

## BAKKE'S FATE

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### INTRODUCTION

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

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

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

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

## I. PRECEDENT

### A. *Adarand* (At First)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14. *Id.*

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

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

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

16. *Id.*

17. *Id.* at 2114.

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

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

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

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

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

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

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

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

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

B. *Bakke*

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

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

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

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

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

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

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

27. *Id.* at 320.

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

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

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

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

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

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

31. *Id.* at 319, 320.

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

33. *Id.* at 322, 323.

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

35. *Id.* at 315.

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

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

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

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

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

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

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

37. In Powell's words:

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

*Id.* at 317.

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

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

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

There are two ways to read all this. The first is that this "approach" permits Harvard-style affirmative action only "so long as" it remedies the effects of past discrimination. The four Justices articulated a test that stressed remedies for past discrimination<sup>41</sup> and then explained how the Davis plan met this test.<sup>42</sup>

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

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

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

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

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

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

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

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

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

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

### C. *Wygant*

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

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

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

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

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

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

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

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

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

49. *Id.* at 267.

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

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

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

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

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

#### D. *Croson*

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

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

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

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

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

56. 481 U.S. 469 (1989).

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

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

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

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

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

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

57. *Id.* at 506.

58. *Id.* at 508.

59. *Id.* at 493-94, 497, 506.

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

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

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

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

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

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

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

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

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

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

*Id.* (citation omitted).

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

### E. *Metro Broadcasting*

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

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

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

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

68. *Id.* at 563.

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

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

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

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

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

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

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

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

73. *Id.*

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

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

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

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

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

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

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

77. *Id.* at 631.

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

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

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

that FCC licenses are "exceptionally valuable property" and that "given the sums at stake, applicants have every incentive to structure their ownership arrangements to prevail in the comparative process"<sup>81</sup>—perhaps creating the possibility of sham and corruption.<sup>82</sup> This concern was elaborated in a separate dissent by Justice Kennedy, who argued that the FCC programs "often are perceived as targets for exploitation by opportunists who seek to take advantage of monetary rewards without advancing the stated policy of minority inclusion."<sup>83</sup> Justice Kennedy added a pointed footnote here, noting that the beneficiary of the FCC policy in the case at hand was a company with a capitalization of \$24 million with only one minority investor who had contributed a paltry \$210.<sup>84</sup>

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

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

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

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

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

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

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

87. We thank Jim Chen for this reminder.

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

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

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

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

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

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

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

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

On this reading, Justice O'Connor's analysis is quite similar to Justice Powell's approach in *Bakke*: When the government looks solely at race and admits people only because of their skin color, it violates equal protection.<sup>92</sup> Indeed, on one occasion she cites Justice Powell's opinion in *Bakke* for the following proposition: "[R]ace-conscious measures might be employed to further diversity only if race were one of many aspects of background ~~and~~ considered relevant to achieving a diverse student body."<sup>93</sup> To be sure, this favorable citation can be construed narrowly—it

is a carefully guarded statement, and even then perhaps only an argument in the alternative—but it tracks much of Justice O'Connor's own language. Two pages later, for example, she writes that "if the FCC believes that certain persons by virtue of their unique experiences will contribute as owners to more diverse broadcasting, the FCC could simply favor applicants whose particular background indicates that they will add to the diversity of programming rather than rely solely upon suspect classifications."<sup>94</sup>

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

90. *Id.* (emphasis added).

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

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

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

94. *Id.* (emphasis added).

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

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

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

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

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

97. *Id.* at 621.

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

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

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

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

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

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

102. *Id.*

103. *Id.* (emphasis added).

104. *Id.* at 649.

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

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

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

108. *Id.* at 2826.

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

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

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

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

#### F. *Adarand* (Again)

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

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

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

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

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

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

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

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

114. See *supra* text accompanying note 62.

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

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

117. As this Article was going to press, a panel of the Fifth Circuit struck down the affirmative action program adopted by the University of Texas Law School. See *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), cert. denied, 116 S. Ct. 2581 (1996). The majority opinion held that "the law school may not use race as a factor in law school admissions" and that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny." *Id.* at 934, 948. Further language in the opinion suggested, however, that a school may enact racial preferences to redress "past wrongs at that school." *Id.* at 952. Judge Jacques Wiener, Jr., specially concurring, found that the majority's diversity conclusion may well be a defensible extension of recent Supreme Court precedent . . .

Be that as it may, this position remains an extension of the law—one that . . . is both overly broad and unnecessary to the disposition of this case. . . .

[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.

*Id.* at 963.

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

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

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

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

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

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

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

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

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

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

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

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

122. See *supra* note 12.

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

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

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

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

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

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

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

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

## II. POLICY AND STRUCTURE

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

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

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

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

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

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

#### A. Quotas Versus Pluses

Our first point concerns quotas versus pluses, or to use Justice O'Connor's phraseology, classifications versus considerations. Race-based classifications impose wooden notions of what it means to be diverse; racial considerations, by contrast, permit and indeed require evaluation of a whole person. From a constitutional standpoint, the distinction between classification and consideration draws upon two separate fairness ideas. First, a classification is unfair to the Allan Bakkes of the world because it automatically excludes them on the basis of their skin color. Because of his pigmentation, Allan Bakke was not even allowed to compete for sixteen out of one hundred seats at U.C. Davis.<sup>132</sup> Second, classifications are stigmatizing to minorities. Quotas create the impression that minority students are admitted because of the seats wholly set aside for them and only them, and that race is altogether different from other diversity factors in the "normal" and "pure" admissions process.

Using race as one consideration among many, however, minimizes both problems. Minority applicants are not segregated into a separate admissions compartment where their files sit with each other and compete only against one another;<sup>133</sup> instead, they are treated just like other applicants and the kinds of diversity they may offer are assessed alongside other kinds of diversity (of musicians, Texans, chess players, French speakers, and so on). Background and life experience are positive attributes—like growing up African—and it is neither unfair to whites nor stigmatizing to minorities

132. See Laurence H. Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness or Substantive Liberty?*, 11 HARV. L. REV. 864, 867-70 (1979).

133. A rigid quota system exacerbates the "Octoroon" and "Aleut" problems noted earlier, *supra* notes 10 and 34, by in effect requiring an application form with a fixed number of racial boxes. In contrast, a plus system need not pigeonhole persons into boxes; the admissions committee can consider the entirety of a person's (perhaps complex) racial and social experience. For an analysis of the complexity of "racial identity," see IAN F. HANEY LÓPEZ, *THINGS BY NAME: THE LEGAL CONSTRUCTION OF RACE* (1996); Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994).

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

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

#### B. Democratic Diversity in Education

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

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

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

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

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

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

135. Kathleen M. Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 *TUL. L. REV.* 1629, 1635-36 n.39 (1990).

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

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

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

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

138. As Duke President Nan Keohane recently remarked:

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

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

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

Of course, a contracting ~~strategy~~ may "diversify" an industry (as could integrated workplaces in the pre-~~1960s~~ era),<sup>140</sup> but the democratic benefits of diversity may not be as strong ~~in the educational setting~~. The diversity-in-contracting argument assumes that ~~mixing~~ will somehow occur between firms—a rather heroic or ~~impossible~~ assumption in many contractual settings. In the school context, by contrast, people from different backgrounds are thrown together for four years, and they are there to learn.

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

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

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

141. See Chen, *supra* note 131.

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

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

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

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

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

This approach finds support in *Adarand* itself. In Justice Ginsburg's words: Properly, a majority of the Court calls for review that is searching in order to ferret out classifications in reality malign, but masquerading as benign. The Court's once lax review of sex-based classifications demonstrates the need for such suspicion. Today's decision thus usefully reiterates that the purpose of strict scrutiny "is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking," "to 'differentiate between' permissible and impermissible governmental use of race," to distinguish "'between a 'No Trespassing' sign and a welcome mat.'" *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2136 (1995) (Ginsburg, J., dissenting) (quoting *id.* at 2112, 2113, 2114) (citations omitted).

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

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

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

<sup>145</sup> See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Litigation*, 33 U. PA. L. REV. 561, 570 n.46 (1984):

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

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

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

#### CONCLUSION

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

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

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

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

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

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

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

151. For a similar vision concerning the American jury, see Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 112 HARV. L. REV. 1169 (1995); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1152-99 (1991); Akhil Reed Amar, Note, *Choosing Representatives by Lottery*, 113 HARV. L. REV. 1287-89 (1984).

# NARROW TAILORING

Ian Ayres\*

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## INTRODUCTION

Since the Supreme Court announced in *Adarand Constructors, Inc. v. Peña*<sup>1</sup> that federal affirmative action programs will be subject to "strict scrutiny,"<sup>2</sup> a debate has reemerged over what constitutes a compelling government interest for classifications that favor traditionally disadvantaged

\* William K. Townsend Professor, Yale Law School. Steven Bainbridge, Jeremy Bulow, John Donohue, Richard Fallon, Paul Gewirtz, Kenneth Karst, Paul Klemperer, Peter Maggs, George Rutherglen, Eric Talley, Tom Ulen, Eugene Volokh, and seminar participants at the University of Illinois provided helpful comments. The detailed comments of Akhil Amar and Evan Caminker particularly aided my rewriting of an initial draft. (Professor Ayres has advised the Justice Department in its post-*Adarand* review of affirmative action. The opinions expressed in this Essay are not necessarily the views of the Justice Department.) Catherine Sharkey provided excellent research assistance.

1. 115 S. Ct. 2097 (1995).

2. Strict scrutiny analysis has two prongs. The government must show (1) a "compelling purpose" and (2) that the means chosen to accomplish that purpose are "narrowly tailored." *Adarand*, 115 S. Ct. at 2113.

practices did not embody religious beliefs.<sup>109</sup> Instead, the court found that the goal of enforcing anti-discrimination law in the university context was overriding, particularly in light of the extent to which the college functions to educate the population at large.<sup>110</sup>

In contrast to the Court's holding in *Amos*, in *EEOC v. Mississippi College*,<sup>111</sup> the Court of Appeals did not exempt the religious organization from compliance with employment discrimination law. The college was owned and operated by the Mississippi Baptist Convention, an organization composed of Southern Baptist churches. While the faculty members were expected to serve as exemplars of practicing Christians, the Court held that "[b]ecause the College is not a church and its faculty members are not ministers," it did not require the same degree of independence to pursue its mission.<sup>112</sup>

As these cases illustrate, when a religious entity seeks a free exercise exemption to statutes that protect the rights of third parties, the context—the extent to which the religious entity is operating within an internal sphere and consequently the extent to which the discrimination will affect persons operating in the external sphere—is essential.

### B. Free Exercise Exemptions and Establishment Clause Conflicts

Cases involving the rights of third parties present another issue to consider in reconciling conflicting rights: whether granting an exemption to a religious individual or organization entangles the state with religion in violation of the Establishment Clause.<sup>113</sup> One of these state-religion entanglement cases is *Otten v. Baltimore & O.R.*<sup>114</sup> In *Otten*, the Second Circuit denied a railroad employee an exemption to the Railway Labor Act that required his employer to run a union shop. The employee claimed that his religious scruples prohibited him from becoming a member of any organization composed of "unbelievers."<sup>115</sup> Judge Learned Hand wrote for the court: "The First Amendment protects one against action by the

government, though even then, not in all circumstances, but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities."<sup>116</sup>

Citing Judge Hand on this point, the Supreme Court in *Estate of Thornton v. Caldor, Inc.*<sup>117</sup> overturned a Connecticut statute that allowed religious employees to choose any day they wished as their Sabbath. The Court held that the law violated the Establishment Clause because it commanded the State to put Sabbath religious concerns above all other secular concerns in the workplace, including the rights of other employees.<sup>118</sup> As this case illustrates, in balancing free exercise rights against laws that grant rights to third parties, courts must be cautious when granting an exemption that the state is not forced to cross the line between "benevolent neutrality" and the "unlawful fostering of religion,"<sup>119</sup> a particular concern that is raised in cases seeking to accommodate religious and anti-discrimination rights.

### III. THE FRAMEWORK OF ANTI-DISCRIMINATION LAW

Mrs. Smith alleged that her religious rights would be violated if she were forced to rent an apartment to Gail Randall and Ken Phillips. The Free Exercise Clause also collided with fair housing laws in the cases of Mr. Desilets and Mr. Swanner. But, depending on the specific law in question, the discord of free exercise and anti-discrimination rights may be resolved very differently.

Federal, state, and local laws protect against various kinds of discrimination. As a result, the type of discrimination and the governmental source of protection together frame the conflict between the two interests. To accommodate both free exercise and anti-discrimination law, one must therefore understand both the kind of anti-discrimination law involved and how the law shapes the conflict and potential resolution.

The foundation of all anti-discrimination law, including fair housing law, is the Civil Rights Amendments.<sup>120</sup> The Thirteenth Amendment prohibits slavery and involuntary servitude, except as criminal punishment,

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 626 F.2d 477 (5th Cir. 1980), cert. denied, 453 U.S. 912 (1981).

<sup>112</sup> *Id.* at 485.

<sup>113</sup> See *supra* note 21 and accompanying text.

<sup>114</sup> 205 F.2d 58 (2d Cir. 1953).

<sup>115</sup> *Id.* at 60.

<sup>116</sup> *Id.* at 61 (footnote omitted).

<sup>117</sup> 472 U.S. 703 (1985).

<sup>118</sup> *Id.* at 709.

<sup>119</sup> *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136 (1987).

<sup>120</sup> U.S. CONST. amend. XIII-XV.

and applies to both state action and private conduct.<sup>121</sup> The Fourteenth Amendment prohibits a state from "den[y]ing to any person within its jurisdiction the equal protection of the laws."<sup>122</sup> While it was originally intended to protect citizens on the basis of race, the Fourteenth Amendment has been applied to afford constitutional protection on other bases as well.<sup>123</sup> However, because neither amendment has been broadly construed to prohibit discrimination in the private sector,<sup>124</sup> and because strict scrutiny under these amendments extends only to "discrete and insular minorities,"<sup>125</sup> discrimination claims are often brought under anti-discrimination statutes.

The two main federal regulations that prohibit discrimination are the Civil Rights Acts of 1866<sup>126</sup> and 1968.<sup>127</sup> Section 1981 of the 1866 Act guarantees all persons within the jurisdiction of the United States the same rights, benefits, and punishments under the laws as any other person.<sup>128</sup> Section 1982 of the 1866 Act requires that all United States citizens have the same right as any white persons "to inherit, purchase, lease, sell, hold, and convey real and personal property."<sup>129</sup> Section 1983 of the 1866 Act provides a civil cause of action for deprivation of rights under color of law.<sup>130</sup> In 1968 the Supreme Court construed this Act to specifically prohibit racial discrimination in housing.<sup>131</sup>

Title VIII of the Civil Rights Act of 1968, commonly referred to as the Fair Housing Act, prohibits discrimination in the provision of housing and related services, including real estate brokerage, insurance, and mortgage lending.<sup>132</sup> The Act prohibits discrimination on the basis of race,

121. U.S. CONST. amend. XIII; *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (holding that Congress has the power to determine what constitutes badges and incidents of slavery and to pass all laws "necessary and proper" to abolish them).

122. U.S. CONST. amend. XIV, § 1.

123. See, e.g., *Craig v. Bören*, 429 U.S. 190 (1976) (sex discrimination); *Graham v. Richardson*, 403 U.S. 365 (1971) (discrimination based on alienage).

124. Although the Thirteenth Amendment does protect against slavery by either private or state actors, it seems to have been narrowly construed to apply only to race and national origin discrimination. See, e.g., *St. Francis College v. Al-Khazfaji*, 481 U.S. 604 (1987). The Fourteenth Amendment prohibitions extend only to discriminatory state action. U.S. CONST. amend. XIV.

125. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

126. 42 U.S.C. §§ 1981, 1982 (1994).

127. *Id.* §§ 2000a-2000h.

128. *Id.* § 1981.

129. *Id.*

130. *Id.* § 1983.

131. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 421 (1968).

132. 42 U.S.C. §§ 3604-3606 (1994).

color, religion, sex, and national origin.<sup>133</sup> In addition, with the passage of the Federal FHAA in 1988,<sup>134</sup> the Act now covers housing discrimination on the basis of familial and handicap status.<sup>135</sup>

Title VIII includes two exemptions that may be relevant to the resolution of free exercise/anti-discrimination cases like Mrs. Smith's. First, the Fair Housing Act includes a so-called "Mrs. Murphy" exemption<sup>136</sup> that removes from its application rooms or units in dwellings where there are no more than four units and where the owner actually lives in one of the units.<sup>137</sup> This exemption was intended to protect owner-operators of boarding houses.<sup>138</sup> In practice, it serves to statutorily raise the rights of privacy and free association of an on-site owner above the government's interest in prohibiting discrimination. The second exemption provided by § 3607 specifically exempts religious organizations and private clubs from the Act's prohibitions on discrimination in the provision of housing that is owned and operated for religious, not commercial, purposes.<sup>139</sup>

Like the federal government, the states may use their police powers to prohibit discrimination in furtherance of the welfare, health, and peace of the state.<sup>140</sup> In fact, many states have gone further than federal law<sup>141</sup> to prohibit discrimination, affording more protections to their citizens than federal law by granting legal protection to more classes of persons,<sup>142</sup> by expanding protections through judicial interpretation,<sup>143</sup> and by including fewer exemptions to their legal proscriptions.<sup>144</sup>

Under both state and federal fair housing laws, once disparate treatment across protected class lines is shown, the burden of proof shifts to the

133. *Id.* §§ 3601-3612.

134. Pub. L. No. 100-430, § 1, 102 Stat. 1619 (1988).

135. 42 U.S.C. §§ 3604-3606 (1994).

136. 114 CONG. REC. 2495 (1968) (statement of Sen. Mondale) (coining the term Mrs. Murphy to represent the traditional boarding house operator).

137. *Id.* § 3603(b)(2).

138. 114 CONG. REC. S2495 (1968) (statement of Sen. Mondale).

139. 42 U.S.C. § 3607 (1994).

140. See, e.g., CAL. GOV'T CODE § 12,920 (West 1992 & Supp. 1996).

141. Justice Louis D. Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932), wrote, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."

142. For instance, marital status and sexual orientation are not protected classes under federal law. See *infra* notes 151-153 and accompanying text.

143. See *infra* note 145 and accompanying text.

144. For instance, of the 23 states that prohibit marital status discrimination in housing, just over half provide a Mrs. Murphy exemption.

discriminator to show a sufficient justification for the conduct.<sup>145</sup> However, the level of protection that a victim of discrimination receives depends upon the basis of discrimination, the specific legal framework in which the complaint is brought, and the context in which the discrimination occurred.<sup>146</sup>

In order to understand federal protections, picture three points along a spectrum of governmental interests: On one end, federal law has recognized a compelling interest in protecting people from discrimination on the basis of race;<sup>147</sup> in the middle, a less stringent justification, an "important" state interest, is required to justify discrimination on the basis of sex;<sup>148</sup> on the other end, Congress, in devising federal law, and the Court, in interpreting it, have signaled that federal protections, including the Fair Housing Act, do not protect persons on the basis of sexual orientation<sup>149</sup> or marital status.<sup>150</sup> Also, the inclusion of the Mrs. Murphy exemption in federal law suggests that the context in which the discrimination occurs may affect the level of justification required to defend a discriminatory practice.

State law, on the other hand, may afford very different protections against identical discriminatory conduct. Many state statutes protect classes beyond those enumerated in the federal law, providing protection against discrimination on the basis of sexual orientation,<sup>151</sup> marital status,<sup>152</sup> and even arbitrary discrimination.<sup>153</sup> These classifications may not be pro-

145. See, e.g., *NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir. 1988), *aff'd*, 488 U.S. 15 (1988) (requiring defendant to show that the practice furthers substantial concerns that cannot be resolved with less discriminatory alternatives); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 149 (3rd Cir. 1977), *cert. denied*, 435 U.S. 908 (1978) (requiring a defendant to show "a legitimate, bona fide interest" and "that no alternative course of action could be adopted . . . with less discriminatory impact").

146. See *Wessels*, *supra* note 89, at 1216 (describing the levels of protection available to a victim of employment discrimination).

147. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("[C]lassifications [on the basis of race] are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest . . .") (emphasis added); see also *Loving v. Virginia*, 388 U.S. 1 (1967).

148. *Craig v. Boren*, 429 U.S. 190, 197 (1976) ("To withstand constitutional challenge . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.") (emphasis added).

149. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

150. The FFHAA does not protect persons on the basis of marital status. 42 U.S.C. §§ 3604-3606 (1994).

151. See, e.g., CONN. STAT. ANN. § 46a-81e (West 1995); D.C. CODE § 1-2515 (1992 & Supp. 1996); MINN. STAT. ANN. § 363.12 (West Supp. 1996); 9 VT. STAT. ANN. tit. 9, § 4503 (1993).

152. See *supra* note 16.

153. See CAL. CIV. CODE § 51 (West 1982 & Supp. 1996) (Unruh Civil Rights Act).

protected by federal law, but state courts have nonetheless confirmed that states do have compelling interests in protecting against discrimination on these bases.<sup>154</sup> In addition, protected conduct under federal law would likely be subject to scrutiny under most state statutes if perpetrated by a Mrs. Murphy landlord.<sup>155</sup>

For instance, in the case of discrimination on the basis of sexual orientation,<sup>156</sup> the Supreme Court may be more restrictive in weighing the state's interests than state courts. In a federal challenge to a state anti-discrimination law, under which the state has granted a certain groups of people protected class status, a court should theoretically give deference to the legislative intent of the state or municipality and the weight that the state places on the interest.<sup>157</sup> This is particularly true of discrimination cases where the protected class is one that has "moral" or religious repercussions, like sexual orientation or marital status. However, as mentioned above, the prevailing doctrine gives courts room to "fudge on standards," to expand the sphere or reduce the sphere of the interest depending on whether or not they believe that the classification deserves protected-class status. The result is both inconsistent decisions, as well as decisions in which the true state's interests may not have been weighed, but instead, the court's *evaluation* of that interest.<sup>158</sup>

#### IV. RECONCILING FREE EXERCISE AND ANTI-DISCRIMINATION RIGHTS

Because the resolution of anti-discrimination and free exercise claims use similar balancing tests, they also share common shortfalls. When the two are pitted against one another, issues of shaping, defining, and measuring interests are magnified. Neither the *Sherbert-Yoder* balancing test nor the RFRA does away with the ambiguities that surface in framing the inter-

154. A court in the District of Columbia held that the District has a compelling interest in preventing discrimination on the basis of sexual orientation. *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1 (D.C. 1987) (en banc). Similarly, the Alaska Supreme Court found that the State had a compelling interest in preventing housing discrimination, thus allowing the unmarried couple's marital status discrimination complaint to trump Mr. Swanner's free exercise rights. *Swanner v. Anchorage Equal Rights Comm'n*, 874 P.2d 274 (Alaska 1994), *cert. denied*, 115 S. Ct. 460 (1994).

155. See *supra* notes 137-138.

156. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

157. See *Gay Rights Coalition*, 536 A.2d at 33 (court looking to the intent of the legislature in making sexual orientation a protected class). The Supreme Court may have given deference to the legislative intent of Alaska when it denied certiorari to Mr. Swanner. It is clear that, in finding a compelling state interest in preventing discrimination on the basis of marital status, the Alaska Supreme Court gave such deference to the legislature. *Swanner*, 874 P.2d at 282-83.

158. See *Wessels*, *supra* note 89, at 1218-19.

the complete exclusion of negroes from jury service, the constitutional provision . . . would be but a vain and illusory requirement."<sup>15</sup>

The same reasoning is applicable to these facts.

Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period. But it taxes our credulity to say that mere chance resulted in there being no members of this class among the over six thousand jurors called in the past 25 years. The result bespeaks discrimination, whether or not it was a conscious decision on the part of any individual jury commissioner. The judgment of conviction must be reversed.

To say that this decision revives the rejected contention that the Fourteenth Amendment requires proportional representation of all the component ethnic groups of the community on every jury<sup>16</sup> ignores the facts. The petitioner did not seek proportional representation, nor did he claim a right to have persons of Mexican descent sit on the particular juries which he faced.<sup>17</sup> His only claim is the right to be indicted and tried by juries from which all members of his class are not systematically excluded—juries selected from among all qualified persons regardless of national origin or descent. To this much, he is entitled by the Constitution.

*Reversed.*

<sup>15</sup> 294 U. S., at 598.

<sup>16</sup> See *Akins v. Texas*, 325 U. S. 398, 403; *Cassell v. Texas*, 339 U. S. 282, 286–287.

<sup>17</sup> See *Akins v. Texas*, *supra*, note 16, at 403.

BROWN ET AL. v. BOARD OF EDUCATION  
OF TOPEKA ET AL.

NO. 1. APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS.\*

Argued December 9, 1952.—Reargued December 8, 1953.—

Decided May 17, 1954.

Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment—even though the physical facilities and other “tangible” factors of white and Negro schools may be equal. Pp. 486–496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 489–490.

(b) The question presented in these cases must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 492–493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 493.

(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other “tangible” factors may be equal. Pp. 493–494.

(e) The “separate but equal” doctrine adopted in *Plessy v. Ferguson*, 163 U. S. 537, has no place in the field of public education. P. 495.

\*Together with No. 2, *Briggs et al. v. Elliott et al.*, on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9–10, 1952; reargued December 7–8, 1953; No. 4, *Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*, on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7–8, 1953; and No. 10, *Gebhart et al. v. Belton et al.*, on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

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(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 495-496.

*Robert L. Carter* argued the cause for appellants in No. 1 on the original argument and on the reargument. *Thurgood Marshall* argued the cause for appellants in No. 2 on the original argument and *Spottswood W. Robinson, III*, for appellants in No. 4 on the original argument, and both argued the causes for appellants in Nos. 2 and 4 on the reargument. *Louis L. Redding* and *Jack Greenberg* argued the cause for respondents in No. 10 on the original argument and *Jack Greenberg* and *Thurgood Marshall* on the reargument.

On the briefs were *Robert L. Carter*, *Thurgood Marshall*, *Spottswood W. Robinson, III*, *Louis L. Redding*, *Jack Greenberg*, *George E. C. Hayes*, *William R. Ming, Jr.*, *Constance Baker Motley*, *James M. Nabrit, Jr.*, *Charles S. Scott*, *Frank D. Reeves*, *Harold R. Boulware* and *Oliver W. Hill* for appellants in Nos. 1, 2 and 4 and respondents in No. 10; *George M. Johnson* for appellants in Nos. 1, 2 and 4; and *Loren Miller* for appellants in Nos. 2 and 4. *Arthur D. Shores* and *A. T. Walden* were on the Statement as to Jurisdiction and a brief opposing a Motion to Dismiss or Affirm in No. 2.

*Paul E. Wilson*, Assistant Attorney General of Kansas, argued the cause for appellees in No. 1 on the original argument and on the reargument. With him on the briefs was *Harold R. Fatzer*, Attorney General.

*John W. Davis* argued the cause for appellees in No. 2 on the original argument and for appellees in Nos. 2 and 4 on the reargument. With him on the briefs in No. 2 were *T. C. Callison*, Attorney General of South Carolina, *Robert McC. Figg, Jr.*, *S. E. Rogers*, *William R. Meagher* and *Taggart Whipple*.

*J. Lindsay Almond, Jr.*, Attorney General of Virginia, and *T. Justin Moore* argued the cause for appellees in No. 4 on the original argument and for appellees in Nos. 2 and 4 on the reargument. On the briefs in No. 4 were *J. Lindsay Almond, Jr.*, Attorney General, and *Henry T. Wickham*, Special Assistant Attorney General, for the State of Virginia, and *T. Justin Moore*, *Archibald G. Robertson*, *John W. Riely* and *T. Justin Moore, Jr.* for the Prince Edward County School Authorities, appellees.

*H. Albert Young*, Attorney General of Delaware, argued the cause for petitioners in No. 10 on the original argument and on the reargument. With him on the briefs was *Louis J. Finger*, Special Deputy Attorney General.

By special leave of Court, *Assistant Attorney General Rankin* argued the cause for the United States on the reargument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10. With him on the brief were *Attorney General Brownell*, *Philip Elman*, *Leon Ulman*, *William J. Lamont* and *M. Magdalena Schoch*. *James P. McGranery*, then Attorney General, and *Philip Elman* filed a brief for the United States on the original argument, as *amicus curiae*, urging reversal in Nos. 1, 2 and 4 and affirmance in No. 10.

Briefs of *amici curiae* supporting appellants in No. 1 were filed by *Shad Polier*, *Will Maslow* and *Joseph B. Robison* for the American Jewish Congress; by *Edwin J. Lukas*, *Arnold Forster*, *Arthur Garfield Hays*, *Frank E. Karelson*, *Leonard Haas*, *Saburo Kido* and *Theodore Leskes* for the American Civil Liberties Union et al.; and by *John Ligtenberg* and *Selma M. Borchardt* for the American Federation of Teachers. Briefs of *amici curiae* supporting appellants in No. 1 and respondents in No. 10 were filed by *Arthur J. Goldberg* and *Thomas E. Harris*.

for the Congress of Industrial Organizations and by *Phineas Indritz* for the American Veterans Committee, Inc.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.<sup>1</sup>

<sup>1</sup> In the Kansas case, *Brown v. Board of Education*, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan. Gen. Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F. Supp. 797. The case is here on direct appeal under 28 U. S. C. § 1253.

In the South Carolina case, *Briggs v. Elliott*, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S. C. Const., Art. XI, § 7; S. C. Code § 5377 (1942). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admis-

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance,

admission to the white schools during the equalization program. 98 F. Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U. S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F. Supp. 920. The case is again here on direct appeal under 28 U. S. C. § 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va. Const., § 140; Va. Code § 22-221 (1950). The three-judge District Court, convened under 28 U. S. C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F. Supp. 337. The case is here on direct appeal under 28 U. S. C. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del. Const., Art. X, § 2; Del. Rev. Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance in-

they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in *Plessy v. Ferguson*, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction.<sup>2</sup> Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.<sup>3</sup>

involved in travel. 87 A. 2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10, *infra*), but did not rest his decision on that ground. *Id.*, at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A. 2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U. S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

<sup>2</sup> 344 U. S. 1, 141, 891.

<sup>3</sup> 345 U. S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time.<sup>4</sup> In the South, the movement toward free common schools, sup-

<sup>4</sup> For a general study of the development of public education prior to the Amendment, see Butts and Cremin, *A History of Education in American Culture* (1953), Pts. I, II; Cubberley, *Public Education in the United States* (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley, *supra*, at 288-339, 408-431; Knight, *Public Education in the South* (1922), cc. VIII, IX. See also H. Ex. Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (*e. g.*, the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particularly in the South, the War

ported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race.<sup>5</sup> The doctrine of

virtually stopped all progress in public education. *Id.*, at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, *A History of Freedom of Teaching in American Schools* (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. *Cubberley, supra*, at 563-565.

<sup>5</sup> *Slaughter-House Cases*, 16 Wall. 36, 67-72 (1873); *Strauder v. West Virginia*, 100 U. S. 303, 307-308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but

"separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson, supra*, involving not education but transportation.<sup>6</sup> American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education.<sup>7</sup> In *Cumming v. County Board of Education*, 175 U. S. 528, and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged.<sup>8</sup> In more recent cases, all on the graduate school

declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."

See also *Virginia v. Rives*, 100 U. S. 313, 318 (1880); *Ex parte Virginia*, 100 U. S. 339, 344-345 (1880).

<sup>6</sup> The doctrine apparently originated in *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

<sup>7</sup> See also *Berea College v. Kentucky*, 211 U. S. 45 (1908).

<sup>8</sup> In the *Cumming* case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the *Gong Lum* case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors.<sup>9</sup> Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout

<sup>9</sup> In the Kansas case, the court below found substantial equality as to all such factors. 98 F. Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F. Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F. Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A. 2d 137, 149.

the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter*, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

“Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system.”<sup>10</sup>

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority.<sup>11</sup> Any lan-

<sup>10</sup> A similar finding was made in the Delaware case: “I conclude from the testimony that in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated.” 87 A. 2d 862, 865.

<sup>11</sup> K. B. Clark, *Effect of Prejudice and Discrimination on Personality Development* (Midcentury White House Conference on Children and Youth, 1950); Witmer and Kotinsky, *Personality in the Making* (1952), c. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. Psychol. 259 (1948); Chein, *What are the Psychological Effects of*

guage in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.<sup>12</sup>

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term.<sup>13</sup> The Attorney General

*Segregation Under Conditions of Equal Facilities?*, 3 Int. J. Opinion and Attitude Res. 229 (1949); Brameld, *Educational Costs, in Discrimination and National Welfare* (MacIver, ed., 1949), 44–48; Frazier, *The Negro in the United States* (1949), 674–681. And see generally Myrdal, *An American Dilemma* (1944).

<sup>12</sup> See *Bolling v. Sharpe*, *post*, p. 497, concerning the Due Process Clause of the Fifth Amendment.

<sup>13</sup> “4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

“(a) would a decree necessarily follow providing that, within the

of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as *amici curiae* upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.<sup>14</sup>

*It is so ordered.*

limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

“(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?”

“5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b),

“(a) should this Court formulate detailed decrees in these cases;

“(b) if so, what specific issues should the decrees reach;

“(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

“(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?”

<sup>14</sup> See Rule 42, Revised Rules of this Court (effective July 1, 1954).

BOLLING ET AL. v. SHARPE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 8. Argued December 10-11, 1952.—Reargued December 8-9, 1953.—Decided May 17, 1954.

Racial segregation in the public schools of the District of Columbia is a denial to Negro children of the due process of law guaranteed by the Fifth Amendment. Pp. 498-500.

(a) Though the Fifth Amendment does not contain an equal protection clause, as does the Fourteenth Amendment which applies only to the States, the concepts of equal protection and due process are not mutually exclusive. P. 499.

(b) Discrimination may be so unjustifiable as to be violative of due process. P. 499.

(c) Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause. Pp. 499-500.

(d) In view of this Court's decision in *Brown v. Board of Education*, ante, p. 483, that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. P. 500.

(e) The case is restored to the docket for further argument on specified questions relating to the form of the decree. P. 500.

*George E. C. Hayes* and *James M. Nabrit, Jr.* argued the cause for petitioners on the original argument and on the reargument. With them on the briefs were *George M. Johnson* and *Herbert O. Reid, Jr.* *Charles W. Quick* was also on the brief on the reargument.

*Milton D. Korman* argued the cause for respondents on the original argument and on the reargument. With him on the briefs were *Vernon E. West*, *Chester H. Gray* and *Lyman J. Umstead*.

Decree of the Court.

Angle to right  $12^{\circ} 17' 30''$ , course N.  $10^{\circ} 45'$  W. 1202.12 ft. to a post opposite the lower end of Green River Island, and at low water as it was in 1792, witnessed by a sycamore 52 inches, N.  $65^{\circ} 35'$  E. 363.45 ft. The above courses are run from the true meridian as ascertained by observation at the point on the map marked "W" on the line between township six (6) and seven (7).

Respectfully submitted.

Feb'y 3d, 1896.

C. C. GENUNG,  
C. E. and S. V. C.

## EXHIBIT "G."

*Statement of Costs and Expenses.*

C. C. Genung, civil engineer, services rendered by order of the commission.....		\$575 75
Expenses of Lieut. Col. Amos Stickney, U. S. A., commissioner.....	\$64 60	
Services as member of the commission.....	500 00	564 60
Expenses of Gaston M. Alves, commissioner.....	20 00	
Services as member of the commission.....	500 00	520 00
Expenses of Gustavus V. Menzies, commissioner.....	20 00	
Services as member of the commission.....	500 00	520 00
F. A. Guthrie, typewriter.....		15 00
Kellar Printing Company.....		41 25
Total.....		\$2236 60

And the court being now fully advised in the premises:

It is ordered that the exceptions to the report of said commissioners be overruled and that the report of said commissioners be, and the same is hereby, confirmed.

And it is ordered, adjudged, and decreed that the boundary line between said States of Indiana and Kentucky in controversy herein be, and it is hereby, established and declared to be as delineated and set forth in said report and the map accompanying the same and referred to therein, which map is hereby directed to be filed as a part of this decree.

It is further ordered, adjudged, and decreed that the said

Syllabus.

boundary line as described in said report and as delineated on said map, and now marked by cedar posts, be permanently marked as recommended in said report, with all convenient speed, and that said commission be continued for that purpose, and make report thereon to this court, and that this cause be retained until such report is made.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners and the expenses attendant on the discharge of their duties, up to this time, be, and they are hereby, allowed at the sum of two thousand two hundred and thirty-six dollars and sixty cents in accordance with their report, and that said charges and expenses and the costs of this suit to be taxed be equally divided between the parties hereto.

And it is further ordered, adjudged, and decreed that this decree is without prejudice to further proceedings as either of the parties may be advised for the determination of such part of the boundary line between said States as may not have been settled by this decree under the pleadings in this case.

And it is further ordered, adjudged, and decreed that the clerk of this court do forthwith transmit to the chief magistrates of the States of Kentucky and Indiana copies of this decree duly authenticated under the seal of this court.

per Mr. CHIEF JUSTICE FULLER.

May 18, 1896.

## PLESSY v. FERGUSON.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 210. Argued April 13, 1896. — Decided May 13, 1896.

The statute of Louisiana, acts of 1890, No. 111, requiring railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; and providing that no person shall be permitted to occupy seats in coaches other than the ones assigned to them, on account

## Statement of the Case.

of the race they belong to; and requiring the officers of the passenger trains to assign each passenger to the coach or compartment assigned for the race to which he or she belongs; and imposing fines or imprisonment upon passengers insisting on going into a coach or compartment other than the one set aside for the race to which he or she belongs; and conferring upon officers of the trains power to refuse to carry on the train passengers refusing to occupy the coach or compartment assigned to them, and exempting the railway company from liability for such refusal, are not in conflict with the provisions either of the Thirteenth Amendment or of the Fourteenth Amendment to the Constitution of the United States.

This was a petition for writs of prohibition and certiorari, originally filed in the Supreme Court of the State by Plessy, the plaintiff in error, against the Hon. John H. Ferguson, judge of the criminal District Court for the parish of Orleans, and setting forth in substance the following facts:

That petitioner was a citizen of the United States and a resident of the State of Louisiana, of mixed descent, in the proportion of seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every recognition, right, privilege and immunity secured to the citizens of the United States of the white race by its Constitution and laws; that on June 7, 1892, he engaged and paid for a first class passage on the East Louisiana Railway from New Orleans to Covington, in the same State, and thereupon entered a passenger train, and took possession of a vacant seat in a coach where passengers of the white race were accommodated; that such railroad company was incorporated by the laws of Louisiana as a common carrier, and was not authorized to distinguish between citizens according to their race. But, notwithstanding this, petitioner was required by the conductor, under penalty of ejection from said train and imprisonment, to vacate said coach and occupy another seat in a coach assigned by said company for persons not of the white race, and for no other reason than that petitioner was of the colored race; that upon petitioner's refusal to comply with such order, he was, with the aid of a police officer, forcibly ejected from said coach and hurried off to and imprisoned in the parish jail of

## Statement of the Case.

New Orleans, and there held to answer a charge made by such officer to the effect that he was guilty of having criminally violated an act of the General Assembly of the State, approved July 10, 1890, in such case made and provided.

That petitioner was subsequently brought before the recorder of the city for preliminary examination and committed for trial to the criminal District Court for the parish of Orleans, where an information was filed against him in the matter above set forth, for a violation of the above act, which act the petitioner affirmed to be null and void, because in conflict with the Constitution of the United States; that petitioner interposed a plea to such information, based upon the unconstitutionality of the act of the General Assembly, to which the district attorney, on behalf of the State, filed a demurrer; that, upon issue being joined upon such demurrer and plea, the court sustained the demurrer, overruled the plea, and ordered petitioner to plead over to the facts set forth in the information, and that, unless the judge of the said court be enjoined by a writ of prohibition from further proceeding in such case, the court will proceed to fine and sentence petitioner to imprisonment, and thus deprive him of his constitutional rights set forth in his said plea, notwithstanding the unconstitutionality of the act under which he was being prosecuted; that no appeal lay from such sentence, and petitioner was without relief or remedy except by writs of prohibition and certiorari. Copies of the information and other proceedings in the criminal District Court were annexed to the petition as an exhibit.

Upon the filing of this petition, an order was issued upon the respondent to show cause why a writ of prohibition should not issue and be made perpetual; and a further order that the record of the proceedings had in the criminal cause be certified and transmitted to the Supreme Court.

To this order the respondent made answer, transmitting a certified copy of the proceedings, asserting the constitutionality of the law, and averring that, instead of pleading or admitting that he belonged to the colored race, the said Plessy declined and refused, either by pleading or otherwise, to ad-

mit that he was in any sense or in any proportion a colored man.

The case coming on for a hearing before the Supreme Court, that court was of opinion that the law under which the prosecution was had was constitutional, and denied the relief prayed for by the petitioner. *Ex parte Plessy*, 45 La. Ann. 80. Whereupon petitioner prayed for a writ of error from this court which was allowed by the Chief Justice of the Supreme Court of Louisiana.

*Mr. A. W. Tourgee* and *Mr. S. F. Phillips* for plaintiff in error. *Mr. F. D. McKenney* was on *Mr. Phillips's* brief.

*Mr. James C. Walker* filed a brief for plaintiff in error.

*Mr. Alexander Porter Morse* for defendant in error. *Mr. M. J. Cunningham*, Attorney General of the State of Louisiana, and *Mr. Lionel Adams* were on his brief.

MR. JUSTICE BROWN, after stating the case, delivered the opinion of the court.

This case turns upon the constitutionality of an act of the General Assembly of the State of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. Acts 1890, No. 111, p. 152.

The first section of the statute enacts "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: *Provided*, That this section shall not be construed to apply to street railroads. No person or persons, shall be admitted to occupy seats in coaches, other than, the ones, assigned, to them on account of the race they belong to."

By the second section it was enacted "that the officers of such passenger trains shall have power and are hereby required

to assign each passenger to the coach or compartment used for the race to which such passenger belongs; any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this State."

The third section provides penalties for the refusal or neglect of the officers, directors, conductors and employes of railway companies to comply with the act, with a proviso that "nothing in this act shall be construed as applying to nurses attending children of the other race." The fourth section is immaterial.

The information filed in the criminal District Court charged in substance that Plessy, being a passenger between two stations within the State of Louisiana, was assigned by officers of the company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong. Neither in the information nor plea was his particular race or color averred.

The petition for the writ of prohibition averred that petitioner was seven eighths Caucasian and one eighth African blood; that the mixture of colored blood was not discernible in him, and that he was entitled to every right, privilege and immunity secured to citizens of the United States of the white race; and that, upon such theory, he took possession of a vacant seat in a coach where passengers of the white race were accommodated, and was ordered by the conductor to vacate

said coach and take a seat in another assigned to persons of the colored race, and having refused to comply with such demand he was forcibly ejected with the aid of a police officer, and imprisoned in the parish jail to answer a charge of having violated the above act.

The constitutionality of this act is attacked upon the ground that it conflicts both with the Thirteenth Amendment of the Constitution, abolishing slavery, and the Fourteenth Amendment, which prohibits certain restrictive legislation on the part of the States.

1. That it does not conflict with the Thirteenth Amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. Slavery implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services. This amendment was said in the *Slaughter-house cases*, 16 Wall. 36, to have been intended primarily to abolish slavery, as it had been previously known in this country, and that it equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery or involuntary servitude, and that the use of the word “servitude” was intended to prohibit the use of all forms of involuntary slavery, of whatever class or name. It was intimated, however, in that case that this amendment was regarded by the statesmen of that day as insufficient to protect the colored race from certain laws which had been enacted in the Southern States, imposing upon the colored race onerous disabilities and burdens, and curtailing their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value; and that the Fourteenth Amendment was devised to meet this exigency.

So, too, in the *Civil Rights cases*, 109 U. S. 3, 24, it was said that the act of a mere individual, the owner of an inn, a public conveyance or place of amusement, refusing accommodations to colored people, cannot be justly regarded as imposing any badge of slavery or servitude upon the applicant, but

only as involving an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears. “It would be running the slavery argument into the ground,” said Mr. Justice Bradley, “to make it apply to every act of discrimination which a person may see fit to make as to the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business.”

A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude. Indeed, we do not understand that the Thirteenth Amendment is strenuously relied upon by the plaintiff in error in this connection.

2. By the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are made citizens of the United States and of the State wherein they reside; and the States are forbidden from making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States, or shall deprive any person of life, liberty or property without due process of law, or deny to any person within their jurisdiction the equal protection of the laws.

The proper construction of this amendment was first called to the attention of this court in the *Slaughter-house cases*, 16 Wall. 36, which involved, however, not a question of race, but one of exclusive privileges. The case did not call for any expression of opinion as to the exact rights it was intended to secure to the colored race, but it was said generally that its main purpose was to establish the citizenship of the negro; to give definitions of citizenship of the United States and of the States, and to protect from the hostile legislation of the States the privileges and immunities of citizens of the United States, as distinguished from those of citizens of the States.

The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

One of the earliest of these cases is that of *Roberts v. City of Boston*, 5 Cush. 198, in which the Supreme Judicial Court of Massachusetts held that the general school committee of Boston had power to make provision for the instruction of colored children in separate schools established exclusively for them, and to prohibit their attendance upon the other schools. "The great principle," said Chief Justice Shaw, p. 206, "advanced by the learned and eloquent advocate for the plaintiff," (Mr. Charles Sumner,) "is, that by the constitution and laws of Massachusetts, all persons without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security." It was held that the powers of the committee extended to the establish-

ment of separate schools for children of different ages, sexes and colors, and that they might also establish special schools for poor and neglected children, who have become too old to attend the primary school, and yet have not acquired the rudiments of learning, to enable them to enter the ordinary schools. Similar laws have been enacted by Congress under its general power of legislation over the District of Columbia, Rev. Stat. D. C. §§ 281, 282, 283, 310, 319, as well as by the legislatures of many of the States, and have been generally, if not uniformly, sustained by the courts. *State v. McCann*, 21 Ohio St. 198; *Lehew v. Brummell*, 15 S. W. Rep. 765; *Ward v. Flood*, 48 California, 36; *Bertonneau v. School Directors*, 3 Woods, 177; *People v. Gallagher*, 93 N. Y. 438; *Cory v. Carter*, 48 Indiana, 327; *Dawson v. Lee*, 83 Kentucky, 49.

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State. *State v. Gibson*, 36 Indiana, 389.

The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court. Thus in *Strauder v. West Virginia*, 100 U. S. 303, it was held that a law of West Virginia limiting to white male persons, 21 years of age and citizens of the State, the right to sit upon juries, was a discrimination which implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility. Indeed, the right of a colored man that, in the selection of jurors to pass upon his life, liberty and property, there shall be no exclusion of his race, and no discrimination against them because of color, has been asserted in a number of cases. *Virginia v. Rives*, 100 U. S. 313; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110; *Gibson v. Mississippi*, 162 U. S. 565. So, where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of

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color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons. *Railroad Company v. Brown*, 17 Wall. 445.

Upon the other hand, where a statute of Louisiana required those engaged in the transportation of passengers among the States to give to all persons travelling within that State, upon vessels employed in that business, equal rights and privileges in all parts of the vessel, without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel, who excluded colored passengers on account of their color from the cabin set aside by him for the use of whites, it was held to be so far as it applied to interstate commerce, unconstitutional and void. *Hall v. De Cuir*, 95 U. S. 485. The court in this case, however, expressly disclaimed that it had anything whatever to do with the statute as a regulation of internal commerce, or affecting anything else than commerce among the States.

In the *Civil Rights case*, 109 U. S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the ground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. In delivering the opinion of the court Mr. Justice Bradley observed that the Fourteenth Amendment "does not invest Congress with power to legislate upon subjects that are within the

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domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect."

Much nearer, and, indeed, almost directly in point, is the case of the *Louisville, New Orleans &c. Railway v. Mississippi*, 133 U. S. 587, wherein the railway company was indicted for a violation of a statute of Mississippi, enacting that all railroads carrying passengers should provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition, so as to secure separate accommodations. The case was presented in a different aspect from the one under consideration, inasmuch as it was an indictment against the railway company for failing to provide the separate accommodations, but the question considered was the constitutionality of the law. In that case, the Supreme Court of Mississippi, 66 Mississippi, 662, had held that the statute applied solely to commerce within the State, and, that being the construction of the state statute by its highest court, was accepted as conclusive. "If it be a matter," said the court, p. 591, "respecting commerce wholly within a State, and not interfering with commerce between the States, then, obviously, there is no violation of the commerce clause of the Federal Constitution. . . . No question arises under this section, as to the power of the State to separate in different compartments interstate pas-

sengers, or affect, in any manner, the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races; that affecting only commerce within the State is no invasion of the power given to Congress by the commerce clause."

A like course of reasoning applies to the case under consideration, since the Supreme Court of Louisiana in the case of the *State ex rel. Abbott v. Hicks, Judge, et al.*, 44 La. Ann. 770, held that the statute in question did not apply to interstate passengers, but was confined in its application to passengers travelling exclusively within the borders of the State. The case was decided largely upon the authority of *Railway Co. v. State*, 66 Mississippi, 662, and affirmed by this court in 133 U. S. 587. In the present case no question of interference with interstate commerce can possibly arise, since the East Louisiana Railway appears to have been purely a local line, with both its termini within the State of Louisiana. Similar statutes for the separation of the two races upon public conveyances were held to be constitutional in *West Chester & Railroad v. Miles*, 55 Penn. St. 209; *Day v. Owen*, 5 Michigan, 520; *Chicago & C. Railway v. Williams*, 55 Illinois, 185; *Chesapeake & C. Railway v. Wells*, 85 Tennessee, 613; *Memphis & C. Railway v. Benson*, 85 Tennessee, 627; *The Sue*, 22 Fed. Rep. 843; *Logwood v. Memphis & C. Railroad*, 23 Fed. Rep. 318; *McGuinn v. Forbes*, 37 Fed. Rep. 639; *People v. King*, 18 N. E. Rep. 245; *Houck v. South Pac. Railway*, 38 Fed. Rep. 226; *Heard v. Georgia Railroad Co.*, 3 Int. Com. Com'n, 111; *S. C.*, 1 Ibid. 428.

While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensa-

tion in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power. Indeed, we understand it to be conceded by the State's attorney, that such part of the act as exempts from liability the railway company and its officers is unconstitutional. The power to assign to a particular coach obviously implies the power to determine to which race the passenger belongs, as well as the power to determine who, under the laws of the particular State, is to be deemed a white, and who a colored person. This question, though indicated in the brief of the plaintiff in error, does not properly arise upon the record in this case, since the only issue made is as to the unconstitutionality of the act, so far as it requires the railway to provide separate accommodations, and the conductor to assign passengers according to their race.

It is claimed by the plaintiff in error that, in any mixed community, the reputation of belonging to the dominant race, in this instance the white race, is *property*, in the same sense that a right of action, or of inheritance, is property. Conceding this to be so, for the purposes of this case, we are unable to see how this statute deprives him of, or in any way affects his right to, such property. If he be a white man and assigned to a colored coach, he may have his action for damages against the company for being deprived of his so called property. Upon the other hand, if he be a colored man and be so assigned, he has been deprived of no property, since he is not lawfully entitled to the reputation of being a white man.

In this connection, it is also suggested by the learned counsel for the plaintiff in error that the same argument that will justify the state legislature in requiring railways to provide separate accommodations for the two races will also authorize them to require separate cars to be provided for people whose hair is of a certain color, or who are aliens, or who belong to certain nationalities, or to enact laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men's houses to be painted white, and colored men's black, or their vehicles or business signs to be of different colors, upon the theory that one side

of the street is as good as the other, or that a house or vehicle of one color is as good as one of another color. The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion for the public good, and not for the annoyance or oppression of a particular class. Thus in *Yick Wo v. Hopkins*, 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco, to regulate the carrying on of public laundries within the limits of the municipality, violated the provisions of the Constitution of the United States, if it conferred upon the municipal authorities arbitrary power, at their own will, and without regard to discretion, in the legal sense of the term, to give or withhold consent as to persons or places, without regard to the competency of the persons applying, or the propriety of the places selected for the carrying on of the business. It was held to be a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. While this was the case of a municipal ordinance, a like principle has been held to apply to acts of a state legislature passed in the exercise of the police power. *Railroad Company v. Husen*, 95 U. S. 465; *Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, and cases cited on p. 700; *Daggett v. Hudson*, 43 Ohio St. 548; *Capen v. Foster*, 12 Pick. 485; *State ex rel. Wood v. Baker*, 38 Wisconsin, 71; *Monroe v. Collins*, 17 Ohio St. 665; *Hulseman v. Rems*, 41 Penn. St. 396; *Orman v. Riley*, 15 California, 48.

So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature. In determining the question of reasonableness it is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. Gauged by this standard, we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances

is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures.

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals. As was said by the Court of Appeals of New York in *People v. Gallagher*, 93 N. Y. 438, 448, "this end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions respecting social advantages with which it is endowed." Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly

or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different States, some holding that any visible admixture of black blood stamps the person as belonging to the colored race, (*State v. Chavers*, 5 Jones, [N. C.] 1, p. 11); others that it depends upon the preponderance of blood, (*Gray v. State*, 4 Ohio, 354; *Monroe v. Collins*, 17 Ohio St. 665); and still others that the predominance of white blood must only be in the proportion of three fourths. (*People v. Dean*, 14 Michigan, 406; *Jones v. Commonwealth*, 80 Virginia, 538.) But these are questions to be determined under the laws of each State and are not properly put in issue in this case. Under the allegations of his petition it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.

The judgment of the court below is, therefore,

*Affirmed.*

MR. JUSTICE HARLAN dissenting.

By the Louisiana statute, the validity of which is here involved, all railway companies (other than street railroad companies) carrying passengers in that State are required to have separate but equal accommodations for white and colored persons, "by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a *partition* so as to secure separate accommodations." Under this statute, no colored person is permitted to occupy a seat in a coach assigned to white persons; nor any white person, to occupy a seat in a coach assigned to colored persons. The managers of the railroad are not allowed to exercise any discretion in the premises, but are required to assign each passenger to some coach or compartment set apart for the exclusive use of his race. If a passenger insists upon going into a coach or compartment not set apart for persons of his race,

he is subject to be fined, or to be imprisoned in the parish jail. Penalties are prescribed for the refusal or neglect of the officers, directors, conductors and employes of railroad companies to comply with the provisions of the act.

Only "nurses attending children of the other race" are excepted from the operation of the statute. No exception is made of colored attendants travelling with adults. A white man is not permitted to have his colored servant with him in the same coach, even if his condition of health requires the constant, personal assistance of such servant. If a colored maid insists upon riding in the same coach with a white woman whom she has been employed to serve, and who may need her personal attention while travelling, she is subject to be fined or imprisoned for such an exhibition of zeal in the discharge of duty.

While there may be in Louisiana persons of different races who are not citizens of the United States, the words in the act, "white and colored races," necessarily include all citizens of the United States of both races residing in that State. So that we have before us a state enactment that compels, under penalties, the separation of the two races in railroad passenger coaches, and makes it a crime for a citizen of either race to enter a coach that has been assigned to citizens of the other race.

Thus the State regulates the use of a public highway by citizens of the United States solely upon the basis of race.

However apparent the injustice of such legislation may be, we have only to consider whether it is consistent with the Constitution of the United States.

That a railroad is a public highway, and that the corporation which owns or operates it is in the exercise of public functions, is not, at this day, to be disputed. Mr. Justice Nelson, speaking for this court in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 382, said that a common carrier was in the exercise "of a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." Mr. Justice Strong, delivering the judgment of

this court in *Olcott v. The Supervisors*, 16 Wall. 678, 694, said: "That railroads, though constructed by private corporations and owned by them, are public highways, has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State's right of eminent domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for a private use. Yet it is a doctrine universally accepted that a state legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean if not that building a railroad, though it be built by a private corporation, is an act done for a public use?" So, in *Township of Pine Grove v. Talcott*, 19 Wall. 666, 676: "Though the corporation [a railroad company] was private, its work was public, as much so as if it were to be constructed by the State." So, in *Inhabitants of Worcester v. Western Railroad Corporation*, 4 Met. 564: "The establishment of that great thoroughfare is regarded as a public work, established by public authority, intended for the public use and benefit, the use of which is secured to the whole community, and constitutes, therefore, like a canal, turnpike or highway, a public easement." It is true that the real and personal property, necessary to the establishment and management of the railroad, is vested in the corporation; but it is in trust for the public."

In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the

race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside," and that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems. They had, as this court has said, a common purpose, namely, to secure "to a race recently emancipated, a race that through

many generations have been held in slavery, all the civil rights that the superior race enjoy." They declared, in legal effect, this court has further said, "that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." We also said: "The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race." It was, consequently, adjudged that a state law that excluded citizens of the colored race from juries, because of their race and however well qualified in other respects to discharge the duties of jurymen, was repugnant to the Fourteenth Amendment. *Strauder v. West Virginia*, 100 U. S. 303, 306, 307; *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370, 386; *Bush v. Kentucky*, 107 U. S. 110, 116. At the present term, referring to the previous adjudications, this court declared that "underlying all of those decisions is the principle that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government or the States against any citizen because of his race. All citizens are equal before the law." *Gibson v. Mississippi*, 162 U. S. 565.

The decisions referred to show the scope of the recent amendments of the Constitution. They also show that it is not within the power of a State to prohibit colored citizens, because of their race, from participating as jurors in the administration of justice.

It was said in argument that the statute of Louisiana does

not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of accommodation for travellers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while travelling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute is that it interferes with the personal freedom of citizens. "Personal liberty," it has been well said, "consists in the power of locomotion, of changing situation, or removing one's person to whatsoever places one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Com. \*134. If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so, and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.

It is one thing for railroad carriers to furnish, or to be required by law to furnish, equal accommodations for all whom they are under a legal duty to carry. It is quite another thing for government to forbid citizens of the white and black races from travelling in the same public conveyance, and to punish officers of railroad companies for permitting persons of the two races to occupy the same passenger coach. If a State can prescribe, as a rule of civil conduct, that whites and blacks shall not travel as passengers in the same railroad coach, why may it not so regulate the use of the streets of its cities and towns as to compel white citizens to keep on one side of a street and black citizens to keep on the other? Why may it not, upon like grounds, punish whites and blacks who ride together in street cars or in open vehicles on a public road.

or street? Why may it not require sheriffs to assign whites to one side of a court-room and blacks to the other? And why may it not also prohibit the commingling of the two races in the galleries of legislative halls or in public assemblages convened for the consideration of the political questions of the day? Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the State require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?

The answer given at the argument to these questions was that regulations of the kind they suggest would be unreasonable, and could not, therefore, stand before the law. Is it meant that the determination of questions of legislative power depends upon the inquiry whether the statute whose validity is questioned is, in the judgment of the courts, a reasonable one, taking all the circumstances into consideration? A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation. A statute may be valid, and yet, upon grounds of public policy, may well be characterized as unreasonable. Mr. Sedgwick correctly states the rule when he says that the legislative intention being clearly ascertained, "the courts have no other duty to perform than to execute the legislative will, without any regard to their views as to the wisdom or justice of the particular enactment." Stat. & Const. Constr. 324. There is a dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature. Our institutions have the distinguishing characteristic that the three departments of government are coördinate and separate. Each must keep within the limits defined by the Constitution. And the courts best discharge their duty by executing the will of the law-making power, constitutionally expressed, leaving the results of legislation to be dealt with by the people through their representatives. Statutes must always have a reasonable construction. Sometimes they are to be construed strictly; sometimes, liberally, in order to carry out the legisla-

tive will. But however construed, the intent of the legislature is to be respected, if the particular statute in question is valid, although the courts, looking at the public interests, may conceive the statute to be both unreasonable and impolitic. If the power exists to enact a statute, that ends the matter so far as the courts are concerned. The adjudged cases in which statutes have been held to be void, because unreasonable, are those in which the means employed by the legislature were not at all germane to the end to which the legislature was competent.

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

In my opinion, the judgment this day rendered will, in time, prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott case*. It was adjudged in that case that the descendants of Africans who were imported into this country and sold as slaves were not included nor intended to be included under the word "citizens" in the Constitution, and could not claim any of the rights and privileges which that instrument provided for and secured to citizens of the United States; that at the time of the adoption of the Constitution they were "considered as a subordinate and inferior class of beings, who had been subjugated by the dominant

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race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the government might choose to grant them." 19 How. 393, 404. The recent amendments of the Constitution, it was supposed, had eradicated these principles from our institutions. But it seems that we have yet, in some of the States, a dominant race—a superior class of citizens, which assumes to regulate the enjoyment of civil rights, common to all citizens, upon the basis of race. The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities, as citizens, the States are forbidden to abridge. Sixty millions of whites are in no danger from the presence here of eight millions of blacks. The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law. What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the

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war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned. This question is not met by the suggestion that social equality cannot exist between the white and black races in this country. That argument, if it can be properly regarded as one, is scarcely worthy of consideration; for social equality no more exists between two races when travelling in a passenger coach or a public highway than when members of the same races sit by each other in a street car or in the jury box, or stand or sit with each other in a political assembly, or when they use in common the streets of a city or town, or when they are in the same room for the purpose of having their names placed on the registry of voters, or when they approach the ballot-box in order to exercise the high privilege of voting.

There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race. But by the statute in question, a Chinaman can ride in the same passenger coach with white citizens of the United States, while citizens of the black race in Louisiana, many of whom, perhaps, risked their lives for the preservation of the Union, who are entitled, by law, to participate in the political control of the State and nation, who are not excluded, by law or by reason of their race, from public stations, of any kind, and who have all the legal rights that belong to white citizens, are yet declared to be criminals, liable to imprisonment, if they ride in a public coach occupied by citizens of the white race. It is scarcely just to say that a colored citizen should not object to occupying a public coach assigned to his own race. He does not object, nor, perhaps, would he object to separate coaches for his race, if his rights under the law were recognized. But he objects, and ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit, or claim the right to sit, in the same public coach on a public highway.

The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution. It cannot be justified upon any legal grounds.

If evils will result from the commingling of the two races upon public highways established for the benefit of all, they will be infinitely less than those that will surely come from state legislation regulating the enjoyment of civil rights upon the basis of race. We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of "equal" accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done.

The result of the whole matter is, that while this court has frequently adjudged, and at the present term has recognized the doctrine, that a State cannot, consistently with the Constitution of the United States, prevent white and black citizens, having the required qualifications for jury service, from sitting in the same jury box, it is now solemnly held that a State may prohibit white and black citizens from sitting in the same passenger coach on a public highway, or may require that they be separated by a "partition," when in the same passenger coach. May it not now be reasonably expected that astute men of the dominant race, who affect to be disturbed at the possibility that the integrity of the white race may be corrupted, or that its supremacy will be imperilled, by contact on public highways with black people, will endeavor to procure statutes requiring white and black jurors to be separated in the jury box by a "partition," and that, upon retiring from the court room to consult as to their verdict, such partition, if it be a moveable one, shall be taken to their consultation room, and set up in such way as to prevent black jurors from coming too close to their brother jurors of the white race. If the "partition" used in the court room happens to be stationary, provision could be made for screens with openings through

which jurors of the two races could confer as to their verdict without coming into personal contact with each other. I cannot see but that, according to the principles this day announced, such state legislation, although conceived in hostility to, and enacted for the purpose of humiliating citizens of the United States of a particular race, would be held to be consistent with the Constitution.

I do not deem it necessary to review the decisions of state courts to which reference was made in argument. Some, and the most important, of them are wholly inapplicable, because rendered prior to the adoption of the last amendments of the Constitution, when colored people had very few rights which the dominant race felt obliged to respect. Others were made at a time when public opinion, in many localities, was dominated by the institution of slavery; when it would not have been safe to do justice to the black man; and when, so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land. Those decisions cannot be guides in the era introduced by the recent amendments of the supreme law, which established universal civil freedom, gave citizenship to all born or naturalized in the United States and residing here, obliterated the race line from our systems of governments, National and State, and placed our free institutions upon the broad and sure foundation of the equality of all men before the law.

I am of opinion that the statute of Louisiana is inconsistent with the personal liberty of citizens, white and black, in that State, and hostile to both the spirit and letter of the Constitution of the United States. If laws of like character should be enacted in the several States of the Union, the effect would be in the highest degree mischievous. Slavery, as an institution tolerated by law would, it is true, have disappeared from our country, but there would remain a power in the States, by sinister legislation, to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens, now constituting a part of the political community called the

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People of the United States, for whom, and by whom through representatives, our government is administered. Such a system is inconsistent with the guarantee given by the Constitution to each State of a republican form of government, and may be stricken down by Congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any State to the contrary notwithstanding.

For the reasons stated, I am constrained to withhold my assent from the opinion and judgment of the majority.

MR. JUSTICE BREWER did not hear the argument or participate in the decision of this case.

UNION PACIFIC RAILWAY COMPANY *et al.*<sup>1</sup> v.  
CHICAGO, ROCK ISLAND AND PACIFIC RAIL-  
WAY COMPANY.

UNION PACIFIC RAILWAY COMPANY v. CHI-  
CAGO, MILWAUKEE AND ST. PAUL RAIL-  
WAY COMPANY.

APPEALS FROM THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH  
CIRCUIT.

No. 157, 158. Argued April 21, 22, 1896. — Decided May 25, 1896.

Railroad corporations possess the powers which are expressly conferred by their charters, together with such powers as are fairly incidental thereto; and they cannot, except with the consent of the State, disable themselves from the discharge of the functions, duties and obligations which they have assumed.

The general rule is that a contract by which a railroad company renders itself incapable of performing its duties to the public or attempts to absolve itself from those obligations without the consent of the State.

<sup>1</sup> The other party was *The Omaha and Republican Valley Railway Company*.

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or a contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel; but where the subject-matter of the contract is not foreign to the purposes for which the corporation is created, a contract embracing whatever may fairly be regarded as incidental to, or consequential upon, those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*.

The contract with the Rock Island Company on the part of the Union Pacific Company which forms one subject of this controversy was one entirely within the corporate powers of the latter company, and, throughout the whole of it there is nothing which looks to any actual possession by the Rock Island Company of any of the Union Pacific property beyond that which was involved in its trains being run over the tracks under the direction of the other company; and this was an arrangement entirely within the corporate powers of the Union Pacific Company to make, and which was in no respect *ultra vires*.

The common object of the act of February 24, 1871, c. 67, regarding the construction of a bridge across the Missouri at Omaha, and the act of July 25, 1866, c. 246, touching the construction of several bridges across the Mississippi, was the more perfect connection of the roads running to the respective bridges on either side; and being construed liberally, as they should be, the scheme of Congress in the act of 1871 was to accomplish a more perfect connection at or near Council Bluffs, Iowa, and Omaha, Nebraska.

It being within the power of the Union Pacific Company to enter into contracts for running arrangements, including the use of its track and the connections and accommodations provided for by the contract in controversy, and that contract not being open to the objection that it disables the Union Pacific Company from discharging its duties to the public, it will not do to hold it void, and to allow the Union Pacific Company to escape from the obligations which it has assumed, on the mere suggestion that at some time in the remote future a contingency may arise which will prevent it from performing its undertakings in the contract.

Other objections made on behalf of the Union Pacific Company disposed of as follows: (1) The provision in the contract respecting reference does not take from the company the full control of its road; (2) Its acts in constructing its road in Nebraska, not having been objected to by the State, must, in the absence of proof to the contrary, be deemed valid; (3) The contract is not to be deemed invalid because, during its term, the charter of the Rock Island Company will expire; (4) The Republican Valley Company, being a creation of the Pacific Company, is bound by the contract; (5) The Pacific Company has power, under its charter, to operate the lines contemplated by these contracts, it being a general principle that where a corporate contract is forbidden by a statute or is obviously hostile to the public advantage or convenience, the courts dis-