reaching this conclusion are somewhat different from those rationales propounded by the Court.

At the outset, it is useful to take stock of the two principal competing notions of equality in the American experience.⁴⁰ "Process" or "individualist" equality is a competitive,

40. See generally, J. CASPER, THE POLITICS OF CIVIL LIBERTIES 148-49 (1972).

individualist, Darwinian, survival-of-the-fittest, equal-opportunity version of equality that solely emphasizes the integrity and fairness of the rules of the game. "Outcome equality," on the other hand, which might also go by the name "collectivist equality,"⁴¹ is a cooperative, communal, from-each-according-to-his-ability-to-each-according-to-his-need, representational version of equality that measures the degree of diversity and shared power that results from the game.⁴²

Process equality thinking and outcome equality thinking are both well-established in American culture, and the two versions of equality constantly vie in legislatures, courts, and on university campuses. There are individualist extremists and collectivist extremists at either end of the spectrum who lack the intellectual imagination to even see the world from the other side. Some individualist-equality thinkers, for example, cannot imagine how any principled person could possibly prefer a *results*-oriented legal regime to a *rule*-oriented regime. To countenance disequality in the rules for the purpose of achieving greater equality in results is seen by these individualists as a surrender of basic norms of justice—indeed, as an affront to the central notion of a *rule* of law. In the eyes of the ardent individualist, ardent exponents of affirmative action are over-zealous, under-principled, and perhaps even racist.

Many zealous collectivists feel the same way, in reverse. Institutions should be dissatisfied with merely changing the formal rules of the game from racially biased to racially neutral. For as long as gross imbalances in outcomes remain, such a change merely substitutes one form of apartheid for another. A just society is a society of shared power, of institutions integrated in fact and not just in law. For many of these collectivist radicals, the ardent opponents of affirmative action are over-principled, under-just, and perhaps even racist.⁴³

Neither of these two views capture the American main-

For a recent popular example of the individualist perspective, as applied to contemporary university life in the United States, see D. D'SOUSA, *ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS* (1991).

41. See Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107 (1990).

42. See Smolla, *In Pursuit of Racial Utopias: Fair Housing, Quotas, and Goals in the 1980s*, 58 S. CAL. L. REV. 947, 960-62 (1985).

43. See generally, Smolla, *Integration Maintenance: The Unconstitutionality of Be-*

stream experience. Rather, the last several decades have witnessed a blend of individualist and collectivist approaches to equality in most acts of Congress, decisions of the United States Supreme Court, and in the affirmative action programs of most public and private institutions in American life. Both the individualist trait and the collectivist trait are alive and well in American thinking about race and ethnicity. The individualist trait is, overall, the dominant gene, but it would be wrong to deny either the influence or legitimacy of collectivist thinking.

While there were, for example, a few members of President Reagan's Justice Department who believed that all race-based governmental actions were unconstitutional unless they were "victim-specific" remedies fashioned to recompense the direct victims of proven discrimination, the more moderate voices in the administration, such as that of Solicitor General Charles Fried, prevailed.⁴⁴ Fried is generally hostile to affirmative action, but would permit the use of race remedies for proven past discrimination, even when the remedies are not victim-specific.⁴⁵

The Reagan administration's view rejecting all affirmative action was still, of course, overwhelmingly individualist.⁴⁶

nign Programs that Discourage Black Entry to Prevent White Flight, 1981 DUKE L.J. 891. (date)

44. For an interesting "insider's" account of these battles over affirmative action within the Reagan Justice Department, see C. FRIED, ORDER AND LAW 89-131 (1991).

45. *Id.* at 105-06.

46. See Fried, *supra* note 41, at 107. Professor Fried discusses two concepts of equality: individualistic and collectivist. The former concept is based on the emphasis of the individual in the constitutional scheme which resists the tendency to separate the polity into racial groupings. *Id.* at 108-09. In contrast, the collectivist, group-rights conception regards discrimination as a group tragedy and treats individuals as members of groups and the group as the holder of independent rights. *Id.* at 109. Fried states that until *Metro Broadcasting*, the Court had adhered to the individualistic approach, recognizing that the rights created by the fourteenth amendment are "guaranteed to the individual." *Id.* at 107.

Fried notes that the conflict between the two approaches is reflected in the conflict between the standards of review for race-conscious government action. *Id.* at 110. The individualist prefers strict scrutiny because he or she believes that all individuals should be treated equally regardless of race and therefore the government needs a compelling reason to draw racial lines. On the other hand, the collectivist, group-rights theorist does not require as strict of a scrutiny for legislation that attempts to secure equality for a group. *Id.* Fried states that the strict scrutiny test is appropriate when the government attempts to attack broad social problems by referring to race. *Id.* at 111. Before

The "Reagan view" would permit the use of race as a remedy only when the transferee is the actual victim of prior discrimination and the transferor is the prior discriminator. This simply allows race to be used to put the players in the same position that they would have been in were the rules of the game not racially skewed.

The Reagan position, however, did not prevail in the Supreme Court. A majority of the Court in *Croson* was unwilling to accept the view that affirmative action was *per se* unconstitutional, and that racial classifications should be limited to direct remedies for victims of prior discrimination. While much is made of the split between the strict scrutiny test employed by the conservative center of the Court and the intermediate scrutiny test endorsed by the liberal wing, those two factions share a willingness to endorse *some* affirmative action. They merely divide over how much. Those Justices who accept the intermediate scrutiny test *and* those who accept strict scrutiny are all willing to accept some degree of collectivist thinking. Once the colorblind position is rejected, and some affirmative action plans are going to be upheld, the debate is no longer over whether to permit the infiltration of collectivist thinking, but rather over how much infiltration is tolerable.

Perhaps uncomfortable with this concession to collectivist thinking, strict scrutinizers on the Court (typified in an earlier epoch by Justice Lewis Powell and now by Justice O'Connor), constantly and forcefully reiterate that equal protection principles must be based on individual rights rather than group rights. Thus Justice Powell admonished, "[t]he Constitution does not allocate constitutional rights to be distributed like bloc grants. . . ."⁴⁷ And in a dissenting opinion in *Metro Broadcasting* drafted in apocalyptic tones, Justice O'Connor claimed that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens 'as *individuals*, not as simply components of a racial, religious, sexual or national

Metro Broadcasting, Fried argues, the Court adhered to strict scrutiny and the individualistic approach.

47. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 281 n.8 (1986) (plurality opinion) (Powell, J.).

class.' ”⁴⁸ They doth protest too much.

No meaningful affirmative action program can be justified purely in individualist terms. Under the strict scrutiny position espoused by Justice O'Connor, for example, an affirmative action plan at either the state or federal level could pass muster if the institution that implemented the plan is clearly guilty of past discrimination, and the plan is narrowly tailored to remedy the effects of that discrimination. Even this relatively cautious formulation, however, allows transfers of benefits to persons who may not have directly suffered the institution's past discrimination. Further, it allows the cost of the transfer to be absorbed by non-minorities, such as white males, who were probably not themselves guilty of acts of discrimination and who may well not have personally benefitted from the institution's past discrimination. The individualist unity of causer and victim, transferor and transferee, has been abandoned.

How different, really, are the strict scrutinizers from the intermediate scrutinizers? The differences are largely overblown. They can be distilled to the following distinctions:

A. Institutional v. Societal Discrimination

Strict scrutinizers insist on evidence that the institution implementing an affirmative action plan actually engaged in past discrimination against the groups to now benefit under the plan. The intermediate scrutinizers do not impose this proof requirement. They instead are willing to permit affirmative action plans predicated on general societal discrimination against the groups now being benefitted.

The intermediate scrutinizers have the better of this argument. The results of inquiries into an institution's history twenty, forty, sixty, or one hundred years past should not dictate the resolution of modern affirmative action conflicts. First, the results of these inquiries are random and arbitrary. They turn on quirks of record-keeping, the persuasiveness of expert witnesses, and the craftsmanship of the drafter of the affirmative action plan. Read the *Croson* decision, hire a good

48. *Metro Broadcasting*, 110 S.Ct. at 3028 (1990) (O'Connor, J., dissenting) (quoting *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083 (1983)).

lawyer and a good affirmative action consultant, be politic in what you say in the minutes of your official meetings, and your institution can compile a record of past discrimination that should be able to withstand constitutional scrutiny.

Second, these historical demonstrations of institutional guilt are at best morally irrelevant and at worst destructive. While it may pay homage to individualist notions of equality to be able to point to an institution's prior bad record as justification for affirmative action, most institutions today house only the ghosts of racists past. The present day officer-holders are not the ones who engaged in discrimination; indeed, they are the very people voting for affirmative action. There is institutional culpability, therefore, only in the wooden corporate law sense. The institution is guilty, but there is no live racial animus to animate that guilt. It may be comforting to insist that the affirmative action plan is designed to remedy those past evil deeds, but we are really dealing largely in euphemism. Remember, strict scrutiny does not require proof that those who will benefit under a new affirmative action plan were actually discriminated against. Nor does it require that those displaced actually benefitted.

The line distinguishing this version of institutional discrimination from general societal discrimination is too thin to bear weight. Do we really believe that if two law schools in adjoining states implement the same affirmative action plan, in one case on the basis of documented proof of discrimination decades before, and in the other without such proof, one plan should be constitutional, and the other not? It is more honest to either approve or reject both programs. When a state law school faculty in 1991 votes to approve a new affirmative action plan, basing its decision on a committee's investigation that uncovers discrimination in the 1930s, 40s, and 50s, the formal purity of the individualist view of equality may be preserved. But, since no one on that faculty was guilty of those acts, and since all institutionalized discrimination was renounced years before, the moral distinction between providing a remedy for this institutional discrimination and for general societal discrimination is meaningless.

B. Quotas v. Goals

Denouncing the "quota society" has been effective political rhetoric for the Reagan-Bush Republican Party, and a nightmare for liberal Democrats. The epithet "quota" is a one-word sound-bite—and a Q word to boot—dripping with negative connotation. The high authoritative scripture on this distinction derives from Justice Lewis Powell's opinion in *Regents of the University of California v. Bakke*.⁴⁹ Powell was a masterful Justice, and his opinion in *Bakke* one of his masterpieces—but that doesn't mean he got it right. Powell labored to distinguish the set-aside system used by the University of California-Davis Medical School, in which a special number of places were reserved for minority applicants, from the Harvard admissions program, in which race counts as a "plus factor" along with innumerable other factors tending to promote diversity in the university community in which admission determinations are made on an individual case-by-case basis.⁵⁰ The University of California set aside seats, Harvard did not. The University of California engaged in collectivist equality thinking, Harvard did not. The University of Cali-

49. 438 U.S. 265, 265 (1978).

50. The special admissions program at issue in *Bakke* purported to advance four purposes, the fourth of which was "obtaining the educational benefits that flow from an ethnically diverse student body." *Id.* at 438 U.S. 306. Justice Powell maintained that a university may constitutionally promote a diverse student body because the Court has long recognized the first amendment concept of "academic freedom." *Id.* at 312. As stated by Justice Frankfurter, academic freedom consists of four main freedoms of a university: (1) who may teach, (2) who may be taught, (3) what may be taught, and (4) how it will be taught. See *Swezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring). In *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the Court again emphasized the importance of "safeguarding academic freedom" because the Nation's future compelled education "through a wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues . . .'" *Id.* at 603.

Justice Powell acknowledged that universities had long believed that a diverse student body promoted a "robust exchange of ideas." *Bakke*, 438 U.S. at 312 (citations omitted). The President of Princeton University stated that a diverse student body encourages

"interaction among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; . . . and who are able, directly or indirectly, to learn from their differences and to stimulate one another . . . 'People do not learn very much when they are surrounded only by the likes of themselves.'"

Bakke, 438 U.S. at 312-13, n.48 (quoting Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)).

fornia used quotas, Harvard did not. And Harvard ran away with the spoon.

In cosmetic appearance, Harvard's plan was more palatable to American sensibilities. But appearances are deceiving. For at the margin, between two otherwise indistinguishable candidates competing for a scarce and finite number of admission seats, one candidate's race may be the plus that the other candidate cannot trump. And if this happens in a rolling admissions program where the admissions committee keeps a watchful weather eye on the overall diversity picture, the actual demographic pattern of the entering class at a university using the Harvard approach and a university using a straight set-aside method may be identical. After *Bakke*, many institutions following astute legal advice redesigned their affirmative action plans to resemble Harvard's. Indeed, in many respects the FCC's "plus factor" program for comparative licensing seemed to track Powell's *Bakke* opinion.

Appearances, of course, often *are* important; they make symbolic statements about our values. There *is*, undeniably, something more appealing about Harvard's plan. Euphemism is not always evil, and candor is not always good.⁵¹ The Harvard plan *seemed* more humane, and in that sense *was* more humane.

But while the Harvard brand of "plus-factor" affirmative action may avoid the terrible Q's, the cold reality is that it still partakes of a heavy dose of collectivist thinking.

C. Remedial v. Diversity Objectives

Is diversity ever a legitimate basis for implementing affirmative action? How shall our knees jerk? Is the diversity rationale grounded in collectivist or individualist notions of equality?

Since diversity in the marketplace purports to be a first amendment value, the search for legitimacy may begin there. In first amendment terms, however, the use of diversity as the basis for affirmative action has its difficulties. For while clas-

51. Indeed, in our everyday social life the person who is too blunt, who makes no effort to soften the message with an occasional caveat or rounded qualifier, is often dismissed as crude, rude, undiplomatic, or lacking in judgment.

sic first amendment theory always pledged allegiance to the value of diversity, this diversity was to arise spontaneously, of its own devices, from an unregulated market. In the general marketplace of ideas, government is not permitted to force private speakers to carry the messages of others, or to suppress one viewpoint to give greater representation to another.⁵² The whole concept of an "underrepresented viewpoint" is, indeed, nonsensical in the classic first amendment marketplace.

When the government has some special fulcrum over speech that extracts it from the general marketplace, however, one must check local listings—special first amendment rules may apply. When government itself is speaking, or when it employs, owns, or operates speech, speakers, or forums, for example, the first amendment may permit regulation that would be barred in the open marketplace.⁵³

Take, for example, the hiring decisions of a university faculty. Could a college of arts and sciences at a major university establish, as a deliberate policy, the maintenance of a mix of various professional perspectives—not just a mix of fields, but *viewpoints*: conservatives and liberals, communitarians and libertarians, believers in a universe that is expanding, believers in a universe that is contracting, and believers in a universe going nowhere at all, capitalists, socialists, and free-market economists, zionists and palestinians, existentialists, feminist historians, marxists, deconstructionists, critical theorists, and defenders of traditional literary values (everyone by-God, but the flat-earth society—we've got to have some standards)—and in implementing such a policy, then use viewpoint as a "plus factor" for "underrepresented" viewpoints to fill faculty openings? Today such a policy would probably not be viewed as violating the first amendment. Quite the contrary, such a policy would be considered an essential element of the university's institutional "academic freedom." If an opening comes up in the economics department, and it is agreed that department has a wealth of radical marxist theorists but is relatively weak on conservative disciples of Milton

52. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Buckley v. Valeo*, 424 U.S. 1 (1976).

53. See R. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* (forthcoming, 1992).

Friedman, then most would assume that the university should be permitted to go for a Friedmanite.

We cannot automatically transfer this principle to other settings in which government has some leverage over speech. But regulating governmental forums or doling out governmental benefits in a manner calculated to increase diversity is, as a threshold matter, permissible under the first amendment. In dispensing grants under the National Endowment for the Arts, the endowment may seek a diversified diet of artistic schools, genres, and art forms. In purchasing books for the public library, the librarian may seek a diversified collection. And in allocating licenses on the broadcast spectrum, a spectrum that is not the unregulated market of print media, but rather the highly regulated electronic spectrum commandeered years ago by the federal government, it is permissible to follow a deliberate policy of awarding plus points to new voices that will bring fresh perspectives to the spectrum.

Radio and television broadcasters, in contrast to print media, have been subjected to substantial regulation of the content of their speech from the beginning.⁵⁴ The first amendment has been interpreted to permit the federal government to impose standards of decency and even-handedness on broadcasters, who are conceptualized as public trustees for the airwaves.⁵⁵ At various times in its history, the Federal Communications Commission has adopted rules limiting the number of broadcast stations that a person may own nationwide,⁵⁶ limiting the number of stations that may be owned in a single community,⁵⁷ and prohibiting newspaper publishers from owning television stations in the same communities in which they publish.⁵⁸ The FCC promulgated the "Equal Time Doctrine"⁵⁹ requiring broadcasters to provide equal

54. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

55. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

56. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding the FCC regulation that no person or group could control more than 7 AM, 7 FM, and 7 TV stations, raised in 1984 to 12, 12, and 12).

57. *In re Rules Relating to Multiple Ownership*, 22 F.C.C.2d 206 (1970).

58. *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

59. *Kennedy For Pres. Comm. v. FCC* (Kennedy I), 636 F.2d 417 (D.C. Cir. 1980).

time for political candidates to present their positions, the "Fairness Doctrine" requiring that broadcasters "provide a reasonable opportunity for the presentation of contrasting viewpoints,"⁶⁰ "reasonable access" rules requiring stations to provide access to federal political candidates,⁶¹ and "indecent" regulations prohibiting broadcasters from airing "indecent" speech at certain times during the day.⁶²

These forms of content regulation have gone in and out of vogue at the FCC with shifts in regulatory winds.⁶³ But from a first amendment perspective, the pattern has been relatively consistent. Generally, courts have upheld content-based regulation of speech for broadcast media on the theory that the special characteristics of the media warrant special first amendment treatment.

It is one thing to say that the first amendment permits policies designed to generate diversity of viewpoints. It is quite another thing to say, however, that it is permissible to gear such policies to identity. Should the Constitution permit identity to be used as a surrogate for viewpoint? It is a complex and subtle problem.

Diversity will be dismissed by many as a deceptive and promiscuous wink at individualist values in which the real agenda is purely collectivist, promoting proportional representation of various racial, ethnic, religious, or sexual groups in all American institutions, for proportionality's own sake. The individualist thinker may well question whether diversity in the broadcast spectrum or on a university faculty is ever a valid justification for affirmative action. Because affirmative action programs entail an encroachment on the usual rule for-

60. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989), *cert. denied*, 110 S.Ct. 717 (1990).

61. *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367 (1981).

62. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding time and place restrictions on indecent speech). The definition of "indecent" speech is much broader than the definition of "obscene" speech. Indecent speech includes vulgar or tasteless speech that does not qualify as obscene under the relatively strict first amendment definition of obscenity. The FCC rules, therefore, bar broadcasters from disseminating "indecent but *not* obscene" speech that print publishers could disseminate without restriction.

63. See generally, L. POWE, *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* (1987); M. SPITZER, *SEVEN DIRTY WORDS AND SIX OTHER STORIES: CONTROLLING THE CONTENT OF PRINT AND BROADCAST MEDIA* (1986).

bidding the use of race as a basis for dispensing government penalties and payments, the individualist may refuse to accept any affirmative action program not designed to advance equality goals. To justify equality sacrifices, there must be corresponding equality gains, keeping the equality ledger in constant balance. The exacting individualist will thus blanch at the invocation of the diversity rationale for affirmative action, because it uses a first amendment gain to justify a fourteenth amendment loss. This is to use the individual as a means rather than an end, to force an individual to suffer a constitutional slight for the perceived greater good of that impersonal abstraction, the marketplace of ideas.

This failing is compounded in the eyes of many individualist thinkers by the belief that the diversity rationale partakes of a glib and superficial racism all its own: the assumption that racial, ethnic, or sexual identity determines how people will live, feel, or think, and that there is anything so palpably discernable as a black viewpoint, Arab viewpoint, gay viewpoint, Jewish viewpoint, or Hispanic viewpoint.

The diversity rationale, however, need not be so abstract, stereotyped, or dehumanizing.⁶⁴ There is an individualist strain in the desire for diversity, a sort of pluralistic collage Walt Whitman *Song of Myself* celebration of vibrant and unique individuals combining to make a lively and energetic marketplace. The *aggregate* effect of an increase in diversity among actor's identities in an intellectual marketplace will be an increase in the diversity of their criss-crossing messages, and in the vigor with which those messages collide, combine, or combust. Not just the ingredients, but the chemistry and volatility of the market will change.

It would be stereotyping to assume that the racial, ethnic, religious, or sexual identity of any specific individual tells us what that person will believe. Views on abortion, school prayer, affirmative action, the Persian Gulf War, the savings and loan crisis, gay rights, sex discrimination, the right to bear arms, or the capital gains tax bear no necessary connection to identity. But when viewed *as a marketplace views it*, as a vast

64. See Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525 (1990).

collection of putters and callers bidding away in a cacophony of voices, a diverse and pluralistic market will behave differently than an homogenized market.

Will a state university class on constitutional law, containing 70 white male middle-class anglo-saxon protestant students, discuss issues such as war, peace, abortion, prayer, busing, affirmative action, or tax rates with the same texture, chemistry, intensity, insight, combativeness, with the same *richness*, as a class of 70 students male and female, gay and straight, black, white, Hispanic, and Native American, rich and poor? Would a class consisting entirely of *any* one of those groups alone be as intellectually rich as the diverse group?

We should never indulge the blithe assumption that identity *determines* viewpoints. But it does not follow that we must jump to the absolutist conclusion that identities, in plural, do not *influence* viewpoints.

The debate over the diversity rationale finally condenses to much the same debate that permeates all divisions between the strict and intermediate scrutinizers—the quantity and quality of the proof that will be required; the closeness of the nexus that will be demanded between cause and effect.

V. CONCLUSION

The FCC in *Metro Broadcasting* did point to a significant body of empirical data supporting the proposition that the ethnic identity of the owners of broadcast stations bore a relationship to programming content. The FCC studies, for example, concluded that minority-owned stations presented programming more targeted to minority issues.⁶⁵ This data was enthusiastically endorsed by the majority of the Court in *Metro Broadcasting*, and roundly criticized by the dissenters. It isn't my purpose to re-litigate the case here, however, but to brush with broad strokes.

Justice Brennan is, in the end, right to employ intermediate scrutiny to affirmative action, right to permit such plans to be grounded in the desire to remedy general societal discrimination, and right to permit such plans as devices for promot-

65. 110 S. Ct. at 3018 n.34.

ing diversity.⁶⁶

In the end, the sorry conceptual disarray of our constitutional doctrines in this area forces the sacrifice of candor. The FCC is forced to recast its goals, Justice Brennan is forced into lame and unconvincing distinctions between federal and state programs, and in our everyday institutional lives, we are forced to speak in code and dress up our motives and our methods. It would be better, in my view, to stop these charades. American constitutional and political discourse is a blend of individualist and collectivist impulses. This is as true in the jurisprudence of the first amendment as the fourteenth. The two impulses live in tension, but the tension is healthy. In affirmative action cases, when we are dealing with minority groups that we all recognize have a long and poignant history of societal discrimination, we ought to openly let more collectivist thinking into the mix, particularly when that mix will also enrich the marketplace of ideas.

POSTSCRIPT: THE CLARENCE THOMAS NOMINATION

Not long after I delivered this speech at the University of Arkansas School of Law, Justice Thurgood Marshall announced his retirement from the Supreme Court, and President Bush nominated Judge Clarence Thomas to be Marshall's replacement. The debate surrounding the Thomas nomination implicates many of the themes discussed in this article, and the editors of the *Arkansas Law Review* quite graciously invited me to comment on Judge Thomas, and the issues of race and diversity posed by his nomination.

At times in this article I refer to the "liberal wing" of the Court. In the context of *Metro Broadcasting*, that wing was comprised of the Court's three liberal stalwarts, Justices Brennan, Marshall, and Blackmun. With Justices Brennan and

66. Like Professor Devins, I do not really believe that the FCC grounded its program solely in the diversity rationale. I believe that to a large degree the program was remedial, but the agency did not have proof of past institutional discrimination nominally required to support a remedial plan. The FCC reverted to diversity, partly out of a genuine desire to achieve that diversity and partly out of a desire to remedy an imbalance in the broadcast spectrum caused by prior societal discrimination. See Devins, *supra* note 25.

Marshall now departed from the Court, it seems unlikely that the precedent of *Metro Broadcasting* will be long-lived. But more significantly, the very term "liberal wing" is now obsolete. If there is still a liberal wing, it is flying on one engine.

In reflecting on the Thomas nomination, I take certain truths to be self-evident: that Clarence Thomas is a black conservative, that he was nominated to the Court by President Bush because he is a black conservative, and that some of the organized opposition to his nomination was the result of his being a black conservative. (I say *some* of his opposition was the result of his being a black conservative. I believe *most* of the opposition to Thomas was the result of his being conservative, period—without regard to his race.)

The philosophical questions posed are whether it was legitimate for President Bush to nominate Thomas because he was either black or conservative or both, and conversely, whether it was legitimate to oppose him for those reasons. I defend President Bush's prerogative to nominate a black conservative. I wish, however, that the President had been more candid about his motivations.

We can analyze the President's choice by first breaking it down to its component parts. Is it legitimate for the President to nominate a conservative? The consensus answer is surely yes.

The argument is made, of course, that Presidents should appoint "distinguished" lawyers to the Supreme Court on the basis of antiseptic and neutral "professional qualifications." Since this is so wildly out of touch with what Presidents do in fact, this argument is seldom pressed in its pure form. In healthy deference to reality, nearly everyone concedes that Presidents may take ideology into account. One usually hears, however, the platitude that a nominee should be approved by a Senator, even when the Senator disagrees with the nominee's ideological positions, as long as the nominee is "within the mainstream." But this tradition is itself more a matter of convenience and politics than principle. The width of the "mainstream" increases and decreases with the importance of the nomination and the caprices of politics. This tug and pull is *itself* within the mainstream of the constitutional tradition—there is nothing unnatural or wrong with the con-

firmation testimony of some nominees lasting two weeks, and others (like the testimony of Lewis Powell) lasting two hours.

A President is thus well within the constitutional tradition in seeking to place persons on the Court with whom he or she is in ideological harmony. The President is checked only by the political will of the Senate. There is no question of moral or constitutional legitimacy here, only raw politics: the President is entitled to appoint persons as conservative or liberal as he or she can get away with, given the political mood of the moment.

Is it legitimate for a President to use race, ethnicity, religion, or sex in choosing a nominee? Here, serious students of the Constitution differ. There will be colorblind and sex-blind individualists who will insist that the only valid criteria are "professional qualifications," which may include, presumably, harmony with the President's ideological views, but never such matters as race or sex. Thus it is said that there should not be a "black seat" or "Jewish seat" or "woman's seat" on the Court. President Bush paid half-hearted and unconvincing lip-service to this colorblind view in insisting repeatedly that he was merely looking for the "best qualified" person to fill Thurgood Marshall's vacancy.

As explained in this article, I would not have been so shy as the President in openly admitting that Clarence Thomas' race was a dominate factor in his selection. Racial, ethnic, sexual, and religious diversity on the Court is, in my view, vital to the constitutional process in modern times. While I would never make specific racial or sexual identity a *requirement* in filling vacancies, and would never be so crass and mechanical as to insist on the maintenance of a "black seat," I think that treating the pursuit of diversity as a significant "plus factor" in shaping the *aggregate* make-up of the Court is not only permissible, but necessary. I will put the matter bluntly and personally: the Supreme Court and the nation have benefited enormously from the service of Justice Thurgood Marshall and Justice Sandra Day O'Connor, in both substance and symbol, not merely because they are talented lawyers and leaders, but because their race and sex brought experiences and insights to the Court that enriched and improved its decision-making.

If President Bush was acting legitimately in nominating a conservative, and in nominating a black, did the nomination somehow forfeit its legitimacy because Thomas was both conservative and black? I should say at the outset here that many liberal Senators and public interest groups who opposed Thomas opposed him *only* because he was conservative. (I am a liberal myself, and not enthusiastic about Thomas' conservatism.) Many of these same Senators and groups also opposed Robert Bork, and in some instances David Souter, on the same ideological grounds. *That* opposition, in my view, was perfectly legitimate—every bit as legitimate as the President's invocation of ideology in selecting the candidate in the first place. This is, again, simply a matter of political struggle: the President is entitled to push as hard in one direction as he or she can, and political opponents are entitled to push back as hard as they can, with each side left to its own devices in calculating the net long term political pluses and minuses.

But what of those who opposed Thomas but did not oppose Souter, because they felt that if the nominee is to be black, he or she must be a liberal black, a Thurgood Marshall black, a pro-affirmative action black? Here, in my view, the legitimacy of the opposition to Thomas fails. To oppose Thomas because he is *both* black and conservative is wrong. To say to Thomas that because he is black he cannot be conservative, or is somehow not "black enough" to count, is unjust.

Now it may be objected that requiring a black nominee to represent the "black viewpoint" as defined by the civil rights "establishment" is merely to carry the quest for ideological diversity to its logical conclusion. If it is permissible to seek out a black person for the Supreme Court in order to promote diversity among the viewpoints on the Court (as I think it is), then it seems only sensible to insist that the particular black nominee represent the viewpoints that will in fact bring diversity to the Court. Some who have opposed Thomas because he is a black conservative have put it precisely that way: the President, as far as they are concerned, should have simply appointed another white Anthony Kennedy or David Souter, and spared the nation the tokenism of Thomas.

This argument is misguided and unfair—it says too little

about what diversity really means, and indulges too much in the blithe assumption that in examining any *particular individual*, it is permissible to assume or require that race be a surrogate for intellectual identity. The argument that Clarence Thomas will bring no more diversity to the Court than, say, Justice David Souter, simply fails to measure up to the lessons of experience. It takes many years for the "jurisprudential personality" of a Supreme Court Justice to mature, and it is impossible to judge today what the long-term contributions of David Souter or Clarence Thomas will be. They may both emerge, over time, as magnificent Justices. They may both come to surprise George Bush. And they may prove to be very much alike or very different in their voting patterns. But common sense and our national experience instruct us that their different racial identity and upbringing cannot help but contribute to the understandings and perspectives that comprise the Court's deliberative process. To say that Clarence Thomas' conservatism snuffs out his childhood poverty, his experiences with prejudice, his *blackness*, is to reduce the inscrutable mysteries of human personality and intellect to sterile political mathematics.

Most fundamentally, however, to disqualify Clarence Thomas as a Supreme Court Justice because he is a black conservative is utterly incompatible with either the constitutional traditions of free speech or equality. For effectively, this says to Clarence Thomas, "Because you were born black, you should not aspire to the Supreme Court of the United States unless you agree to embrace moderate-to-liberal ideological positions."

There is nothing wrong with basing opposition to Thomas on his conservative views, as long as one would have been equally opposed to him if he were white, and on balance I suspect that most of the opposition to Thomas has been race-neutral. This is the stuff of politics, and not "law as courts know law," to borrow a phrase from Justice Potter Stewart,⁶⁷ and over time can be expected to ebb and flow with the political currents. But there is something deeply wrong

67. *New York Times Co. v. United States*, 403 U.S. 713, 729 (Stewart, J., concurring) (1971).

with giving white conservatives a pass and black conservatives a shake-down. I hope there has really not been much of that; it certainly should not be condoned.

