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BALANCED SCHOLARSHIP AND RACIAL BALANCE

Brian K. Landsberg*

Professor Landsberg presents a responsive essay to Kirk Kennedy's Race-Exclusive Scholarships: Constitutional Vel Non. Professor Landsberg argues for the preservation of the Supreme Court's balanced approach to assessing the validity of affirmative action programs. Landsberg notes approvingly that the Court "has carefully avoided absolutes in deciding affirmative action cases," and criticizes Mr. Kennedy for his support of an absolute, all-or-nothing approach to race-exclusive scholarships. Landsberg argues first, that Regents of the University of California v. Bakke remains good law and that universities should not be enjoined from all race-conscious decisionmaking; second, that race-exclusive scholarships may, in narrow circumstances, be used to overcome the effects of past discrimination; and third, that in a broader range of circumstances, race may be used as a factor in deciding scholarship applications. Landsberg concludes by expressing hope that the Supreme Court will continue to avoid "mechanical formulae and blunderbuss rules," and instead retain its careful case-by-case consideration of race-conscious decisionmaking.

Kirk Kennedy's article epitomizes much of the academic and civic discourse concerning race issues today. Larded with assumptions about race and merit, the article essentially ignores history and the competing values at stake in the affirmative action debate, and treats the issue as one of partisan politics. The article treats all forms of affirmative action the same, disdaining distinctions between quotas and less intrusive race-conscious measures. Adopting the style of the *National Review* or *New Republic*, it heaps sarcasm and scorn on presidents, professors, and academic administrators, dismissively assuming their lack of understanding. At the same time, the article bestows Biblical sanction on those with whom Kennedy agrees.¹ The result is that, although the article may speak many truths, taken as a whole it is false. The article displays hubris reminiscent of former Assistant Attorney General William Bradford Reynolds, who in 1985 insisted that *Firefighters Local Union No. 1784 v. Stotts*² had held that courts could not order employers to implement race-based

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1. See Kirk Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 *WAKE FOREST L. REV.* 759, 760 (1995) (referring to Powell's decision as a "Solomonic compromise").

2. 467 U.S. 561 (1984) (disapproving the use of a layoff quota as relief in an employment discrimination case).

affirmative action plans as a remedy for past employment discrimination.³ Two terms later, the Supreme Court upheld the use of race-based affirmative action to remedy employment discrimination.⁴

Unlike Kennedy, the Supreme Court has carefully avoided absolutes in deciding affirmative action cases. While Justice Scalia is willing to adopt a rigid rule which says "never,"⁵ most of the other Justices have opted for more flexible standards. They have often taken pains to underscore the fact-specific nature of review of affirmative action programs.⁶ Nonetheless, as Mr. Kennedy's article exemplifies, the tendency to over-read Supreme Court rulings may transform a subtle opinion which recognizes the clash of competing values into an all-or-nothing decision. Just as *Fullilove v. Klutznick*⁷ has led many recklessly to embrace ill-conceived affirmative action plans, cases such as *Stotts* and *City of Richmond v. J.A. Croson Co.*⁸ have led others to proclaim affirmative action dead by decree. Kennedy makes the same sort of all-or-nothing interpretations, baldly asserting, for example, that *Croson* "sounded the constitutional death knell for state-sponsored affirmative action programs,"⁹ and that "*Croson* has virtually overruled *Bakke*."¹⁰

3. Reynolds reacted to the decision in these words:

As we read the *Stotts* opinion, it appears to us to say that the federal courts may neither require nor permit race-conscious or gender-conscious hiring, promotion or layoff procedures as an element of Title VII relief (whether incorporated in a court order or a consent decree) in an employment discrimination case.

Affirmative Action: Joint Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, and the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 99th Cong., 1st Sess. 34 (1985) (statement of William Bradford Reynolds).

4. See *Local No. 93 Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 517 (1986).

5. Justice Scalia has stated that, "[i]n 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." *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 1097, 2118 (1995) (Scalia, J., concurring in part and concurring in the judgment).

6. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 362 (1978) (Brennan, J., White, J., Marshall, J., and Blackmun, J., stating that past discrimination is an impediment with regard to medical school).

7. 448 U.S. 448, 492 (1980) (upholding federal 10% minority set-aside program for public works projects).

8. 488 U.S. 469, 511 (1989) (holding that Richmond's minority set-aside program violated the equal protection clause of the Fourteenth Amendment).

9. Kennedy, *supra* note 1, at 767. One paragraph later, however, Kennedy reverses field, conceding that "narrow tailoring may now require *a priori* consideration of race-neutral alternatives before a government entity may decree a race-based remedy." *Id.* at 768. He later concludes "that there is a rebuttable presumption that race-based scholarships are unconstitutional." *Id.* at 781. In other words, where the university successfully rebuts the presumption, a race-based remedy—i.e., affirmative action—may properly be imposed.

10. *Id.* at 797. Here Kennedy refers to *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), in which the Supreme Court held that quota admissions to a state-operated medical school offend Title VI of the Civil Rights Act of 1964, but that the University may employ other race-conscious means to promote the diversity of its student body.

I want to make the following arguments. First, Justice Powell's opinion in *Regents of the University of California v. Bakke* remains good law, as does its judgment, which holds not only that Bakke should be admitted to medical school, but also that the University of California should not be enjoined from all race-conscious decisionmaking.¹¹ Second, race-exclusive scholarships may, in narrow and rare circumstances, be used to overcome the effects of past discrimination. And, third, in a much broader range of circumstances, race may be used as a factor in deciding on scholarship applications.

As Mr. Kennedy notes, Justice Powell's opinion in *Bakke* does not speak for the Court, but instead was a tie-breaking opinion mediating between two camps of four Justices each.¹² It is, however, crucial to recognize that Justice Powell spoke for two majorities. Powell agreed with one set of Justices, though for different reasons, that the University of California at Davis Medical School violated Title VI of the Civil Rights Act of 1964 by setting aside for minority applicants slots for admission for which non-minorities would not be considered.¹³ Powell also agreed with the other Justices, again for different reasons, that "the portion of the [California Supreme Court's] judgment enjoining [the Regents] from according any consideration to race in its admissions process must be reversed."¹⁴ The judgment of the Court, in other words, disapproved the medical school's quota system, but affirmed the school's right to take race into account in some manner in the admissions process.

As one observer has pointed out, Justice Powell's opinion stresses dual themes. First, the state actor "must demonstrate that it is using racial or gender preferences to select among equally, or relatively, well-qualified candidates."¹⁵ Second, the actor must derive some benefit from the affirmative action plan, "whether those benefits be in the form of increasing labor force productivity, deterring inefficient practices, or improving educational diversity in a way that advances the institution's educational mission."¹⁶ Far from having been repudiated, "[t]he dual themes of Justice Powell's *Bakke* opinion—qualification of the applicants as well as a stated benefit to the firm—run throughout the Court's affirmative action cases."¹⁷

Mr. Kennedy mischaracterizes *Bakke*. Relying on a dictum in the opinion of Justice Powell, he implies that *Bakke* specifically rejected claims made by the University of California that it was properly equipped to make a finding that UC-Davis had committed either statutory or constitutional violations.¹⁸ Even if Justice Powell's opinion were the opinion

11. *Bakke*, 438 U.S. at 320.

12. Kennedy, *supra* note 1, at part I.A.

13. *Bakke*, 438 U.S. at 271.

14. *Id.*

15. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1310 (1995).

16. *Id.*

17. *Id.* at 1311.

18. Kennedy, *supra* note 1, at 787.

of the Court, and even if the dictum were a holding, Kennedy would still be mistaken. It is inconceivable that a state agency, which knows it has discriminated in the past, would be constitutionally disabled from taking affirmative steps to remedy the effects of the past discrimination. Indeed, the Court has held that a school system with a history of past discrimination commits a fresh constitutional violation when it fails to take such steps to overcome its own past discrimination.¹⁹ Most recently, in *Croson*, one of the reasons for disapproving Richmond's set-aside program was the City's failure to show that the program would remedy the effects of past discrimination.²⁰ In any event, Justice Powell did not say that the Regents were incompetent to remedy the effects of their own discrimination, but only that the Regents did not have the authority to employ race-based means to overcome the effects of societal discrimination.²¹

The two-pronged holding of *Bakke*, striking down the quota plan but upholding diversity-based, narrowly tailored affirmative action, survives completely unscathed. The Court still requires compelling state justifications for quotas and still acknowledges that some race-based decision-making by the state may be justified. Since *Bakke*, the Court has followed a case-by-case approach to constitutional challenges to affirmative action. It has required race-based decisionmaking to overcome the effects of past discrimination.²² It has approved a 50% promotion quota which a federal court imposed as a last resort remedy against a recalcitrant government employer.²³ It has upheld voting districts designed to comply with the Voting Rights Act and to ensure minority voters an electoral voice.²⁴ It has approved a federal 10% set-aside program for minorities in the grant of federal contracts.²⁵ It has upheld limited preferences for minorities in distress sales and competitive grants of broadcast licenses.²⁶ On the other hand, the Court has held that race-based layoffs of teachers, designed to provide a faculty whose racial makeup mirrors that of the students, violates the equal protection clause.²⁷ It has disapproved a 30% minority

19. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979); *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

20. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989).

21. Although Kennedy offers a lengthy, edited quote from Justice Powell's opinion to prove his point, he omits from the quote Justice Powell's observation that the University "does not purport to have made and is in no position to make, such findings." *Bakke*, 438 U.S. at 310. Moreover, Kennedy's version of that quote says "in no position to make, such findings [of past discrimination]." Kennedy, *supra* note 1, at 787. Here, however, Justice Powell was referring to past societal discrimination, not to past discrimination by the University. The paragraph in Justice Powell's opinion which follows the garbled quote begins with the statement: "Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of 'societal discrimination' does not justify [the classification in *Bakke*]." *Bakke*, 438 U.S. at 310.

22. *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 25 (1971).

23. *United States v. Paradise*, 480 U.S. 149, 185-86 (1987).

24. *United Jewish Orgs. of Williamsburg, Inc. v. Carey*, 430 U.S. 144, 165 (1977).

25. *Fullilove v. Klutznick*, 448 U.S. 448, 490-92 (1980).

26. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 552 (1990).

27. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283-84 (1986).

set-aside in the grant of contracts by the City of Richmond.²⁸ It has disapproved race-based voting districts where the state lacked a compelling interest for its use of race.²⁹

The Court's most recent discussion of *Bakke* appears in *Adarand Constructors, Inc. v. Pena*, where the Court described Justice Powell's conclusion, in which Justice White had joined, as dictating that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting examination."³⁰ The Court cited with approval Justice Powell's rejection of a less stringent standard for "benign" classifications, because, as Justice Powell said, "it may not always be clear that a so-called preference is benign."³¹ Justice O'Connor's opinion in *Adarand* also reflects a split among those Justices who supported the Court's disposition of the case. She was careful to emphasize that strict scrutiny was not necessarily fatal to race-conscious government programs.³² She stressed that "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test."³³ For this reason, the case was remanded to determine whether the program at issue was narrowly tailored to serve a compelling interest.³⁴

*United States v. Fordice*³⁵ is the only case since *Bakke* to consider race discrimination in higher education. In *Fordice*, the lower courts held that Mississippi, by removing its explicit racial barriers to admission to public colleges and universities, had complied with the equal protection clause.³⁶ The Supreme Court, however, vacated and remanded, holding that "[t]o the extent that the State has not met its affirmative obligation to dismantle its prior dual system, it shall be adjudged in violation of the Constitution."³⁷ The Court added that "[i]f policies traceable to the *de jure* system are still in force and have discriminatory effects, those policies too must be reformed to the extent practicable and consistent with sound educational policies."³⁸

28. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989).

29. *Miller v. Johnson*, 115 S. Ct. 2475, 2490-91 (1995).

30. *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2108 (1995) (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)).

31. *Id.* at 2108 (citing *Bakke*, 438 U.S. at 298).

32. *Id.* at 2118.

33. *Id.* at 2117. Justice Scalia did not assent to this statement, which therefore represents the opinion of only four Justices. Four dissenting Justices, however, would have upheld the Minority Business Enterprise (MBE) program. Thus, eight Justices would either apply nonfatal strict scrutiny or a lesser standard to the MBE program.

34. *Id.* at 2118.

35. 112 S. Ct. 2727 (1992).

36. *Id.* at 2734-35.

37. *Id.* at 2743.

38. *Id.* at 2736. The concurring Justices disagreed as to what this standard meant. Justice O'Connor emphasized that the burden remained on Mississippi, and that "the circumstances in which a State may maintain a policy or practice traceable to *de jure* segregation that has segregative effects are narrow." *Id.* at 2743 (O'Connor, J., concurring). Justice Thomas, on the other hand, seemed to support the majority formulation only because he

In short, *Bakke* survives intact. What are the implications of *Bakke* for educational institutions which grant race-based scholarships?³⁹ *Bakke* disapproves race-based action which excludes a racial group from consideration for benefits, except where the action is necessary to advance a compelling state interest.⁴⁰

Analysis must begin with an understanding of the reasoning that produced the compelling interest test. Most classifications imposed by government do not violate the equal protection clause of the Fourteenth Amendment. Government, by its very nature, must classify. All rules lead to different treatment of individuals. Those who violate rules are subject to sanction; those who follow rules are not. As Tussman and tenBroek illustrate in their classic treatment of equal protection, the reasonableness of any classification depends on its relationship to a legitimate purpose of the law.⁴¹ Normally courts defer to judgments of the legislative and executive branches that the classification serves a legitimate purpose. The Supreme Court treats race classifications differently, however, for at least two reasons. First, experience teaches that race has seldom been rationally related to a legitimate state interest. Second, the Fourteenth Amendment was adopted in part to address racial discrimination against the newly freed slaves, who were all African-Americans.

As the Court noted as early as 1872, the "one pervading purpose" of the Reconstruction Amendments was to ensure "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."⁴² Seven years later, the Court again affirmed that the Fourteenth Amendment "was designed to assure to the colored race the enjoyment of all the civil rights that under the law are enjoyed by white persons, and to give to that race the protection of the general government, in that enjoyment, whenever it

believed the burden of justification would impose "a far narrower, more manageable task than that imposed under *Green*." *Id.* at 2745 (Thomas, J., concurring). He believed the Court's standard was implicitly consistent with an intent requirement: "if a policy remains in force, without adequate justification and despite tainted roots and segregative effect, it appears clear—clear enough to presume conclusively—that the State has failed to disprove discriminatory intent." *Id.* Finally, he believed that the State legitimately could maintain "historically black colleges as such." *Id.* at 2746. Justice Scalia, pointing to this disagreement as evidence of confusion engendered by the Court's opinion, concluded that "essentially, the Court has adopted *Green*." *Id.* at 2753 (Scalia, J., concurring in the judgment in part and dissenting in part).

39. In addressing this question, I am assuming that the same standards will apply to state and private institutions of higher learning. While the Fourteenth Amendment applies only to the former, the latter are subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1988), to the extent that they receive federal financial assistance.

40. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305 (1978).

41. Joseph Tussman, & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 346 (1949).

42. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872). The Court added that persons who were not of African descent were also protected by the Fourteenth Amendment. *Id.*

should be denied by the states."⁴³ In 1938, the Court further developed this point in famous footnote 4 of *United States v. Carolene Products Co.*,⁴⁴ where Justice Stone raised the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."⁴⁵ The Court has most recently stressed that the compelling interest test nonetheless applies to discrimination against whites and non-whites alike.⁴⁶ Although the Court itself has upheld some race-based decisions which disfavor white persons, it is difficult to conceive of a case today in which the state could show a compelling interest in discriminating against persons of color.

The label "compelling" is a confusing one, because facially it arrogates to courts the legislative function of deciding the relative importance of various objectives. The Court has never explained how it determines which objectives are compelling and which are merely important or legitimate. One may gather from its decisions that objectives which find their basis in the Constitution are compelling.⁴⁷ Apparently, however, overcoming societal discrimination and providing role models for minority students are not considered compelling interests.⁴⁸ We are, therefore, left guessing as to what, if any, other interests the Court might regard as "compelling."

It is important to understand how the Court reached these conclusions. As to societal discrimination, the Court pointed to the perceived incompatibility of this objective with the narrow tailoring requirement.⁴⁹ The Court regarded the role model justification as grounded in racially discriminatory assumptions.⁵⁰ The term "compelling interest" seems, in

43. *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879). The Court reasoned that it was "the colored race" for whose consideration the amendment was "framed and adopted." *Id.* Professor Jerome Culp has argued:

The genuine moral goal associated with race is to end race-based oppression.

Color-blindness may sometimes accomplish this moral goal, but it is not the goal itself. Therefore, the color-blind principle in modern constitutional discourse must be seen as a policy argument and not a moral precept.

Jerome Culp, *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162, 171 (1994).

44. 304 U.S. 144, 152 n.4 (1938).

45. *Id.*

46. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995).

47. See *United States v. Paradise*, 480 U.S. 149, 153-54 (1987) (insuring against future discrimination); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) (overcoming past unconstitutional action); *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (national security).

48. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (stating that the role model theory fails as a basis for upholding racial classification because it has no probative value in demonstrating past discrimination); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274-76 (1986) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification.").

49. *Wygant*, 476 U.S. at 275-76.

50. *Croson*, 488 U.S. at 498-99.

combination with "narrowly tailored," to be a short-hand phrase for the Court's skepticism⁵¹ regarding the legitimacy of race-based decisionmaking. As Justice O'Connor's plurality opinion in *Croson* put it:

[T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.⁵²

The only interests which a majority of the Court has recognized as compelling in related contexts are the interest in overcoming the effects of past discrimination (the remedial interest) or the interest in ensuring future non-discrimination (the prophylactic interest). Both those interests were involved, for example, in *United States v. Paradise*,⁵³ in which the Court upheld an order requiring that 50% of state trooper promotions in the Alabama Department of Public Safety go to African-Americans.⁵⁴ And the Fourth Circuit's disapproval of the Banneker program in *Podberesky v. Kirwan*,⁵⁵ stemmed in part from the court's inability to see continuing effects of past discrimination at the University of Maryland.⁵⁶

Both the court which decided *Podberesky* and Mr. Kennedy fail to place in appropriate context the one key fact on which the University of Maryland's Banneker scholarship program was based. The State of Maryland had traditionally maintained two sets of institutions of higher education, one set for whites and the other for African-Americans.⁵⁷ Although the state had abandoned its policy of segregation, open admissions had not appreciably altered the dual system of education.⁵⁸ In this circumstance it is not true that affirmative action is, as Kennedy asserts, a zero sum game. The question is not whether eligible Maryland students will attend a university or receive financial aid, but which campus will they attend. The Banneker program was designed to attract African-American students to the University of Maryland. The appropriate inquiry in the case would have considered Maryland's system of higher education as a whole and would have asked whether it had been successfully converted from a dual race-based system to a unitary system without "white schools

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

52. *Croson*, 488 U.S. at 493 (O'Connor, J., plurality opinion).

53. 480 U.S. 149 (1987).

54. *Id.* at 185-86.

55. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3832 (U.S. May 22, 1995).

For a discussion of *Podberesky* by Mr. Kennedy, see Kennedy, *supra* note 1.

56. See *Podberesky*, 38 F.3d at 154 (racially discriminatory scholarship program not upheld because not justified by effects of past discrimination).

57. See *Podberesky v. Kirwan*, 838 F. Supp. 1075, 1076 (D. Md. 1993) (Maryland universities separated for almost a century by law), *vacated*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 63 U.S.L.W. 3832 (U.S. May 22, 1995).

58. See *id.* at 1077-80 (for the district court's treatment of manifestations of past discrimination).

or black schools, but just schools.”⁵⁹ Had the courts found that effects of past discrimination still infected Maryland’s system of higher education, they would have found a compelling state interest in overcoming those effects.⁶⁰

The remedial justification for race-based scholarships applies primarily to those states which maintained a dual system of higher education. In some of those states, the effects of past discrimination can still be seen in the racial disparities in enrollments in the former white and former black institutions of higher education. Given the highly fact-specific nature of the *Podberesky* opinion and the apparent failure of the University of Maryland to develop any facts relating to the overall dual system in Maryland, *Podberesky* tells us little about the probable outcome in these other states. In addition, the decision does not address the prophylactic justification for race-conscious programs. True, *Podberesky* also held that the Banneker program was not “narrowly tailored” to overcome the effects of past discrimination.⁶¹ That holding, however, largely depended on the Fourth Circuit’s view that those effects were by now attenuated.⁶²

Little attention has been given to the prophylactic justification for considering race. If a university has a very small non-white enrollment, it might be concerned that the lack of non-white students results from racial discrimination in admissions and financial aid. The Court has never said that a university must assume that disproportionately low enrollment of qualified persons of color, when compared with the eligible pool, flows from natural differences between the races or other adventitious reasons. A university might reasonably look inward for the answer and conclude that the problem lies with its own admissions process or with the treatment of those minorities who are enrolled. Indeed, under Department of Education regulations which have been in effect since 1964, a university may not use “criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.”⁶³ The Supreme

59. *Green v. County Sch. Bd.*, 391 U.S. 430, 437 (1968).

60. The Department of Education Title VI regulation, which has remained essentially unchanged through six presidential administrations, provides: “In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.” 34 C.F.R. § 100.3(b)(6)(i) (1994).

61. *Podberesky*, 38 F.3d at 161.

62. The Fourth Circuit’s reasoning has been criticized as well for failing to recognize the evidence that race-neutral programs had not worked and that the Banneker program was a temporary one which imposed a minimal burden on students who were not African-American. Recent Case, 108 HARV. L. REV. 1773, 1777-78 (1995).

63. This language first appeared in the Title VI regulation of the Department of Health, Education and Welfare. 45 C.F.R. § 80.3(b)(2) (1994) (originally published in the Federal Register on December 4, 1964). It currently appears in the Department of Education Title VI regulation, 34 C.F.R. 100.3(b)(2) (1994). The Supreme Court upheld this use of an “effects” test in *Guardians Ass’n v. Civil Serv. Comm’n of New York*, 463 U.S. 582

Court has not foreclosed the possibility that a school could therefore reasonably decide to supplement its selection and recruitment devices so as to ensure that it does not discriminate against persons of color. Federal Title VI regulations have approved this prophylactic use of affirmative action since 1973.⁶⁴

While this prophylactic justification would further a compelling interest, it may be difficult to show that race-exclusive scholarships are narrowly tailored to the prophylactic interest. The prophylactic justification falls somewhere between the reparative justification, which might well support some race-exclusive actions, and the diversity justification, which Justice Powell said would support consideration of race but not race exclusivity.

Although race-exclusive scholarships will often but not always be held to violate the Fourteenth Amendment, Justice Powell upheld diversity as a legitimate educational interest which would support some consideration of race as a "plus" in admissions. His logic would apply equally to financial aid. Powell characterized diversity as "a goal that is of paramount importance in the fulfillment of [the school's educational] mission"⁶⁵ and said "the interest of diversity is compelling in the context of a university's admissions program."⁶⁶ More recently, the Court stated that "the interest in enhancing broadcast diversity is, at the very least, an important governmental objective."⁶⁷

The Department of Education has concluded that Justice Powell's opinion and later decisions do not foreclose race-based scholarships where they are narrowly tailored to achieve diversity.⁶⁸ This conclusion is fur-

(1983); see also *Lau v. Nichols*, 414 U.S. 563, 566-67 (1974) (noting that the Civil Rights Act of 1964 bans discrimination based "on the ground of race, color, or national origin" in "any program or activity receiving federal financial assistance" and the implementing regulations of the Department of Health, Education, and Welfare).

64. Twenty-five agencies adopted regulations approving prophylactic affirmative action. 38 Fed. Reg. 17,919-17,997 (1973). The Department of Health, Education, and Welfare regulation provided that a recipient of federal funds "may take affirmative action to overcome the effects of conditions which resulted in limiting participation [in the program] by persons of a particular race, color, or national origin." 45 C.F.R. § 80.3(b)(6)(ii) (1994). The identical language survives today in the Department of Education Title VI regulations, 34 C.F.R. § 100.3(b)(6)(ii) (1994).

65. *Regents of the Univ. of Cal. v. Bakke*, 430 U.S. 265, 313 (1978) (opinion of Powell, J.).

66. *Id.* at 314.

67. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990). *Metro's* holding that the standard of review of federal affirmative action programs is more relaxed than the standard of review of state affirmative action programs has been overruled. *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2113 (1995). The *Adarand* Court, however, did not disapprove the above statement regarding diversity.

68. See 59 Fed. Reg. 8756, 8757 (Feb. 23, 1994) (noting that "a college may use race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria"). The policy guidance then provides a comprehensive definition of "narrowly tailored." *Id.* Mr. Kennedy's broadside against the Department of Education guidance ignores

ther supported by the arguments of many colleges that "the use of race or national origin as a plus factor in awarding financial aid may be inadequate to achieve diversity."⁶⁹ In so concluding, the Department has ventured slightly beyond clear Supreme Court doctrine into the unknown. The Department's policy guidance makes a respectable argument that, since pursuit of diversity may support use of race as a plus factor, the Court must view diversity as a compelling interest in the context of higher education. The Department argues that a college's interest in seeking diversity flows from the First Amendment and, therefore, is constitutionally based.⁷⁰ Moreover, a college may be able to demonstrate the existence of barriers which render ineffectual the plus factor technique.⁷¹ If so, it would seem to follow that narrowly tailored race-exclusive scholarships might survive constitutional scrutiny. The case against the Department of Education guidance is not the slam-dunk presented by Mr. Kennedy.

No issue has been more divisive in America than race. Consideration of race-based affirmative action requires sensitivity to competing interests. The Supreme Court has navigated carefully in its consideration of permissible and impermissible uses of race. It has avoided mechanical formulae and blunderbuss rules, preferring instead a careful case-by-case consideration of race-conscious decisionmaking. One would hope and expect that the Court would continue on this course if faced with the issue of race-based scholarships.

its emphasis on narrow tailoring.

69. *Id.* at 8761. The Department provided an extensive legal analysis to support its decision to allow race-exclusive scholarships in these narrow circumstances. *Id.* at 8761-62. Mr. Kennedy completely ignores the Department's reasoning.

70. *Id.* at 8761. The Department supports this view with a quotation from Justice Powell's opinion in *Bakke*: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body." *Regents of the Univ. of Cal. v. Bakke*, 430 U.S. 265, 312 (1978). *But see* *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-05 (1983) (noting that the denial of charitable tax-exempt status to racially discriminatory university does not offend the First Amendment).

71. *See* U.S. GENERAL ACCOUNTING OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS 9-10 (1994) (noting that the elimination of minority targeted scholarships would attenuate the ability of some schools to recruit and retain minority students).