RACIAL DISCRIMINATION
(Update 2)

Supreme Court decisions at the end of the 1980s heralded the ascendancy of colorblind constitutionalism. Decisions in the 1990s confirmed the preeminence of that vision.

In SHAW V. RENO (1993), the Court ruled in favor of a FOURTEENTH AMENDMENT challenge to North Carolina's enactment of a majority-black ELECTORAL DISTRICT, created pursuant to an agreement with the U.S. Department of Justice under the terms of the VOTING RIGHTS ACT OF 1965. MOBILE V. BOLDEN (1980) requires that one show both an intent to discriminate and discriminatory effect to prevail on an EQUAL PROTECTION challenge to electoral districting. The challengers of the North Carolina plan, which resulted in the election of the first African American member of Congress from that state since RECONSTRUCTION, alleged neither, claiming instead a violation of their right to "participate in a 'color-blind' electoral process." Despite the novelty of this claim, the Court held that they had stated an adequate claim for relief. Focusing on the "extreme irregularity" in the shape of the district, *Shaw* suggested that the districting legislation "was unexplainable on grounds other than race," and so, prohibited under the Fourteenth Amendment absent a showing of a COMPELLING STATE INTEREST. *Shaw* worked a substantial revision of equal protection doctrine in this area, although it did so on the highly context-specific basis of district shape.

Shaw says less about the majority's general concern for quashing racial discrimination than about its concern that government not consider race in efforts to remedy past discrimination. Consider ADARAND CONSTRUCTORS, INC. V. PEÑA (1995). At issue was the STANDARD OF REVIEW to apply when the federal government relies on a racial classification in an AFFIRMATIVE ACTION program: the STRICT SCRUTINY necessary where the government harms a racial group; or, in recognition of the benign purpose of the classification, a less onerous intermediate standard. Because strict scrutiny is nearly always fatal to the law under review, the answer to this question goes directly to the viability of government-sponsored affirmative action programs. A plurality in FULLILOVE V. KLUTZNICK (1980) upheld a federal program similar to the one at issue in *Adarand* along lines approximating an intermediate standard of review. The Court in RICHMOND (CITY OF) V. J. A. CROSON CO. (1989), however, ruled that where a municipality attempted a similar program, it would have to meet the higher level of justification. *Croson* distinguished the reach of the federal government in the area of race relations, stressing the power to remedy racism vested in Congress by the FOURTEENTH AMENDMENT, SECTION 5. Only the federal government would be allowed leeway in designing race-based remedies; other governmental actors would be held to a stricter standard regardless of whether they sought to harm or help minorities. Relying on *Fullilove* and *Croson*, the Court in METRO BROADCASTING, INC. V. FCC (1990) used an intermediate standard to uphold a federal affirmative action program. Nevertheless, *Adarand* sidestepped *Fullilove* and OVERRULED *Metro Broadcasting*, imposing a heightened level of justification on the federal government. Congress, like the states, now faces strict scrutiny in relying on racial classifications, irrespective of whether for harmful or remedial purposes. (Note, though, that *Adarand* held off on whether strict scrutiny means the same thing for Congress as for others, leaving open the future possibility of relatively more though still limited deference to the former.)

The MAJORITY OPINIONS in *Croson*, *Shaw*, and *Adarand*, all by Justice SANDRA DAY O'CONNOR, stop just short of announcing that government may never rely on race in the effort to remedy social inequality. Meanwhile, Justices ANTONIN SCALIA and CLARENCE THOMAS strongly urge the Court to move to full colorblindness. In his concurrence in *Adarand*, Scalia suggests that "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." Thomas expounds "a 'moral and constitutional equivalence' between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality." Whether the Court will complete or retreat from its attack on affirmative action remains to be seen. For now, however, the Court seems far more concerned with limiting race discrimination of the remedial than of the invidious sort. In this context, one cannot help but recall Charles L. Black, Jr.'s injunction, in responding to criticism of BROWN V. BOARD OF EDUCATION (1954), that we laugh when confronted with the argument that SEGREGATION amounted to "equal treatment." Such laughter might be appropriate here, too, in response to the suggestion that affirmative action and Jim Crow be morally and legally equated, were it not for the fact that it is a majority of Supreme Court Justices who insist on the equation.

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