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BACK TO *BAKKE*: AFFIRMATIVE ACTION REVISITED IN EDUCATIONAL DIVERSITY

*Dawn R. Swink**

You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, 'You are free to compete with all others' and still justly believe you have been completely fair.¹

In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.²

I. INTRODUCTION

Affirmative action in higher education has never been more established, and more vulnerable, than it is today. It is difficult to find a reputable school that does not practice some form of affirmative action, yet affirmative action is under the most serious attack it has endured in decades. Recent constitutional challenges have yielded conflicting results in Texas, Washington, Georgia, Maryland, and Michigan. The fundamental issue in these cases and in this article is whether educational diversity is a compelling interest that justifies racial preferences in university admission programs.

Affirmative action programs do serve compelling interests. Our universities are, and should continue to be, places where people from different walks of life and diverse backgrounds come together to learn from one another. Learning with such people helps destroy racial stereotypes and animosity. This

* Assistant Professor of Business Law at the University of Saint Thomas in St. Paul, Minnesota. I would like to thank Vincent, Zachary and Chantel Wang for their never-ending faith, love, and patience. A special thank you to Mr. Chad Balfanz for his incredible proof-reading skills.

1. Nicolaus Mills, *Introduction*, in *Debating Affirmative Action* 1, 7 (Nicolaus Mills, ed., Delta 1994) (writing about President Lyndon Johnson's commencement speech at Howard University in June 1965).

2. *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (opinion of Blackmun, J.).

article argues that diversity should continue to be used as a factor in the admissions process.

University education typically occurs early in life and is of limited duration. Applying affirmative action programs only during this period creates an interesting paradox. Any detrimental effects from the programs will be short-lived. However, because affirmative action is applied to the formative years, the benefits last a lifetime. In other words, education can be the "ramp up" to a level playing field, eliminating the need for affirmative action later in life or in other fields of endeavor. Race should be used as a factor in admissions.

This article traces the formative history of affirmative action, including the *Bakke* decision. It outlines recent Court decisions in Texas, Washington, Georgia, Maryland, and Michigan and examines the status of "color-blind" programs in California as potential indicators of what happens when race as a factor is removed from the admissions selection process. Finally, the importance of racial diversity in higher education is analyzed.

II. THE COLORFUL HISTORY OF AFFIRMATIVE ACTION

The U.S. Constitution is not a color-blind document. In fact, it is race-biased. In its original form, each member of the House of Representatives was required to have been a "Citizen" for seven years,³ and each member of the Senate was required to have been a "Citizen" for nine years.⁴ Moreover, the Framers of the Constitution also required the President to be a natural born citizen or a citizen at the time of the adoption of the Constitution.⁵ These seemingly innocuous requirements failed to include any persons other than whites; African Americans were effectively excluded from citizenship.⁶ In *Dred Scott*, the Supreme Court's analysis of the framers' original intent reveals that a "perpetual and impassable barrier was intended to be erected between the white race and the one they

3. See U.S. Const. art. I, § 2, cl. 2.

4. See U.S. Const. art. I, § 3, cl. 3.

5. See U.S. Const. art. II, § 1, cl. 5.

6. The original intent of the framers was not to include African-Americans as citizens, as the founding fathers believed that African-Americans were of an 'inferior order' for whom slavery was a "benefit." See *Dred Scott v. Sanford*, 60 U.S. 393, 403 (1856).

had reduced to slavery.”⁷

To maintain this color-conscious barrier from 1790 to 1870, the U.S. Congress limited naturalization and voting rights to whites. From 1879 to 1906,⁸ the color barrier fell slightly when the U.S. Supreme Court expanded naturalization to include whites and freed slaves.⁹ The number of representatives allotted to each state was determined by the number of “free Persons,” “excluding Indians not taxed” and “three-fifths of all other persons.”¹⁰

Despite its misguided beginnings, it was the Fourteenth Amendment where notions of affirmative action originated. The Equal Protection Clause of the Fourteenth Amendment provides that “No State shall . . . deny to any person . . . the equal protection of the laws.”¹¹ The underlying policy was that state governments must treat similarly situated persons in a similar manner.¹² When the U.S. Supreme Court had its first opportunity to interpret “Equal Protection” in the Fourteenth Amendment, Justice Black, dissenting, noted that the Amendment “came into being primarily to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves.”¹³ It was this ambiguity in defining “Equal Protection” that led to the seminal decision, *Plessy v. Ferguson*,¹⁴ and the doctrine of “separate but equal.”¹⁵

7. *Id.* at 409.

8. See *Ozawa v. U.S.*, 260 U.S. 178, 192–93 (1922). In *Ozawa*, the debate was whether the explicit exclusions of citizens for blacks and Indians meant that only the enumerated races were excluded or, rather, that the Framers intended inclusion of whites only.

9. See *id.*

10. U.S. Const. art. I, § 2, cl. 3.

11. U.S. Const. amend. XIV, § 1.

12. This policy reflects the *Yick Wo* principle which originated in *Yick Wo v. Hopkins*, 118 U.S. 356 (1885) (holding that a facially neutral statute requiring permits for laundry operators violated the Equal Protection Clause of the Fourteenth Amendment when all Chinese applicants were denied permits).

13. *Goldberg v. Kelly*, 397 U.S. 254, 275 (1970) (Black, J., dissenting). See also *Strauder v. West Virginia*, 100 U.S. 303, 306 (1879) (holding the Fourteenth Amendment was “one of a series of constitutional provisions having a common purpose, namely securing to a race, recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”). But see *City of Richmond v. J.A. Croson*, 488 U.S. at 559 (where Justice Marshall stated that in fact, Congress’s concern in passing these Amendments was that states would not adequately respond to racial violence or discrimination against newly freed slaves).

14. 163 U.S. 537 (1896). In *Plessy*, the Supreme Court upheld a Louisiana law

The modern era of “affirmative action” began in 1961 when President John F. Kennedy first coined the term in Executive Order 10,925.¹⁶ That Order forbade federal “government contractors from discriminating on the basis of ‘race, creed, color, or national origin.’”¹⁷ It required contractors “to take affirmative action” to prevent discrimination to applicants and employees.¹⁸

In 1964, Congress passed the Civil Rights Act.¹⁹ This groundbreaking legislation prohibited “race...[and ethnicity] discrimination by *private* employers, agencies, and educational institutions receiving federal funds.”²⁰ The scope of affirmative action was again expanded when President Lyndon B. Johnson issued Executive Order 11,246 in 1965. That Order provided “equal opportunity in *Federal* employment for all qualified persons...[and] prohibit[ed] discrimination in employment because of race, creed, color, or national origin.”²¹ Congress soon after created the Equal Employment Opportunity Commission²² as a vehicle for reviewing *federal* affirmative action policies. By the 1970’s, federal agencies began enforcing regulations, calling for timetables and goals to implement this idea of affirmative action.

Forty years have passed since President Kennedy issued Executive Order 10,925. While the initial efforts of affirmative action were directed primarily at federal government

that required segregation of black and white train passengers. When Plessy, seven-eighths white, attempted to sit in the passenger car reserved for whites, and refused to move to the car “used for the race to which he belonged,” he was ejected from the train and arrested.

15. See *Bakke*, 438 U.S. at 401 (Marshall, J., concurring in part and dissenting in part) (“From Plessy to Brown v. Board of Education, ours was a Nation where, by law, an individual could be given ‘special’ treatment based on the color of his skin.”).

16. Exec. Order No. 10,925, 3 C.F.R. 448 (1961). Executive Order 10,925 was superseded by Executive Order 11,246.

17. Terry Eastland, *The Case Against Affirmative Action*, 34 Wm. & Mary L. Rev. 33, 33 (1992).

18. Executive Order 10,925.

19. 42 U.S.C. § 2000 (1999).

20. 42 U.S.C. §2000d of the Civil Rights Act of 1964 provides: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation ‘in,’ be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Emphasis added.

21. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-65) *as amended in* 42 U.S.C. § 2000e (1999). Emphasis Added.

22. Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103 (1972).

employment and private industry, affirmative action gradually extended into other areas, including admissions programs in higher education. As the application of affirmative action expanded, so did the group of intended beneficiaries.²³

Today, the originally intended goals of promoting equality and eliminating race-based discrimination are confronted by “an increasing number of Americans...declaring war on policies giving ‘preferential’ treatment to specified racial and ethnic groups.”²⁴ Whether out of hostility, lack of knowledge, or simple indifference, a recent survey concludes that forty percent to sixty percent of all white Americans *incorrectly* believe that the average black American is faring about as well as, and perhaps even better than, the average white American in terms of their jobs, incomes, schooling and health care.²⁵ Government statistics show that, while they have narrowed the gap, African Americans continue to lag significantly behind whites in the aforementioned areas.²⁶ Such misperceptions may

23. Eastland, *supra* n. 17, at 33 (“Those whom affirmative action was intended to benefit came to include not only blacks, the original focus of Executive Order 10,925, but also, in most cases, Hispanics, Asian-Pacific Americans, and Native Americans.”).

24. Tanya T. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 Ann. Surv. Am. L. 515, 516 (1995).

The Equal Protection Clause of the Fourteenth Amendment, created to reinforce the Thirteenth Amendment’s promise of freedom and equality to the emancipated slave, has become the primary weapon in the effort to end affirmative action policies in employment and education. Similarly, Title VI of the Civil Rights Act of 1964, which once provided an incentive to promote equal educational opportunities, is now used as a tool to force public and private universities to limit the reach of their affirmative action policies.

Id. at 516–17 (footnotes omitted).

25. Washington Post/Kaiser/Harvard Racial Attitudes Survey at <http://washingtonpost.com/wp-srv/nation/sidebars/polls/race071101.htm> (Results are from a telephone survey of a nationally representative sample of 1,709 adults—including an oversample of minority groups—conducted by The Washington Post, the Henry J. Kaiser Family Foundation and Harvard University March 8–April 22. The total sample included 779 whites, 323 African Americans, 315 Hispanics and 254 Asians, and the margin of sampling error for each group is plus or minus four, six, seven and nine percentage points respectively. Sampling error is only one of many potential sources of error in this or any other public opinion poll. Fieldwork was conducted by ICR of Media, Pa.).

26. See Richard Morin, *Misperceptions Cloud Whites’ View of Blacks*, Wash. Post A01 (July 11, 2001) (comparing the survey results against the 2000 U.S. Census Bureau’s Current Population Survey, which found that although 49 percent of all whites believe that blacks and whites have similar levels of education, actually about one in six blacks—17 percent—have completed college, compared with 28 percent of all whites. And 88 percent of all whites are high school graduates, compared with 79 percent of all blacks 25 years old or older.). Not surprisingly, 49 percent of all whites compared to 77 percent of all blacks favored employers and colleges making an extra effort to find and recruit *qualified* minorities. Survey, *supra* n. 25, at question 51. It is

account for the resistance to racially influenced policies. In 1978, the U.S. Supreme Court showed that this resistance to affirmative action was not limited to the laity.

A. The Seminal Higher Education Race-based Case: Bakke

In *Regents of the University of California v. Bakke*, the U.S. Supreme Court held the University of California at Davis's (UC Davis) quota-based admissions program unconstitutional.²⁷ Allan Bakke, a white male, was rejected twice for admission to the university's medical college.²⁸ UC Davis rejected Bakke despite the fact that he received better objective scores than a number of minority students who were admitted under a two-track special admissions program.²⁹ Mr. Bakke's resulting lawsuit confronted the Court with the issue of whether the school's special admission program violated the Equal Protection Clause of the Fourteenth Amendment.³⁰ The trial court found that the admissions procedure was a racial quota and consequently violated the federal Constitution.³¹ The court,

suggested that perhaps the pervasiveness of incorrect views seems to explain, in part, white resistance to even the least intrusive types of affirmative action.

27. *Bakke*, 438 U.S. at 276.

28. The University of California at Davis Medical School opened in 1968 with 50 freshmen seats, and expanded enrollment to 100 seats in 1971. *Id.* at 272. With no special admissions program for minority or disadvantaged students, the first class contained three Asian-Americans, but no other minorities. The faculty created a program over the next two years to aid "disadvantaged" applicants. A separate admissions committee with a majority of members from minority groups was formed and pre-screened applicants before sending them on to the general admissions committee. *See id.* at 272-75. The special committee continued to send approved applicants to the general committee until 16 of the 100 seats had been filled (8 when there were only 50 seats). *See id.* at 275. Although a substantial number of the special committee applicants were white, only minorities were admitted through the program. *See id.* at 275-76, n. 5.

29. *See id.* at 276-77. Allan Bakke applied late in 1973 with a composite score too low (468 on a 500-point scale) to qualify him for admission under the regular program. *See id.* at 276. Although there were still four special admissions seats open, he was not considered for them. Bakke complained to the chairman of the admissions committee that the program was a racial or ethnic quota system. *See id.* Bakke reapplied in 1974, and although he was interviewed by and received a low score from the chairman to whom he had previously complained, he received a score of 549 on a scale of 600. *See id.* at 277. He was again rejected, although, as was the case the prior year, his scores were significantly higher than those of some special admittees. *See id.*

30. Bakke also claimed violations of his rights under the Equal Protection Clause of the California Constitution and under Title VI of the Civil Rights Act of 1964. *Id.* at 278.

31. *Id.* at 279.

however, did not order Bakke's admission because he had not shown that he would have been admitted but for the quota.³² Upon cross-appeal, the Supreme Court of California took the case directly from the trial court.³³ It agreed with the trial court that the admissions program was a racial quota system, and consequently, applied strict scrutiny. Although it found compelling state interests for the program, the California Supreme Court found the program not to be the least intrusive way to achieve those goals.³⁴ It based its decision on the Equal Protection clause of the U.S. Constitution.³⁵

UC Davis appealed to the U.S. Supreme Court. This appeal marked the one and only time the U.S. Supreme Court has considered the constitutionality of affirmative action programs in university admissions. Justice Powell, writing for a divided Court, stated that UC Davis's admissions policy created a distinction drawn on racial or ethnic lines and, therefore, must be subjected to "the most rigid scrutiny"³⁶ and "the most exacting judicial examination."³⁷ The Court found that, of the four justifications the UC Davis Medical School offered for its race-based policy, only the goal of attaining a diverse student body was compelling.³⁸ After finding the diversity interest to be compelling, the Court turned its attention to the question of whether the medical school's race-based admissions program was necessary to achieve the goal of attaining a diverse student body. Justice Powell stated:

32. 438 U.S. at 279.

33. See 553 P.2d 1152, 1156 (Cal. 1976).

34. See *Bakke*, 438 U.S. at 279; see also 553 P.2d at 1162-66.

35. *Bakke*, 553 P.2d at 1166.

36. *Bakke*, 438 U.S. at 291 (citing *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944)).

37. *Id.* However, Powell stated, "that is not to say that all such restrictions are unconstitutional." *Id.* It is interesting to note that the Court split into two groups with sharply different opinions in this case. The Stevens Group, comprised of Justice Stevens, Chief Justice Burger, and Justices Stewart and Rehnquist, concluded that the special admissions program violated Bakke's rights under Title VI of the Civil Rights Act of 1964. Thus, on a statutory basis alone, the Steven Group would have admitted Bakke to the medical school. *Id.* at 417-18. The Brennan Group, comprised of Justices Brennan, White, Marshall and Blackmun, found the school's special admissions program constitutional. *Id.* at 362. This Group applied the intermediate scrutiny standard of review. The Brennan Group found that the medical school's purpose of remedying the effects of past societal discrimination was "sufficiently important" to support the use of its special admissions program 'where there is a sound basis for concluding that minority underrepresentation is substantial and chronic.' *Id.* at 362.

38. See *id.* at 306-311.

This clearly is a constitutionally permissible goal for an institution of higher education. 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.³⁹

Nevertheless, the Court held that the university's program failed to withstand strict scrutiny because race was the *sole* criterion the University used to search for a diverse student body.⁴⁰ Justice Powell, while clearly an advocate of institutional autonomy, indicated that race may be a "plus" factor in admissions decisions⁴¹ and noted two university admissions programs, which were using race as a factor.⁴² The Court specifically cited Harvard's admissions program, in which "race has been a factor in some admissions decisions,"⁴³ and to Princeton University's admission program, in which "race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished and against what odds."⁴⁴ Thus, according to Justice Powell, an admissions program that uses race as a "plus" factor will withstand strict scrutiny.⁴⁵

Justice Brennan, concurring in part and dissenting in part, asserted that the "central meaning" of *Bakke* was that "government may take race into account when it acts not to demean or insult any racial group [and] to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in

39. *Id.* Justice Powell found support for this proposition in *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). See *Bakke*, 438 U.S. at 313-14.

40. *Bakke*, 438 U.S. at 314-15.

41. Race can be a factor in determining a particular candidate's "potential contribution to diversity without the factor of race being decisive" when compared to the qualities exhibited by others. A list of factors could include, in addition to race, such qualities as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [or] ability to work with the poor." *Id.* at 317.

42. *Id.* at 316-17.

43. *Id.* at 316 (citing Amici Curiae Br. for Colum. U., Harv. U., Stan. U., and the U. of Pa., at 2-3).

44. *Id.* at 317, n. 51 (citing Bowen, *Admissions and the Relevance of Race*, Princeton Alumni Weekly 7, 9 (Sept. 26, 1977)).

45. *Id.* at 316-17.

this area."⁴⁶ Although Justice Brennan relied on intermediate scrutiny, he focused on the importance of remedying the effects of past societal discrimination.⁴⁷

Justice Blackmun argued that, wholly apart from racial and ethnic considerations, any university's selection process inevitably results in the denial of admission to many qualified persons.⁴⁸ Justice Blackmun found it ironic that people were so deeply disturbed over a program where race was an element of consciousness, yet no one said anything about higher education institutions routinely giving preference to those with athletic skills, to those of a certain geography, to those children of alumni, to the affluent, or "to those having connections with the celebrities, the famous and the powerful."⁴⁹ Whichever preferences are selected, Justice Blackmun agreed that admissions programs were within the special competence of academicians, administrators, and the specialists they employ, rather than the judiciary.

Justices Stevens, joined by Chief Justice Burger, Justice Stewart, and Justice Rehnquist, viewed "the question of whether race can ever be used as a factor in an admissions decision" as an issue not before the Court.⁵⁰ They found the majority's decision superfluous.⁵¹

B. Affirmative Action Cases Following Bakke

In the cases following *Bakke*, the courts struggled for the proper test to apply to affirmative action programs in the employment context. These cases are confusing primarily because of the absence of a bright line rule in *Bakke*, subsequent narrow majorities, changing substantive analysis and the flip-flopping level of scrutiny applied.⁵² In *Fullilove v.*

46. *Id.* at 327.

47. *Id.* at 362. It is important that Justice Brennan focused on societal discrimination rather than discrimination particular to the state actor seeking to impose a race-based remedial measure.

48. *Id.* at 404.

49. *Id.* at 405.

50. *Id.* at 408 & 411.

51. *See id.* at 411.

52. *See U.S. v. Miami*, 614 F.2d 1322, 1337 (5th Cir. 1980) ("We frankly admit that we are not entirely sure what to make of the various Bakke opinions. In over one hundred and fifty pages of United States Reports, the Justices have told us mainly that they have agreed to disagree."); *See also U.S. v. Paradise*, 480 U.S. 149, 166 (1987) (plurality opinion of Brennan, J.) ("Although this Court has consistently held that some

Klutznick,⁵³ the U.S. Supreme Court examined a congressionally created affirmative action program that, unlike *Bakke*, did not involve a quota, but instead mandated that a certain percentage of government business be awarded to minorities under the auspices of the Minority Business Enterprise Program.⁵⁴ Although Chief Justice Burger did not specifically set forth the applicable standard of review, he held that the program at issue would pass strict scrutiny.⁵⁵ Chief Justice Burger expressly rejected the contention that Congress must act in a color-blind fashion.⁵⁶ “When effectuating a limited and properly tailored remedy to cure the effects of a prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.”⁵⁷

In *United States v. Paradise*,⁵⁸ the United States Supreme Court upheld the constitutionality of a temporary one-black-for-one-white promotion scheme for Alabama state troopers.⁵⁹ An Alabama district court had ordered the color-conscious promotion scheme after finding that the Alabama Department of Public Safety had engaged in blatant racial discrimination for nearly four decades. Moreover, the district court found Alabama had willingly resisted court-ordered desegregation for

elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis”); See also *Kromnick v. Sch. Dist. of Phila.*, 739 F.2d 894, 901 (3d Cir. 1984) (“The absence of an Opinion of the Court in either *Bakke* or *Fullilove* and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable”), *cert. denied*, 469 U.S. 1107 (1985).

53. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

54. The *Fullilove* fact pattern was similar to that which the court would face fifteen years later in *Adarand v. Peña*. See *id.* at 473. The Public Works Employment Act of 1977 required that 10 percent of federal grants for local works projects be used to buy goods or services from “minority business enterprises” (MBEs). The statute defined an MBE as a business owned at least 50 percent (51 percent in the case of publicly owned businesses) by people who are “Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.” *Id.* at 454 (quoting 42 U.S.C. 6705(F)(2) (Suppl. II 1976)). Congress adopted the plan because although there were qualified minority businesses available to do the projects, they accounted for an “inordinately small percentage of government contracting.” *Id.* at 463.

55. *Id.* at 492.

56. *Id.* at 482.

57. *Id.* at 484.

58. *U.S. v. Paradise*, 480 U.S. 149 (1987).

59. See *id.* at 153.

more than ten years.⁶⁰ The U.S. Supreme Court held that the scheme survived strict scrutiny because the plan was narrowly tailored and served a compelling governmental interest.⁶¹ The Court specifically noted that remedying past and present discrimination by a state actor is unquestionably a compelling governmental interest.⁶² Justice O'Connor, however, argued that "rigid quotas" could not be considered narrowly tailored because no evidence existed that such quotas were necessary to erase the effects of the department's racial discrimination.⁶³ Justice O'Connor believed there were more benign alternatives available.⁶⁴

In *Wygant v. Jackson Board of Education*,⁶⁵ the U.S. Supreme Court held that a school board violated the Equal Protection Clause when it extended preferential protection against layoffs to some teachers because of their race.⁶⁶ Just as in *Bakke*, the Court was splintered. Four Justices applied strict scrutiny and held that, even if the school board's asserted interest to correct prior discrimination was compelling, its protection scheme was not narrowly tailored to that purpose's fulfillment. Justice O'Connor's oft-quoted concurrence stated that "although its precise contours are uncertain, 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."⁶⁷

In *City of Richmond v. J.A. Croson*,⁶⁸ the United States Supreme Court held that the City of Richmond's Minority Business Utilization Plan (the Plan) was unconstitutional.⁶⁹ The City of Richmond had designed the Plan in 1983 to increase business among Minority Business Enterprises (MBE).⁷⁰ Richmond, with an African-American population of

60. See *Paradise v. Prescott*, 585 F. Supp. 72, 74 (M.D. Ala. 1983).

61. See *id.* at 166-67.

62. See *id.*

63. See *Paradise*, 480 U.S. at 187 (even 37 years apparently could not justify a temporary "quota").

64. See *id.* at 198-99.

65. 476 U.S. 267 (1986).

66. *Id.* at 284.

67. *Id.* at 286 (O'Connor, J., concurring) (citing Powell's *Bakke* opinion).

68. 488 U.S. 469 (1989).

69. See *id.* at 511.

70. See *id.* at 478.

fifty percent, had awarded less than one percent of its contracts to minorities between 1978 and 1983 and had virtually no minority members in its contractors' associations.⁷¹ The Court found that the Plan was not narrowly tailored to remedy the effects of past discrimination,⁷² and that the city had failed to demonstrate a compelling governmental interest.⁷³ The Court also stated that Richmond had failed to attempt race-neutral alternatives before enacting the Plan.⁷⁴

Justice O'Connor, writing the opinion for the Court in *City of Richmond*, stated that the Plan failed the narrow-tailoring test because it was unrealistic to assume that minorities would choose the construction trade in proportion to their numbers in the population. The relevant numbers of African-Americans were, according to Justice O'Connor, not the fifty percent of African-American population of the City of Richmond, but rather the pool of qualified Minority Business Enterprise contractors.⁷⁵ Justice O'Connor concluded that, "in sum, none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."⁷⁶ Justice O'Connor stated that the City was wrong in relying on general findings of discrimination in the entire construction industry.

Justice Stevens, concurring in part and dissenting in part, disagreed with Justice O'Connor's position that racial classifications were only permissible to remedy past wrongs.⁷⁷ However, he did agree that the Plan benefited persons who were not victims of discrimination, and that the Plan imposed a stigma on its beneficiaries.⁷⁸

Justice Scalia, who concurred only in the judgment, would have held that state and local governments may *never* discriminate on the basis of race to remedy the effects of past discrimination.⁷⁹ Justice Scalia concluded:

Racial preferences appear to "even the score" (in some

71. *See id.* at 479-80.

72. *See id.* at 507-08.

73. *See id.* at 505.

74. *See id.* at 507.

75. *Id.* at 501-02.

76. *Id.* at 505.

77. *See id.* at 511.

78. *See id.* at 515-16.

79. *See id.* at 520.

small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white. Nothing is worth that embrace.⁸⁰

In *Metro Broadcasting, Inc. v. FCC*,⁸¹ a five-Justice majority held that “benign” race-based classifications enacted by Congress are to be subjected to intermediate scrutiny.⁸² The Court stated that racial classifications would withstand intermediate scrutiny if they did not “impose *undue* burdens on nonminorities.”⁸³ Two FCC policies were at issue in *Metro Broadcasting*.⁸⁴ These policies favored minority-owned businesses, applying for radio and television broadcast licenses.⁸⁵ In upholding the policies, Justice Brennan, who wrote the majority, took pains to detail the lack of minority ownership of radio and television stations.⁸⁶ He underscored the point that the FCC had only adopted race-conscious methods after other methods had been tried and failed.⁸⁷ He announced:

We hold that benign race-conscious measures mandated by Congress—even if those measures are not “remedial” in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.⁸⁸

Justice Brennan held that Congress’s interest in enhancing broadcast diversity was “at the very least, an important

80. *Id.* at 528.

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

82. *See id.* at 596–97. Note: This was Justice Brennan’s last opinion before retiring. He was replaced with David Souter who assisted in overruling *Metro Broadcasting* in *Adarand v. Peña*.

83. *Id.*

84. *See id.* at 552.

85. Minorities were defined by the FCC as “Black, Hispanic, Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.” *Id.* at 553 n. 1.

86. Although in 1986 minorities made up at least 20% of the population, they owned only two. One percent of the 11,000 radio and television stations in the U.S. *See id.* at 553.

87. *See id.* at 554–56.

88. *Id.* at 564–65 (footnotes omitted).

governmental objective” in the context of radio and television programming.⁸⁹

1. The Application of Bakke’s Strict Scrutiny for Race-based Classifications

In *Adarand Constructors, Inc. v. Pena*,⁹⁰ the Court overruled its decision in *Metro Broadcasting*⁹¹ to apply intermediate scrutiny and held that race-based classifications are constitutional only if they are “narrowly tailored measures that further compelling governmental interests.”⁹² In other words, the Court’s holding in *Adarand* resolved all existing ambiguities by making strict scrutiny the standard of review for race-based programs. Hence, strict scrutiny applies to race-based programs regardless of whether the programs are state or federal, or whether they benefit the racial majority or the racial minority.⁹³

In *Adarand*, *Adarand Constructors, Inc.* sued the federal government when congressionally created preferences resulted in the award of a guardrail subcontract to the minority-owned Gonzales Construction Company.⁹⁴ Gonzales was awarded the project despite the fact that *Adarand* had submitted the lowest bid for the project.⁹⁵ *Adarand* sought declaratory and

89. *Id.* at 566-67.

90. 515 U.S. 200 (1995).

91. *See id.* at 225.

92. *See id.* at 227.

93. *Id.*

94. *See id.* at 205.

95. *See id.* The prime contractor, Mountain Gravel & Construction Company, received additional compensation if it hired subcontractors certified as small businesses controlled by “socially and economically disadvantaged individuals.” *Id.* Gonzales was certified; *Adarand* was not. Mountain Gravel would not have chosen Gonzales but for the additional compensation. *See id.* Under the relevant statutory provision, social and economic disadvantage could be manifest in a person of any race, but the contractor was allowed to presume such disadvantage in the case of African-American, Hispanic American, Native American, Asian Pacific Americans and other minorities. *See id.* (citing section 8(a) of the Small Business Act, 15 U.S.C. 637 (d)(2)(3) (1994). The Act defines “socially disadvantaged individuals” as those individuals who are subject to racial or ethnic prejudice or cultural bias, and defines “economically disadvantaged individuals” as those individuals who are socially disadvantaged individuals with a diminished ability to compete in the free enterprise system. *See id.* at 206 (quoting 15 U.S.C. 637 (a)(5), (a)(6)(A)). The compensation was one of a number of provisions designed to provide such individuals with not less than 5 percent of subcontracts. *See id.* at 206. However, non-minorities could prove disadvantaged status on the basis of “clear and convincing evidence,” and the presumption of disadvantage enjoyed by minorities could be rebutted by third persons. *See id.* at 207–

injunctive relief against use of race-based presumptions.⁹⁶ It argued that the government's use of race-based presumptions in their project award process violated the Equal Protection component of the Fifth Amendment's Due Process Clause.⁹⁷ The district court granted the government's motion for summary judgment,⁹⁸ and the United States Court of Appeals for the Tenth Circuit affirmed.⁹⁹ The Tenth Circuit read *Fullilove* as having adopted "a lenient standard, resembling intermediate scrutiny in assessing" federal race-based measures, and held that *Metro Broadcasting* had refined this lenient standard.¹⁰⁰

Because the case was brought under the Fifth Amendment, the Court then re-examined the differing levels of scrutiny it had applied under the Fifth and the Fourteenth Amendments. The Court ultimately found that the level of scrutiny it had applied under the two, different Amendments was essentially the same.¹⁰¹ Thus, strict scrutiny should apply to race-based actions whether taken by a state government or the federal government.

Justice O'Connor, writing for the majority, looked at whether race-based governmental actions should be subjected to strict scrutiny when benefiting historically disadvantaged groups. While she concluded that federal and state programs to benefit "disadvantaged businesses" were not unconstitutional, she intimated that it may be difficult for those programs to pass strict scrutiny.¹⁰² Past and present discrimination against the minority group in question must be proven, rather than assumed, and the proponent must show that its program benefits only the victims of past discrimination.¹⁰³ The U.S. Supreme Court vacated the appellate court's judgment in *Adarand* and remanded the case to the district court.¹⁰⁴ It instructed the district court to

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96. *See id.* at 210.

97. *Id.* at 204.

98. *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992).

99. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994).

100. 515 U.S. at 210 (citing 16 F.3d at 1544-47).

101. *See id.* at 217.

102. *Id.* at 228 (quoting Stevens, J., dissenting at 246).

103. *See id.* at 228-29.

104. *See id.* at 239.

determine whether the government's use of subcontractor compensation clauses could survive strict scrutiny.¹⁰⁵

Justice Scalia concurred in the majority's judgment but declined to join in Part III-C of Justice O'Connor's opinion. He believed that racial preferences can never survive strict scrutiny.¹⁰⁶ A "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."¹⁰⁷ Justice Ginsburg did not agree with Justice Scalia.¹⁰⁸ For Justice Ginsburg, the irony of Justice Scalia's claim that "we are just one race" was apparent in the fact that the present effects of past discrimination exist today because our lawmakers and judges have not been color-blind for generations.¹⁰⁹ Justice Thomas, like Justice Scalia, also concurred in the judgment, but wrote separately to emphasize his belief that there is not a "racial paternalism exception to the principle of equal protection."¹¹⁰ Thus, Justice Thomas would not favor distinctions based upon race.

Adarand went back to the district court, as per the U.S. Supreme Court's command, to evaluate the federal contracting procurement of the Subcontractor Compensation Clause, which continued to use race-conscious presumptions. The district court granted *Adarand*'s motion for summary judgment, finding the government's program unconstitutional.¹¹¹ The government, meanwhile, changed the way in which it implemented the race-conscious program in highway construction matters.¹¹² Quotas were not permitted, and to ensure that contractors benefiting from the program were truly disadvantaged, the recipients needed to demonstrate that their net worth was less than \$750,000. On appeal, the Tenth Circuit Court of Appeals reversed the district court's holdings and held that the Subcontractor Compensation Clause Program and the Disadvantaged Business Enterprise

105. *See id.* at 238.

106. *See id.* at 239 (Scalia, J., concurring). For Justice Scalia, strict scrutiny would indeed be fatal in fact.

107. *Id.* at 239 (Scalia, J., concurring).

108. *See id.* at 271 (Ginsberg, J., dissenting).

109. *See id.* at 272 (quoting 515 U.S. at 239 (Scalia, J., concurring)).

110. *Id.* at 240 (Thomas, J., concurring in part and concurring in judgement).

111. *See Adarand Constructors, Inc., v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997).

112. *Adarand Constructors, Inc. v. Mineta*, 228 F.3d 1147, 1155 (3d Cir. 2000).

Certification Program were permissible and constitutional.¹¹³

2. *The Fourth Circuit and Race-based Admissions Policies*

In *Podberesky v. Kirwan*,¹¹⁴ the Fourth Circuit was faced with the issue of whether the University of Maryland at College Park's Banneker scholarship program for African-Americans could survive strict scrutiny.¹¹⁵ Unlike the aforementioned cases, the plaintiff in this case was Hispanic, not white. The university argued, and the district court agreed, that the scholarship program was aimed at the present effects of past discrimination. The district court found that the program was narrowly tailored to remedy those present effects.¹¹⁶ The university was able to demonstrate that there was a basis for the perception by African-Americans that a hostile climate existed at the university.¹¹⁷ The University of Maryland relied on statistical data, namely the underrepresentation of African-Americans in the student population and their low retention and graduation rates, to demonstrate the present effects.¹¹⁸ The university argued that the purpose of the Banneker scholarship was to increase the number of qualified African-American Maryland residents attending the University.¹¹⁹ Further, the university posited that Banneker scholars would act as role models, thereby attracting more African-American students to the school.¹²⁰

The Fourth Circuit, however, reversed the district court's summary judgment in favor of the university.¹²¹ The court of appeals took issue with the district court's finding that the university suffered present effects of past racial discrimination. The court of appeals attributed the current problems at the

113. *Id.*

114. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995).

115. *See id.* at 151. The Banneker scholarship program was a merit-based program open only to African-Americans.

116. *See id.* (citing 838 F. Supp. at 1075, 1094 (D. Md. 1993)).

117. *See id.* at 154.

118. *See id.* at 155.

119. *See id.* at 159.

120. *See id.* It is not clear why awarding a scholarship to an African-American from any state besides Maryland is any less capable of remedying the effects of past University discrimination than awarding the same scholarship to a Maryland-born African-American but the court seemed focused on this.

121. *See id.* at 161.

university to societal discrimination.¹²² The fact societal discrimination existed precluded the inference of a nexus between past university discrimination and the hostility felt by current students.¹²³ The court of appeals was similarly unimpressed by the university's statistical information, revealing low African-American populations, and found that the possibility of other causes, such as "economic. . . factors," existed.¹²⁴

Even if the university had been able to demonstrate sufficient present effects of past discrimination, the court of appeals suggested that the program still would have failed the "narrowly tailored" prong of the strict scrutiny test.¹²⁵ The university's averred purpose was to increase the number of qualified African-American Maryland residents attending the university. However, the court of appeals found the fact that the scholarships were not *exclusively* for Maryland residents to be "indicative of lack of narrow tailoring."¹²⁶ Finally, the court of appeals found the fact that the University had not attempted any race-neutral alternative measures to be determinative.¹²⁷

3. *The Fifth Circuit and Raced-based Admissions Policies*

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Roger were white, Texas residents, who applied for admission to the University of Texas Law School in 1992.¹²⁸ All four were rejected, and they brought suit against the law school, claiming violations of their rights under the Equal Protection Clause of the Fourteenth Amendment.¹²⁹ The crux of their complaint was that the law school's affirmative action admissions program subjected them to unconstitutional racial

122. *See id.* at 155. Although the district court found that student surveys and focus groups revealed hostility through class segregation, social situations and dining rooms, treatment by fraternities and sororities, and patronizing behavior by faculty. *Id.* at 154, n. 2.

123. Societal discrimination was found by the fact that several Northern universities suffered from similar racial problems. *See id.* at 154.

124. *See id.* at 155-56.

125. *See id.* at 160-61.

126. *See id.* at 159.

127. *Id.* at 161.

128. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert denied* 518 U.S. 1033 (1996) ("*Hopwood II*").

129. *Id.* at 938. The plaintiffs also claimed statutory violations under Title VI of the Civil Rights Act of 1964.

discrimination.

The admission procedure employed by the law school in 1992 was based on the availability of 500 seats. Initially, each application was assigned to one of the three administrative categories, which were based solely on the applicant's Texas Index (TI) score: 1) presumptive admit, 2) discretionary zone, and 3) presumptive deny.¹³⁰ The TI scores required for placement in the various categories were lower for minority applicants than for non-minority applicants.¹³¹ In 1992, the cutoff scores were adjusted several times to increase the number of presumptive admits. By March 1992, the "presumptive admit" threshold for non-minority applicants was at a TI score of 199, and the denial ceiling for those applicants was at 192. For minority applicants, the presumptive admit threshold was 192, and the presumptive denial ceiling was 179.¹³² Once an application had been placed in one of the three administrative categories, different procedures were used for determining whether admission would be offered.¹³³

The district court analyzed the law school's admissions program under a strict scrutiny standard of review.¹³⁴ Of the five reasons the law school offered for maintaining its admissions program, the district court held that two of the reasons qualified as compelling government interests: 1) "obtaining the [educational] benefits that flow from a racially and ethnically diverse student body" and 2) "overcoming the past effects of discrimination."¹³⁵ In considering the scope of past discrimination, the district court rejected the applicants' argument that past discrimination be limited to the law school's history. Instead, the district court held that Texas "institutions of higher education are inextricably linked to the

130. *Id.*

131. *Id.* The term "minority" as used in the Law School's admissions procedure refers only to African Americans and Mexican Americans. *Id.* at 265, n. 29.

132. *Id.* (citing *Hopwood B*, 999 F. Supp. at 880) (citation omitted).

133. *Id.*

134. *Hopwood v. Texas (Hopwood I)*, 861 F. Supp. 551, 569 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *reh'g en banc denied*, 84 F.3d 720 (5th Cir. 1996) *cert. denied*, 518 U.S. 1033 (1996).

135. *Id.* at 570. The district court rejected the plaintiffs' arguments that under recent Supreme Court decisions, the only compelling government interest for race-based programs was remedying the past effects of racial discrimination. "However, none of the recent opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society." *Id.*

primary and secondary schools in the system,"¹³⁶ and as a result, Texas' history of racial discrimination in public schools contributed to the law school's reputation among minorities as both a "white school" and a hostile environment.¹³⁷

The district court upheld that part of the admissions program that gave minorities a "plus" by treating their IT scores differently based upon race.¹³⁸ However, the district court struck down the part of the admissions program that used separate admissions committees, which never compared candidates of different races.¹³⁹

On appeal, the Fifth Circuit also applied the strict scrutiny standard of review. The court of appeals, in contrast to the district court, found that neither attaining a diverse student body nor remedying the effects of past discrimination were sufficiently compelling governmental interests to justify the law school's race-based admissions program.¹⁴⁰ Writing for the court of appeals, Judge Smith supported his holding on three different bases. First, Judge Smith wrote that Justice Powell's diversity rationale in *Bakke* "[was] not binding precedent on this issue."¹⁴¹ Second, "no case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis."¹⁴² Previous U.S. Supreme Court decisions indicate that the only compelling state interest to justify racial

136. *Id.* at 571. The court noted that even if past discrimination were limited to the University of Texas alone, there would still be a strong basis for concluding that remedial action was warranted. *Id.* at 572.

137. *Id.* There was no evidence of 'overt officially sanctioned discrimination' at the University of Texas. The school had expended considerable effort in recruiting minorities and minimizing racial discrimination. However, the court found that the school's "legacy of the past" still persisted into the present. *Id.* The University of Texas continued to implement discriminatory policies against both black and Mexican American students during the 1950s and 1960s. *Id.* at 555. Between 1978 and 1980, the Dept. of Health, Education and Welfare, Office for Civil Rights (OCR) investigated Texas' public higher education system and found that it was not in compliance with Title VI and still maintained vestiges of de jure segregation. *Id.* at 556. "To date, OCR has not completed its evaluation to determine if Texas is in compliance with Title VI." *Id.* at 557.

138. *Id.* at 578.

139. *Id.* at 578-79.

140. *Hopwood II*, 78 F.3d at 962.

141. *Id.* at 944. Judge Smith wrote that the word "diversity" was mentioned only once in Justice Powell's single-Justice opinion, and that when he "announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale." *Id.*

142. *Id.*

classifications is remedying the effects of past discrimination. Third, Judge Smith opposed the use of race as a means of achieving student body diversity on policy grounds.¹⁴³ He wrote that the use of race in higher education admissions “contradicts rather than furthers, the aims of equal protection.”¹⁴⁴ It “simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.”¹⁴⁵ Judge Smith stressed that a school could reasonably consider many other factors outside of race in making its admissions decisions, including those “which may have some correlation with race.”¹⁴⁶

A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant’s home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant’s parents attended college or the applicant’s economic and social background.¹⁴⁷

The Fifth Circuit Court of Appeals next turned its attention to an evaluation of the purported compelling, government interest of remedying the effects of past discrimination. Noting that a state actor “must ensure . . . it has convincing evidence that remedial action is warranted,”¹⁴⁸ the court of appeals concluded that the law school, not the entire State of Texas’ educational system, was the appropriate governmental unit for measuring a constitutional remedy.¹⁴⁹ Each of the three *present* effects of past discrimination: hostile environment for minorities, school’s poor reputation among minorities, and

143. *Id.*

144. *Id.* at 945.

145. *Id.* Judge Smith wrote further: “Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.” *Id.*

146. *Id.* at 946.

147. *Id.*

148. *Id.* at 950.

149. *Id.*

underrepresentation of minorities was rejected by the court.¹⁵⁰ The Fifth Circuit held that the law school had not shown a compelling state interest in remedial discrimination sufficient to justify its use of a race-based admissions program.¹⁵¹

Judge Wiener of the Fifth Circuit wrote a concurring opinion in *Hopwood*.¹⁵² Although he agreed with the result, he disagreed that “diversity can never be a compelling governmental interest in a public graduate school.”¹⁵³ Judge Wiener would have held the admissions program unconstitutional on grounds that it was not narrowly tailored; the program limited the label “minorities” to only African Americans and Mexican Americans.¹⁵⁴ Judge Wiener was also very uncomfortable with the majority’s outright rejection of Justice Powell’s opinion in *Bakke*. He wrote: “If *Bakke* is to be declared dead, the Supreme Court, not a three-panel circuit court, should make that announcement.”¹⁵⁵ Subsequently, a suggestion for rehearing *en banc* was denied when a majority of the Fifth Circuit’s sixteen regular active judges declined to rehear the issue.¹⁵⁶ Seven judges dissented from the rehearing denial with sharp criticism, writing that the “far-reaching importance” of the decision “demanded the attention of more than a divided panel.”¹⁵⁷

A petition for a writ of certiorari to the U.S. Supreme Court was also denied.¹⁵⁸ Although Justices Ginsburg and Souter acknowledged that the constitutional issue of race or ethnicity-

150. The court relied on *Podberesky v. Kirwan*, 38 F.3d 147, 153 (4th Cir. 1994), that the poor reputation was due to “historical fact” which was not the kind of present effect that could justify current racial classifications. *Hopwood II*, 78 F.3d 952–53. In addition, the court wrote that “one cannot conclude that the law school’s past discrimination has created any current hostile environment for minorities.” *Id.* at 953. Rather, any racial tensions were the result of present societal discrimination. Finally, the court rejected the underrepresentation of minorities as a present effect of past discrimination. *Id.* There was no showing of “overt officially sanctioned discrimination.” *Id.* at 954 (quoting *Hopwood I*, 861 F. Supp. at 572).

151. *Id.* at 955. Because there was no showing of a compelling state interest, the Fifth Circuit did not have to consider whether the admissions program was narrowly tailored to achieve the state interest.

152. *Id.* at 962 (Wiener, J., specially concurring).

153. *Id.*

154. *Id.*

155. *Id.* at 963.

156. *Hopwood v. Texas (Hopwood III)*, 84 F.3d 720, 720, cert. denied, 518 U.S. 1033 (1996).

157. *Id.* at 722.

158. 518 U.S. 1033.

based admissions programs in higher education "is an issue of great importance," the law school's objectionable admissions program had already been discontinued for some time, making the issue moot.¹⁵⁹

On remand for other issues, the district court found,¹⁶⁰ and the Fifth Circuit affirmed, none of the plaintiffs in *Hopwood* would have been offered admission in 1992 even under a race-blind system. The Fifth Circuit reversed the district court's injunction, thereby refusing to permit consideration of race in the law school's admission process. The United States Supreme Court refused to review the Fifth Circuit's holding.¹⁶¹

There is little doubt that the *Hopwood* decision has reignited the debate over preferential admissions policies. Because the U.S. Supreme Court chose not to review the case, one cannot state with certainty that Judge Smith's underlying reasoning is correct. However, two factors do seem to weaken his analysis. First, the negative sentiment generated by his decision likely limits *Hopwood's* legal impact. In fact, at least one Texas law school dean has openly defied *Hopwood's* conclusions.¹⁶² Second, *Hopwood*, since it was decided by the Fifth Circuit, is only binding precedent on the courts of Texas, Louisiana, and Mississippi. Louisiana and Mississippi have continued to use racial preferences after *Hopwood* because of federal court orders to desegregate their higher education systems.¹⁶³

4. *The Ninth Circuit and Race-based Admissions Policies*

In *Smith v. University of Washington Law School*,¹⁶⁴ Katuria Smith, Angela Rock, and Michael Pyle brought suit on

159. *Id.*

160. *Hopwood v. Texas*, 999 F. Supp. 872 (W.D. Tex. 1998) (*Hopwood B*).

161. *Hopwood v. Texas*, 533 U.S. 929 (2001).

162. See Barbara Bader Aldave, *Hopwood v. Texas: Much Ado About Nothing?* Tex. L. 43 (Nov. 11, 1996) (writing as dean of St. Mary's University School of Law in San Antonio: "I can promise you this: Unless and until my superiors order me to stop, we at St. Mary's University School of Law are going to ignore the *Hopwood* decision and adhere to the guidelines of *Bakke*. I am immensely proud that 41 percent of the students in our first year class are members of minority groups, and that our school now has a higher percentage of Mexican-American students than any other law school in the United States.").

163. See Cathy Young, *The High Price of Racial Preferences*, Boston Globe A15 (June 27, 2001).

164. 2 F. Supp.2d 1324 (W.D. Wash. 1998).

behalf of themselves and a class of Caucasians, claiming they had been denied admission to the University of Washington Law School because of racially discriminatory admissions policies.¹⁶⁵ From 1994 to December of 1998, the law school used race as a criterion in its admissions process to assure the enrollment of a diverse student body.¹⁶⁶ The school's admissions policy stated:

Important academic objectives are furthered by classes comprised of students having talents and skills derived from diverse backgrounds believed to be relevant to a rich and effective study of law. Factors that indicate this diversity include, but are not limited to, racial or ethnic origin, cultural background, activities or accomplishments, career goals, living experiences. . . , or special talents. The list is not exhaustive, and the factors are not of equal weight; moreover, no single factor is dispositive.¹⁶⁷

Moreover, the policy stated "affirmative action will be taken to increase substantially the number of minority group members. . . in educational programs where they have been traditionally underrepresented."¹⁶⁸

Applicants to the law school were admitted based on their undergraduate grades, LSAT scores, and a "personal statement," in which they were invited to describe how their life experiences would contribute to the diversity of the law school.¹⁶⁹ A three-step process of review was conducted to apportion approximately one hundred sixty-five seats.¹⁷⁰ Both minority and non-minority applications were reviewed in concert and ranked on a scale from three to fifteen. Offers were made based on an applicant's index score.¹⁷¹ The plaintiff-applicants offered statistics they contended raised questions

165. *Id.* at 1328. Katuria Smith applied for and was denied admission in 1994, Ms. Rock in 1995, and Mr. Pyle in 1996.

166. *Id.* The Law school's admission policy provided that its objective was to "select individuals who have the highest potential for achievement and contribution. . . . The Law school has determined this objective is best obtained by . . . individuals who have demonstrated the greatest capacity for high quality work . . . and who will contribute to the diversity of the student body." *Id.*

167. *Id.* at 1329.

168. *Id.* at 1330.

169. *Id.* at 1329.

170. *Id.*

171. *Id.*

about the role of race in the University of Washington's admissions policies. The plaintiffs noted that in 1994, for example, nearly seventy-nine percent of those admitted with index scores below 193 were racial minorities.¹⁷² In 1994, one hundred percent of African-American applicants with GPAs between 2.5 and 3.24, and with LSAT scores in the 155–159 range, were admitted while none of the 131 candidates identified as “white or other ethnicity” with comparative grades and LSAT scores were admitted.¹⁷³

While *Smith* was pending, the voters of the State of Washington passed Initiative Measure 200, which enacted the following provision: “[T]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹⁷⁴ Upon the passage of Measure 200, the law school eliminated the use of race as a criterion in its admission process. The new admissions policy, however, did retain a diversity clause, which stated that “important academic objectives are furthered by . . . students . . . from diverse backgrounds.”¹⁷⁵ Nevertheless, race, color, and national origin were excluded from the list of diversity factors.¹⁷⁶ In the final analysis, the district court granted the law school's motion to dismiss, declaring the individual and class claims moot due to the passage of Initiative Measure 200.¹⁷⁷ However, the district court did hold that race could be used as a factor in achieving educational diversity even where it is not done for remedial purposes.¹⁷⁸

On appeal, the Ninth Circuit reviewed, *inter alia*, two key issues: 1) whether educational diversity is a compelling governmental interest under strict scrutiny under the Fourteenth Amendment, and 2) whether race may be

172. *Id.* at 1330.

173. *Id.*

174. Wash. Rev. Code § 49.601.400(1).

175. *Smith*, 233 F.3d at 1192. The non-exhaustive list of factors indicative of diversity include: persevering or personal adversity or other social hardships; having lived in a foreign country or spoken a language other than English at home; career goals; employment history; educational background; evidence of and potential for leadership; geographic diversity or unique life experiences; and special talents. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 1196.

considered in the admissions process only for remedial purposes.¹⁷⁹ The Court of Appeals affirmed the district court and held: 1) that educational diversity is a compelling governmental interest that meets the demands for strict scrutiny, and 2) that the Fourteenth Amendment permits university admissions programs to consider race for reasons other than remedial purposes. The court examined the fractured ruling of *Bakke* to determine whether Justice Powell's concurring opinion was truly the controlling opinion. The court decided that it was.

We are well aware of the fact that much has happened since *Bakke* was handed down. Since that time, the court has not looked upon race-based factors with much favor. Still, it has not returned to the area of university admissions, and has not indicated that Justice Powell's approach has lost its vitality in that unique niche in our society.¹⁸⁰

On May 29, 2001, the United States Supreme Court denied certiorari.¹⁸¹ Although the state of Washington's Initiative Measure 200 prohibited the consideration of race in public education, *Smith* became binding precedent for the states of Nevada, Arizona, Idaho, Montana, and Oregon. California, which is also located within the Ninth Circuit, passed Proposition 209, a referendum, prohibiting the consideration of race in public education.¹⁸²

5. *The Eleventh Circuit and Race-based Admissions Policies*

Two seminal cases, involving race-conscious admissions programs, took place within the Eleventh Circuit. *Wooden v. Board of Regents of the University System of Georgia* concerned the University of Georgia's (UGA) admissions policy from 1995 to 1997. Its admissions program during this period was based on a three-stage process.¹⁸³ In the initial stage, the Academic Index or AI stage, UGA objectively judged applications without regard to the applicant's race. In 1997, to be admitted to the

179. *Id.* at 1192.

180. *Id.* at 1200 (cites omitted).

181. *Smith v. U. of Wash. L. Sch.*, cert. denied, 121 S.Ct. 2192 (2001).

182. Cal. Const. art. I § 31 (1996).

183. *Wooden v. Bd. of Regents of the U. Sys. of Ga.*, 247 F.3d 1262, 1266 (11th Cir. 2001).

university during the AI stage, an applicant to UGA was required to have an AI score of 2.50 or above. Applicants with an AI below 2.25 were rejected outright.¹⁸⁴ Those students whose academic indices were above a certain number and met the minimum SAT scores were put into a “further evaluation” group.¹⁸⁵ In other words, their applications continued on in the process. Green, the only surviving plaintiff, was among that group of applicants, with an AI of 2.39 and an SAT equivalency score of 1170–1190.¹⁸⁶

Much of the district and appellate court opinions in *Wooden* were devoted to standing. The courts focused on whether Green suffered an “injury in fact.”¹⁸⁷ UGA alleged that, because Green’s race was not a factor in the ultimate decision to deny his application, he lacked standing to challenge UGA’s admission policy. Even if Green had received the 0.5 point credit for his “non-white” ethnic status, UGA proffered that his application still would have been tossed out in the final, ER stage. In other words, although UGA may have affirmatively considered his race at some point in the admissions process, the unrebutted evidence showed that its final decision to reject his application was not based on race.

In opposition, Green argued that he had standing because UGA’s admissions process inflicted a constitutional injury upon him. Just having his application threaded through a process that considered race was enough, he argued. Citing *Jacksonville*,¹⁸⁸ Green contended “a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking

184. *Id.* at 1266.

185. *Id.*

186. *Id.* For each applicant placed in this group, the university calculated a Total Student Index (TSI). The TSI is based on a combination of weighted academic and demographic factors. It is only at this stage that the university expressly considered an applicant’s race, although other factors such as Georgia residence, alumni relationships, extracurricular activities and after-school hours were considered as well. In calculating a TSI score for applicants to the 1997 freshman class, UGA awarded 0.5 points under the category “Demographic Factors” to applicants who self-classified themselves as non-Caucasians. Applicants, such as Green, who did not do this, did not receive the point credit. Green received a TSI score of 3.89, which included credits for his parents’ educational level, his Georgia residency, his relatively high GPA/SAT score and his male gender. Had he designed himself as white, his TSI score of 4.39 would have been 0.5 points higher than it was, but still lower than the 4.40 threshold for automatic admission. *Id.*

187. *Id.* at 1270.

188. *N.E. Fla. Chapter, Associated Gen. Contractors of Am. v. Jacksonville*, 508 U.S. 656, 666 (1993).

relief need not affirmatively establish that he would receive the benefit in question if race were not considered. The relevant injury in such cases is 'the inability to compete on an equal footing.'¹⁸⁹

The appellate court ruled that, for standing purposes, the issue was whether Green's application had *actually* been treated differently at some stage in the admissions process because of his race.¹⁹⁰ If his application was treated differently, then Green had not competed on an equal footing with other applicants, and consequently he suffered an injury-in-fact. Conversely, if Green's application was never actually treated differently because of his race, then Green had no standing.¹⁹¹ The Eleventh Circuit reversed the district court's summary judgment of no standing and remanded the case to the district court for further proceedings.

In a different case, *Johnson v. University of Georgia*,¹⁹² the U.S. District Court for the Southern District of Georgia held that the promotion of student body diversity in higher education was not a compelling interest sufficient to meet the test of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.¹⁹³ This case concerned the 1999 admissions process for the University of Georgia.

The University of Georgia subjected its 1999 applicants to a three-stage evaluation process except that, in contrast to the 1997 process, that required an AI score of 2.50 or above for automatic admittance in the first stage, 1999 applicants needed a minimum AI score of 2.86 to be automatically admitted.¹⁹⁴ TSI scores were again used to re-rank applicants who were not automatically admitted or rejected in the second stage. Persons of color still received the 0.5 point credit toward their TSI score, and males received an additional 0.25 TSI points simply because of their gender. Hence, a non-white male could receive an additional 0.75 TSI points.¹⁹⁵ To be automatically admitted in 1999 during the TSI stage, applicants needed a TSI score over 4.92; in contrast, applicants

189. *Wooden*, 247 F.3d at 1269.

190. *See id.* at 1278.

191. *Id.*

192. *Johnson v. U. of Ga.*, 106 F. Supp.2d 1362 (S.D. Ga. 2000).

193. *Id.* at 1375.

194. *Id.* at 1365.

195. *Id.*

needed a TSI score of 4.40 in 1997. Those 1999 applicants having a TSI score between a 4.66–4.92 were referred to the ER or final stage.¹⁹⁶

Plaintiff Jennifer Johnson, a white female, received a TSI score of 4.10. Since she did not receive the additional 0.75 TSI points, which were allocated for non-white males, her TSI was below the 4.66 second-stage cutoff. Consequently, she was denied admission without the ER-phase review.¹⁹⁷ Had she received the additional 0.75 TSI points, she would have qualified for the ER stage. Ms. Johnson was, however, eventually admitted to UGA three days after bringing this action, but by that time, she had already been accepted to and planned on attending another University.¹⁹⁸

The two remaining plaintiffs in *Johnson*, Aimee Bogrow and Molly Ann Beckenhauer received second-stage TSI scores of 4.52 and 4.06, respectively.¹⁹⁹ Just as with Ms. Johnson, neither Ms. Bogrow nor Ms. Beckenhauer was awarded the 0.75 race/gender point credits. Had UGA awarded those points, Ms. Bogrow would have been admitted, and Ms. Beckenhauer would have qualified for ER consideration.²⁰⁰ However, without the bonus points, both persons were denied admission.

The district court determined strict scrutiny to be the applicable standard of review. The court then addressed the issue of whether using racial preferences to promote “diversity” was a compelling governmental interest that would survive strict scrutiny.²⁰¹ The University of Georgia claimed the TSI phase of its admission plan was patterned on the Harvard Plan that Justice Powell spoke of, and approved of, in *Bakke*. The district court, however, found Justice Powell’s view of Harvard’s admissions system to be “mere dicta.”²⁰² In addition, since Justice Powell’s “statements. . . gained the support of no other Justice,”²⁰³ his opinion should not be considered by courts as binding precedent.²⁰⁴

196. *Id.*

197. *Id.*

198. *Id.* at 1366.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 1369.

203. *Id.*

204. *Id.*

UGA's difficulty stemmed from its inability "to meaningfully show how [racial diversity] actually foster[ed] educational benefits."²⁰⁵ Former UGA President Charles Knapp argued that educational diversity was a compelling interest because, after graduation, students will need to work cooperatively with people from "different ethnic and cultural backgrounds," and this skill "cannot be fully acquired by students whose educational and life experiences have been racially or culturally homogenous."²⁰⁶ Judge Edenfield of the district court found such generalized assertions to be merely speculative. In addition, the district court noted that affirmative action programs were usually approved only for limited durations, and UGA was ill-prepared "to identify with particularity exactly when or how that goal...[would] be met."²⁰⁷ Likening the case to *Croson*, the district court held that UGA's system used race as a proxy for a purported interest: that minorities, through their presence, make a valued contribution to the other students' education.²⁰⁸ This interest was insufficient to meet strict scrutiny according to the district court.

6. *The Sixth Circuit and Race-based Admissions Policies*

In *Gratz v. Board of Regents of the University of Michigan*,²⁰⁹ plaintiffs Jennifer Gratz and Patrick Hamacher, both white, Michigan residents, applied for admission into the University of Michigan's College of Literature, Science, and the Arts (LSA) in 1995 and 1997, respectively.²¹⁰ Both persons were denied admission and subsequently filed a motion for summary judgment, asserting that LSA's use of race as a factor in admissions decisions violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the Equal Protection Clause of the United States Constitution.²¹¹

Two compelling interests were asserted by LSA and its

205. *Id.* at 1371 (citing *Tracy v. Bd. of Regents*, 59 F. Supp.2d 1314, 1322 (S.D.Ga. 1999)).

206. *Id.* at 1372.

207. *Id.* at 1372.

208. *Id.* at 1374.

209. *Gratz v. Bd. of Regents of the U. of Mich.*, 122 F. Supp.2d 811 (E.D. Mich. 2000).

210. *Id.* at 815.

211. *Id.* at 813.

minority intervenors. First, LSA had a compelling interest in the educational benefits that result from having a diverse student body. Second, LSA had a compelling interest in remedying the University of Michigan's past and current discriminatory practices against minorities.²¹²

Recognizing that Justice Powell's opinion in *Bakke* came from a sharply divided court, the district court in *Gratz* labeled the desire by the University of Michigan for a diverse student body a compelling interest.²¹³ "It is clear that a majority of the Justices in *Bakke* expressly agreed that the California Supreme Court erred in enjoining the university from ever considering race in its admission programs."²¹⁴ Dismissing the Fifth's Circuit *Hopwood* decision, Judge Patrick Duggan of the Sixth Circuit opined that the Fifth Circuit erred in reading Justice Brennan's silence in *Bakke* as rejection.²¹⁵ In fact, his silence could have just as easily been interpreted as "implicit approval."²¹⁶ Upon examination of past U.S. Supreme Court cases, involving the diversity rationale and strict scrutiny, the *Gratz* court found that those cases did not apply because they did not involve the context of higher education.²¹⁷

Interestingly, the University of Michigan presented overwhelming expert testimony and solid evidence, regarding the educational benefits that flowed from a racially and ethnically diverse student body.²¹⁸ One study, presented by Professor Patricia Y. Gurin,²¹⁹ cited research suggesting that "[s]tudents learn better in a diverse educational environment, and they are better prepared to become active participants in [a] pluralistic, democratic society once they leave such a

212. *Id.* at 816.

213. *Id.* at 819.

214. *Id.*

215. *Id.* at 820.

216. *Id.*

217. *Id.* at 821.

218. *Id.* at 822-23.

219. Professor of Psychology at the University of Michigan and Interim Dean of the LSA. Professor Gurin used her thirty-four years of experience in social psychological research and teaching to analyze data from a Michigan Student Study and nine years' worth of data from a national sample of institutions and students from the Cooperative Institutional Research Program in her report. See Patricia Gurin, *The Compelling Need for Diversity in Higher Education*, at <http://www.umich.edu/~urel/admissions/legal/epert/summ.html> (accessed July 20, 2001).

setting.”²²⁰ In addition, Professor Gurin cited to multi-institutional national data, extensive surveys, and data drawn from specific classroom programs at the University of Michigan to show that “students who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.”²²¹ These students, she averred, were also “better able to understand and consider multiple perspectives, deal with conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of common ground.”²²² A number of amici-filed briefs in *Gratz* concurred with the University of Michigan and Professor Gurin’s position; diversity results in a richer educational experience for students.²²³

To this evidence, the plaintiff-applicants presented no argument or evidence to rebut the University and Professor Gurin’s assertions. Rather, the plaintiffs’ main argument was that diversity was an important goal, but did not rise to the level of a compelling, state interest. The district court found the goal of achieving a diverse student body a compelling interest.²²⁴

The district court then examined whether LSA’s admission program was narrowly tailored. The court held it was.²²⁵ LSA’s admission counselors took race into account in two determinative and important ways: each underrepresented minority applicant could be assigned twenty points on account of race at the outset in calculating his or her index score, and/or admissions counselors could “flag” an applicant as possessing certain qualities or characteristics, including physical qualities,

220. *Gratz*, 122 F. Supp.2d at 822 (citing Gurin Report, *supra* n. 219, at 3).

221. *Id.* (citing Gurin Report, *supra* n. 219, at 5).

222. *Id.*

223. Along with the ALS and ACE, the following filed amicus briefs in support of the University’s position: the United States, the State of Ohio, the Michigan Attorney General, General Motors corporation, Steelcase, Inc., joined by nineteen other global corporations, and the National Association of Social Workers, joined by the Council on Social Work Education, the Association of Baccalaureate Social Work Program Directors, Inc., and the Group for the Advancement of Doctoral Education in Social Work. *Id.* at n. 13.

224. *Id.* at 824.

225. *Id.* at 828.

which LSA deemed important to the composition of the incoming class.²²⁶ The court held such uses of race operated as nothing more than “plus” factors, which Justice Powell enunciated, and approved of, in *Bakke*.²²⁷

Moreover, minority applicants were not insulated from review by virtue of these additional twenty points any more than other applicants were insulated from review by virtue of other points given. In fact, the Court noted that in certain circumstances, these other, possible points might combine for a total of up to forty.²²⁸ The fact that these points might “tip the balance” in favor of a particular applicant, however, did not mean that such applicants had been insulated from competition.²²⁹

Further, the district court held the University of Michigan’s program was not a “dual” or “two-tracked” system prohibited by *Bakke*.²³⁰ The program at issue in *Bakke* had one group of students, i.e., minority students, competing for one set of seats, and another group of students, i.e., majority students, competing for another set of seats. This process, in effect, created two, separate admissions programs. Nothing in *Bakke*, however, prohibited the practice of employing different GPA requirements for minorities *vis-a-vis* majority students.²³¹ Further, LSA’s system did not utilize a separate admissions review committee for underrepresented minority applications as did the review committee in *Bakke*.²³²

Finally, the district court in *Gratz* found LSA’s efforts to enlarge its pool of underrepresented minority applicants through vigorous minority recruitment programs, which had all proved to be unsuccessful, determinative.²³³ Recruiting fairs, direct mailings, campus visits, and personal contact with minorities continually resulted in a low pool of minority applicants.

226. *Id.* at 827.

227. *Id.* at 828.

228. *Id.* Points were given as follows: Six points for geographic factors, four points for alumni relationships, three points for outstanding essay, five points for leadership and service skills, twenty points for socioeconomic status or twenty points for athletes. *Id.*

229. *Id.*

230. *Id.* at 828.

231. *Id.*

232. *Id.*

233. *Id.* at 831.

In another Sixth Circuit case, *Grutter v. Bollinger*,²³⁴ Barbara Grutter applied for admission to the University of Michigan Law School in 1996.²³⁵ At first, she was placed on the waiting list, but in June of 1997, she was denied admission. Ms. Grutter brought suit, alleging that she was rejected because the law school used race as the “predominant” factor in its admission process, giving minority applicants a “significantly greater chance of admission than students with similar credentials from disfavored groups.”²³⁶ She claimed racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.²³⁷

Since 1992, the University of Michigan Law School’s admissions policy had openly acknowledged a commitment to racial and ethnic diversity.²³⁸ Both in its written admissions policy and its law school bulletin, the law school stressed its effort to increase the numbers of students from racial and ethnic groups. “By enrolling a ‘critical mass’ of minority students, we have ensured their ability to make unique contributions to the character of the Law School.”²³⁹

Under Michigan’s system, law school applicants were selected from one of three groups. The first group consisted of applicants who were chosen based on the “numbers.”²⁴⁰ The second group consisted of a pool of applicants who had lower “numbers” but other interesting qualities. The third group, known as the “special admission” group, was for minority candidates who did not fall within the other two groups.

234. *Grutter v. Bollinger*, 137 F. Supp.2d 821 (E.D. Mich. 2001).

235. *Id.* at 824.

236. *Id.* (quoting Plaintiff’s Complaint).

237. *Id.* She also claimed defendants violated Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d. Ms. Grutter sought declaratory judgment that her rights were violated; an injunction prohibiting racial discrimination in admissions; compensatory and punitive damages; an order requiring the defendants to admit her to the law school; and attorney fees and costs. *Id.* at 824.

238. *Id.* at 827. The admissions policy explains that applicants with lower index scores may be admitted because they “may help achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.” *Id.* (quoting the UMLS Admissions Policy at 3). This is referred to as “diversity admissions”. Additional factors to be considered include: an applicant’s interesting or unusual employment experiences, extracurricular activities, travel experiences, athletic accomplishments, volunteer work, or foreign language fluency.

239. *Id.* at 828 (quoting the Admissions Policy at 12).

240. *Id.* at 830.

approximately one-half of the minority applicants, who were ultimately admitted, came from the first two groups; the other half came from the third or special group.²⁴¹ The “special admissions” program was adopted to increase the minority enrollment at the law school.²⁴² At trial, Michigan’s law school Director of Admissions from 1979 to 1990 testified that “the law school had a ‘goal’ or ‘target’ whereby ten to twelve percent of the students of each entering class should be Black, Chicano, Native American, and mainland Puerto Rican.”²⁴³ Admission decisions were handled on a “rolling basis,” and “daily reports” were used to keep track of the number of applications received to date, the number of applicants offered admission, the number rejected, the number on the waiting list, and so on.²⁴⁴ As the admissions process progressed, the Director of Admissions admitted he consulted the “daily reports” more often in order to ensure that a “critical mass” of minority students was enrolled.²⁴⁵

At trial, no one seemed to be able to quantify what was meant by “critical mass,” but one administrator testified that, during his tenure from 1979–1990, at least eleven to seventeen percent of each class consisted of African American, Hispanic, and Native American students.²⁴⁶ One admissions director described it as “meaningful numbers,” “meaningful representation,” or “a number sufficient so that the minority students can contribute to classroom dialog and not feel isolated.”²⁴⁷ However, university witnesses were adamant that the university did not have a set number, percentage, or target for this “critical mass” achievement.

While the law school posited that race was only one element in the admissions decision-making process, the trial court was not persuaded by statisticians who testified that Michigan’s law school placed a very heavy emphasis on an

Id.

Id.

Id. at 831. In fact, testimony revealed that over the years, the law school agreed that black and Hispanic students should constitute between 10 percent and 15 percent of the entering class.

Id. at 832.

Id.

Id.

Id. at 832–33. Defining “critical mass” was important to the court in determining whether a targeted number had been preset. Testimony revealed that the definition of race was crucial. Had admissions decisions been driven by the definition of race, only ten minority students per entering class would have been admitted..

applicant's race in deciding whether to accept or reject the applicant. "When cell by cell, and year by year, underrepresented minority applicants are admitted in significantly greater proportions than their non-minority competitors with similar UGPA and LSAT scores, it is clear that the law school accords the race of the applicants a great deal of weight."²⁴⁸

The trial court then addressed the issues of whether the achievement of racial diversity was a compelling state interest and, if so, whether the law school's admissions policy was narrowly tailored to serve that interest.²⁴⁹ In reviewing *Bakke*, the court noted that Justice Powell was the only Justice to mention diversity. "The Brennan group did not so much as mention diversity rationale in their opinion, and they specifically declined to join in the portion of Justice Powell's opinion that addressed that issue."²⁵⁰ The law school argued that Justice Powell's opinion was controlling because it was the narrowest ground that supported the judgment.²⁵¹ The trial court held that *Bakke* did not stand for the proposition that a state educational institution's desire to assemble a racially diverse student body is a compelling governmental interest.²⁵² Further, the court held that under post-*Bakke* U.S. Supreme Court cases, the achievement of such diversity was not a compelling state interest because it was not a remedy for past discrimination.²⁵³

The court did not hold that racial diversity was unimportant, but it did draw a distinction between viewpoint diversity and racial diversity.²⁵⁴ Although the experts that testified in *Grutter* had also testified during the *Gratz* case, the court, nevertheless, refused to find a compelling interest in diversity.

Even if the university had convinced the court that diversity was a compelling interest, the admissions program was deemed to have failed the "narrow tailoring" test for several reasons. First, no witness could define what "critical

248. *Id.* at 842.

249. *Id.* at 843.

250. *Id.* at 846.

251. *Id.* at 847.

252. *Id.* at 848.

253. *Id.* at 849.

254. *Id.*

mass” meant in terms of percentages or numbers.²⁵⁵ “Narrow tailoring is difficult, if not impossible, to achieve when the contours of the interest being served are so ill-defined.”²⁵⁶ Second, there was no time limit on the law school’s use of race in the admissions process, and, by using race to ensure the enrollment of a certain minimum percentage; the law school had practically set up a quota system. “There is no principled difference between a fixed number of seats and an essentially fixed minimum percentage figure.”²⁵⁷ Third, under Michigan’s system, students did not compete against one another for each seat. There was no logical basis for the law school to have chosen the particular racial groups that received special attention under the current admissions policy.²⁵⁸ Fourth, the law school failed to utilize alternative means for increasing minority enrollment.²⁵⁹

The *Grutter* trial court ordered an injunction, enjoining the law school from considering race as a factor in its admission process.²⁶⁰ On May 14, 2002, in a 5–4 decision the Sixth Circuit reversed the District Court’s judgment in *Grutter*,²⁶¹ holding that the law school’s interest in achieving a diverse student body was a compelling interest, surviving strict scrutiny pursuant to *Bakke*.²⁶² The Sixth Circuit disagreed with the district court’s refusal to apply the *Marks* analysis to *Bakke* “because Justice Powell’s rationale was not ‘subsumed’ in that of the Brennan concurrence.”²⁶³ In fact, the Sixth Circuit found Justice Powell’s opinion to be the narrowest, a decision in line with the *Marks* analysis. “[T]he Brennan concurrence agreed with Justice Powell that Davis’s admissions program was

255. *Id.* at 850.

256. *Id.*

257. *Id.*

258. *Id.* The 1992 admissions policy, at page 12 identifies “African Americans, Hispanics and Native Americans”. Later, the law school bulletin indicated that special attention has been given to “students who are African American, Mexican American, Native American, or mainland Puerto Rican.” *Id.*

259. *Id.* at 853. The court lists race-neutral alternatives such as: increasing recruiting efforts, using a lottery system for all qualified applicants, decreasing the emphasis for all applicants on undergraduate GPA and LSAT scores, or a system whereby a certain number or percentage of the top graduates from various colleges and universities are admitted. *Id.*

260. *Id.* at 872.

261. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir 2002).

262. *See id.* at 739.

263. *Id.* at 740.

subject to heightened scrutiny. . . . [It] disagreed only with his application of strict scrutiny. . . . As Justice Powell's rationale would permit the most limited consideration of race. . . it is at the most *Bakke's* narrowest rationale."²⁶⁴

The Sixth Circuit also disagreed with the district court's contention that Justice Powell was the only Justice to mention diversity. The Sixth Circuit opined that Justice Brennan's first footnote gave qualified approval of a race-conscious admissions policy: "We also agree with Mr. 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.*"²⁶⁵ Further, the language "at least so long as" does not mean "only if."²⁶⁶ The court of appeals argued that this qualifying language only "modifies *when* race may be used. . . it does not modify *why.*"²⁶⁷ Thus, a university need not show that it is remedying specific instances of past discrimination in order to use race as a factor in admissions. The Sixth Circuit quoted Justice Brennan's opinion in *Metro Broadcasting, Inc.*,²⁶⁸ citing *Bakke* "for the proposition that a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal' on which race-conscious university admissions programs may be predicated."²⁶⁹

The Sixth Circuit spent considerable time favorably comparing Michigan's law school admissions policy to the Harvard plan approved of in *Bakke*. Just as in the Harvard plan, Michigan used race and ethnicity, along with a number of other factors, as a potential "plus."²⁷⁰ Moreover, like the Harvard plan, no student was insulated from competing with other prospective students at Michigan.²⁷¹ "That the Law

264. *Id.* at 741.

265. *Id.* at 742 (emphasis in original) (quoting *Bakke*, 438 U.S. at 326 n.1 (citations omitted) (emphasis added)).

266. *Id.*

267. *Id.* at 742-43.

268. 497 U.S. 547, 568 (1990), *overruled on other grounds Adarand*, 525 U.S. at 227.

269. *Grutter*, 288 F.3d at 743.

270. *Id.* at 746-47. "In seeking an academically diverse class, the record indicates that the Law School considers more than an applicant's race and ethnicity." *Id.* "In light of the foregoing, we find that the Law School's consideration of race and ethnicity is virtually indistinguishable from the Harvard plan Justice Powell approved in *Bakke*. *Id.* at 747.

271. *See id.*

School's pursuit of a 'critical mass' has resulted in an approximate range of underrepresented minority enrollment does not transform 'critical mass' into a quota."²⁷²

The Sixth Circuit reviewed the remaining factors the district court had used to declare that the law school's admissions program as not narrowly tailored.²⁷³ "First, the district court's conclusion that the term 'critical mass' is not sufficiently defined is at odds with the extensive record in this case, and the district court's own characterization of 'critical mass' as the functional equivalent of a quota."²⁷⁴ Second, as to "the district court's statement that 'there is no logical basis for the law school to have chosen the particular groups which receive special attention under the admissions policy,'"²⁷⁵ the Sixth Circuit stated that "some degree of deference must be accorded to the educational judgment of the Law School in its determination of which groups to target."²⁷⁶ As to the district court's assertion that the law school had not availed itself of alternate means to increase minority enrollment, the Sixth Circuit contended that the evidence suggested otherwise. "We note that we do not read *Bakke* and the Supreme Court's subsequent decisions to require the Law School to choose between meaningful racial and ethnic diversity and academic selectivity."²⁷⁷

Finally, the Sixth Circuit examined the district court's determination that the law school's policy must fail because there was no definite stopping point. The court of appeals agreed that a race-conscious remedial program should have a self-contained stopping point.²⁷⁸ However, as the court succinctly pointed out, "this directive does not neatly transfer to an institution of higher education's non-remedial consideration of race and ethnicity."²⁷⁹ The United States Supreme Court has granted Barbara Grutter's petition for writ

272. *Id.* at 748.

273. *Id.* at 749. "As a initial matter, we have serious reservations regarding the district court's consideration of five factors not found in *Bakke*." *Id.*

274. *Id.* at 751.

275. *Id.* (quoting *Grutter*, 137 F.Supp.2d at 850).

276. *Id.* (quoting *Regents of the U. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985)).

277. *Id.* at 750.

278. *Id.* at 751.

279. *Id.* at 752. The dissent and concurring opinions, while critical of the majority opinion, are unique in that they seem to be written in an effort to complain about the procedures used to hear this case *en banc*. See *id.* at 752-773.

of certiorari.²⁸⁰

III. THE IMPLICATIONS OF REMOVING RACE-BASED ADMISSIONS POLICIES

A. California and Proposition 209

On November 5, 1996, fifty-four percent of Californians voted to adopt Proposition 209, otherwise known as the "California Civil Rights Initiative."²⁸¹ Proposition 209 prohibits discrimination and racial and gender preferences in public employment, public education, and public contracting.²⁸² One day after Proposition 209 was passed, the constitutionality of the Initiative was challenged in *Coalition for Economic Equity v. Wilson*.²⁸³ The plaintiffs in *Wilson* asserted that Proposition 209 interfered with their equal protection rights under the Fourteenth Amendment, and therefore, sought a preliminary injunction, enjoining state officials from implementing the Initiative.²⁸⁴

The district court began by noting that much of the language contained in Proposition 209 "simply affirm[ed] existing anti-discrimination protections already provided by the United States and California Constitutions and by the 1964 Civil Rights Act."²⁸⁵ However, the district court did find that Proposition 209 had a racial focus and restructured the political process "to the detriment of the interests of minorities and women."²⁸⁶ Consequently, the district court granted the preliminary injunction.²⁸⁷ On appeal, the Ninth Circuit held that Proposition 209 did not violate the United States Constitution and vacated the injunction.²⁸⁸

280. *Grutter v. Bollinger*, 2002 U.S. Lexis 8677 (Dec. 2, 2002).

281. Cal. Const. art. I § 31.

282. Cal. Const. art. I § 31, cl. A ("The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.").

283. 946 F. Supp. 1480 (N.D. Cal. 1996) (*Wilson I*).

284. *Id.* at 1488, 1491.

285. *Id.*

286. *Id.* at 1506.

287. *Id.* at 1520.

288. *Wilson II*, 122 F.3d 692, 710 (9th Cir. 1997).

What are the effects of Proposition 209? In 1996, 89 Hispanics, 43 African Americans, and 10 Native Americans were enrolled as first year students at the top three public California law schools.²⁸⁹ In 1997, the year Proposition 209 took effect, these numbers fell to 59, 16, and 4, respectively.²⁹⁰ Enrollment of minorities in California's law school had declined by eighty-one percent. At University of California, Berkeley, only one African American enrolled in the freshman law class in 1997, whereas twenty had been enrolled in the freshman class the year before.²⁹¹ Between 1994 and 1996, thirteen Filipinos were enrolled at Boalt.²⁹² After Proposition 209, Boalt's 1997 class included zero Filipinos, as did its 1999 entering class.²⁹³ After a similar initiative passed in the State of Washington in 1998, the number of applications, acceptances, and enrollments of minority students at the University of Washington dropped by comparable measures for the 1999 freshman class.²⁹⁴ Even using college-transfer policies, in part, as a way around the ban on racial preferences in admissions, the numbers still dropped.²⁹⁵

B. Texas and the Aftermath of Hopwood

The *Hopwood* decision, which banned the consideration of applicants' race in university admissions in the Fifth Circuit, also affected enrollment of underrepresented minority students. At the University of Texas School of Law at Austin, whose admissions system was challenged in *Hopwood*, the percentage of the entering class that was African American dropped from five-point-eight (twenty-nine students) in 1996 to point-nine percent (four students) in 1997.²⁹⁶ The percentage of Native Americans enrolled at that law school dropped from one-point-two percent (six students) in 1996 to point-two

289. *Grutter*, 137 F. Supp.2d at 858.

290. *Id.*

291. *Id.* See also Larry Reibstein, *What Color is an A?*, Newsweek 77 (Dec. 29, 1997).

292. See Boalt Hall School of Law, *1999 Annual Admission Report* 11 (1999).

293. See *id.*

294. See Roberto Sancho, *UW Minority Enrollment to Fall—Officials Plan to Improve Recruitment, Outreach*, Seattle Times A12 (May 18, 1999).

295. See Sara Hebel, *States Without Affirmative Action Focus on Community-College Transfers*, Chron. of Higher Educ. A35 (May 26, 2000).

296. *Grutter*, 137 F. Supp.2d at 858.

percent (1 student) in 1997.²⁹⁷ Enrollment for Hispanics dropped from nine-point-two percent (forty-six students) in 1996 to six-point-seven percent (thirty-one students) in 1997.²⁹⁸

In an attempt to alleviate the effects of the *Hopwood* decision, the Texas legislature adopted a policy, guaranteeing all students who finish in the top ten percent of their high school class admission to any state university.²⁹⁹ This type of program has also been initiated in Florida under the Florida One Initiative, whereby the top twenty percent are guaranteed admission to the state universities.³⁰⁰

On March 19, 1999, the University of California Board of Regents adopted a similar policy of admission, guaranteeing admission to all California applicants who ranked in the top four percent of their high school class. The plan was devised by Governor Davis as a means of booting minority numbers in the UC system.³⁰¹

The Texas and California programs have been criticized for two main reasons. First, critics argue such an approach has the effect of “admitting some students from weaker high schools while turning down better-prepared applicants who happen not to finish in the top tenth of their class in academically stronger schools.”³⁰² “College admissions officers have long known that class rank is hardly comparable from one high school to the next. The top students in many high poverty schools are woefully unprepared for college.”³⁰³ Second, since the very success of producing a diverse student body depends on the continuing *de facto* segregation of high schools, the

297. *Id.*

298. *Id.*

299. See Robert M. Berdahl, Essay, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 Case W. Res. 115, 123 (2000).

300. *Id.* Governor Jeb Bush celebrated an almost 12 percent increase in the proportion of minorities attending public universities for fall 2000, the first year of Florida's controversial plan to end affirmative action in college admissions. However, the actual proportion of minorities in the freshman class of 2000–2001 remained relatively unchanged from 1999–2000. Opponents argued that the enrollment surge had more to do with population growth than with his policy to end racial preferences. See Gary Finout, *Florida Governor Touts Minority Enrollment Increase after Racial Preferences Ban*, Black Issues in Higher Educ. 17 (Sept. 28, 2000).

301. Kenneth R. Weiss, *UC Regents OK Plan to Admit Top 4%*, L.A. Times A18 Mar. 20, 1999).

302. *Gratz*, 122 F.Supp.2d at 830 (quoting William Bowen).

303. Gary Orfield & Edward Miller, *Chilling Admissions* 10 (Harv. Civ. Rts. Project & Harv. Educ. Publishing Group 1998).

cause of a fully integrated and racially just society is not advanced.³⁰⁴

1. *Expert Opinions on Race-based Admissions Policies*

Expert after expert testified in *Gratz* and *Grutter*, setting forth reasons why affirmative action programs continue to be needed in higher education, why they are important as a remedy for past and present discrimination, and the compelling need for diversity in higher education.³⁰⁵ Disproportionate numbers of Native Americans, African Americans, and Hispanics live and go to school in impoverished areas of the country. "It should not surprise anyone that students, who attend school where books are lacking, where classrooms are overcrowded, and where advanced placement or other higher level courses are not offered, are at a competitive disadvantage as compared to students, whose schools do not suffer from such shortcomings."³⁰⁶ Advanced placement courses are not available in every high school. "As many as twenty-five percent of California's high schools offer no AP courses whatsoever. Yet some high schools, four percent, offered twenty-one or more AP courses."³⁰⁷ Imagine graduating from high school with a 4.0 grade point average only to be rejected for admission in favor of a student, whose straight "A" grade point was boosted to 5.0 due to AP courses. Indeed, our nation's public schools as a whole are currently under attack for their inability to offer a quality education to our nation's youth.³⁰⁸ The top students in general are not performing as

304. A 1993-1994 study comparing student scores on the Iowa Test of Basic Skills showed that black students in mostly segregated schools failed to reach the national average for their age bracket, while black students in integrated schools exceeded the national average. See Gary Orfield, Susan Eaton & Harv. Project on Sch. Desegregation, *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* 130-31 (The New Press 1996). Moreover, scores for both black and white students rose by approximately 20 points during a period of time when busing promoted racial diversity in the area schools. *Id.* at 132.

305. See *Gratz*, 122 F.Supp.2d at 822-24; see also *Grutter*, 137 F.Supp.2d at 849-50.

306. *Grutter*, 137 F. Supp.2d at 864.

307. See Charles R. Lawrence III, *Essay: Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 Colum. L. Rev. 928, 944 (2001); see also, William G. Bowen & Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* 18-19 (Princeton U. Press 1998).

308. See Paul E. Peterson, *School Choice: A Report Card*, 6 Va. J. Soc. Policy & L. 47, 54-58 (1998), for a survey of the public school system that concludes that big city

well on standardized tests as they once did. If affirmative action in higher education is to be dismantled, the quality of primary and secondary education must first be stable.

An extensive body of research indicates that Blacks and Latinos have consistently scored more poorly on standardized SAT and LSAT tests than white and Asian Americans.³⁰⁹ Many studies have challenged the usefulness of standardized tests in predicting the performance of poor and minority students, finding that the SAT does a better job of predicting the socio-economic status of the test taker's parents than predicting college performance.³¹⁰ One explanation for this is that to some extent, standardized tests, like the SAT and the LSAT, are "heavily loaded with academic English."³¹¹ This disadvantages Hispanics because English is their second language. African Americans are also disadvantaged because many—sixty percent—speak "Black English."³¹²

It is undisputed that underrepresented minority groups have, on average, lower undergraduate grade-point averages (UGPA) than whites. "Among applicants accepted by the University of Michigan Law School from 1995 to 2000, the median UGPA of every underrepresented minority group has been lower than the median UGPA of Caucasians by approximately one-tenth to three-tenths of a point."³¹³ One cannot ignore the large amounts of research that point conclusively to the benefits of racial diversity to all students. *The Shape of the River*,³¹⁴ a book written by William Bowen and Derek Bok, former presidents at Princeton and Harvard,

schools are the worst off, but that the "problems in American education are endemic." *Id.* at 47; see also Natl. Commn. on Excellence in Educ., *A Nation At Risk* 5 (Dept. of Educ. 1983). The study warned that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people . . . we have, in effect, been committing an act of unthinking, unilateral education disarmament."

309. See Nicholas Lemann, *The Great Sorting*, A. Mthly. 84, 99-100 (Sept. 1995) (arguing that use of the SAT achieves mixed results, sometimes at the expense of students at the bottom of the social structure who are least prepared for the test).

310. See Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Calif. L. Rev. 953, 957 (1996) (criticizing the continued reliance on standardized tests).

311. *Grutter*, 137 F. Supp.2d at 862 (quoting Dr. Eugene Garcia, Dean of the School of Education, U.C. Berkeley).

312. *Id.*

313. *Grutter*, 137 F. Supp.2d at 864.

314. Bowen, *supra* n. 307.

respectively, draws on a forty-year longitudinal study of more than 80,000 black and white students who attended twenty-eight of the nation's best colleges and universities. The book begins with the authors' bias: they believe that the end of affirmative action would impoverish us all.³¹⁵ Full of statistics, graphs, tables, and multivariate regressions, *The Shape of the River* constitutes a compelling brief for race-sensitive admissions in higher education. In addition, Patricia Gurin, Professor of Psychology at the University of Michigan, has shown that experience with diversity in college has impressive effects on the extent to which graduates in the national survey lived racially and ethnically integrated lives.³¹⁶ Professor Gurin's studies represent the first time a major university has amassed empirical data to show that segregated education is substandard education.³¹⁷ "Students who experienced the most racial and ethnic diversity in classroom settings and informal interactions with peers showed the greatest engagement in active thinking process, growth in intellectual engagement and motivation, and growth in intellectual and academic skills."³¹⁸

As Justice Powell in *Bakke* made very clear, it is a university's prerogative to decide what to teach and who to admit, so long as individual freedoms are not trampled upon.³¹⁹ If race is used as one simple though important factor, to ensure the diversity and equality of access to quality or elite educational facilities, that should be a compelling interest to meet strict scrutiny. The law doesn't treat everyone equally. If a student is denied admission in favor of a student with lower SAT scores, but has an alumni mother, does it make it any more fair? Some applicants will get points for being athletes, for their age, and/or for their family background. Others will get points for playing chess, for being from Iowa, and/or for having alumni relationships. Some applicants will even get points for their financial contributions or celebrity status. Therefore, it follows that some applicants should get points for adding to the cultural enrichment of all.

315. *Id.*

316. See Gurin, *supra*, n. 219.

317. *Id.* Gurin's study, relied on heavily in Gratz, utilized data collected from nearly 200 colleges and universities in reaching its conclusion to uphold the University of Michigan's race-conscious admission program.

318. *Id.*

319. See *Bakke*, 438 U.S. at 311-12.

IV. SUMMARY

Beginning with *Brown v. Board of Education*,³²⁰ the U.S. Supreme Court has frequently recognized the uniqueness of the educational setting in Equal Protection cases. Specifically, the Court has acknowledged “those qualities which are incapable of objective measurement” and the importance of providing an educational environment conducive to “the interplay of ideas and the exchange of views.”³²¹ Justice Powell specifically recognized the importance of diversity in higher education, as have judges across the nation.

The primary mission of colleges and universities is to educate those students who are likely to become the leaders of society in an increasingly diverse world. The learning environment of higher education is special; it encourages the robust exchange of ideas and of culture. More importantly, the extent to which a college student is exposed to diversity has impressive effects on the extent to which he or she later lives a racially and ethnically integrated life. A racially diverse campus is essential to the education of students.

320. 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) by concluding “that in the field of public education the doctrine of ‘separate but equal’ has no place”). The Court wrote “Education is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.” *Id.* at 493.

321. *Sweatt*, 339 U.S. at 634.