

Michigan Journal of Race and Law

Volume 2

1997

Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest

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Recommended Citation

Marty B. Lorenzo, *Race-Conscious Diversity Admissions Programs: Furthering a Compelling Interest*, 2 MICH. J. RACE & L. 361 (1997).

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RACE-CONSCIOUS DIVERSITY ADMISSIONS PROGRAMS:
FURTHERING A COMPELLING INTEREST[†]

Marty B. Lorenzo*

This Article argues that narrowly tailored, race-conscious admissions programs can be employed to achieve a more diverse student body and consequently a more enlightened and egalitarian society. An admissions body which looks beyond traditional academic indicators and explores the whole person of each applicant will matriculate a group of students with a wide variety of race, gender, class and other backgrounds, thereby fostering a robust exchange of ideas among these students. Pointing to the enduring precedential value of Bakke as well as the ideological makeup of the Supreme Court, this Article asserts that the Courts would likely uphold a program aimed at promoting diversity. The Article concludes by describing the ideal diversity program and why Asian Americans, in particular, should support these programs.

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* B.A. 1993, University of San Diego; J.D. 1996, University of San Diego. I wish to thank my mentor, Professor Cynthia Lee, for her wisdom and suggestions. I also thank Professor Robert Chang for his helpful comments on an earlier draft. Charles Dixon and Kiana Woods of the *Michigan Journal of Race & Law* deserve special thanks for their hard work and assistance. Thanks also to the San Diego Chapter of the Filipino American National Historical Society for their helpful research. As always, I thank Joanne, Mom, Dad, and Glenn for their support. I dedicate this Article to my brother Virgil, whose music and spirit continue to bring people together; I hope to do the same with my work. *Ito ay inihahandog ko sa aking mahal na kapatid na si Virgil. Siya ay manannatiting tagapagbigay ng inspirasion.*

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*In order to get beyond racism, we must first take account of race.
There is no other way.*¹

INTRODUCTION

The history of abuse associated with race-based classifications and their use to exclude disempowered people speaks for itself.² Justice Powell stated that “unless [race-based classifications]³ are

1. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

2. *See, e.g., Hirabayashi v. United States*, 320 U.S. 81 (1943) (addressing a curfew applicable only to persons of Japanese ancestry); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking down a California laundry permit ordinance which was purposefully administered to exclude all Chinese from the laundry business); *see also* Amendments to the Civil Code, 23rd Sess., ch. XLI, § 1. The Acts Amendatory of the Codes of California (1880) (stating that no license must be issued “authorizing the marriage of a white person with a negro, mulatto, or mongolian”), amended by Stats. 1933, Ch 105, § 1, at 561 (extending the anti-miscegenation laws to members “of the Malay race” to prohibit Filipinos from marrying whites) repealed 1959.

3. The term “race-conscious” has been criticized as merely being a less officious way of saying “race-based.” However, these two terms differ. In this Article I use the term “race-based” to refer to classifications where “race” was the primary, if not sole, factor considered and where the individual’s race was not explored in the larger context of social reality. *See* T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1063 (1991) (defining race-based as indicating “decisions and conduct that would have been different but for the race of those benefited or disadvantaged by them.”) citing U.S. DEP’T OF JUSTICE, OFF. OF LEGAL POL’Y, REP. TO THE ATT’Y GEN., REDEFINING DISCRIMINATION: “DISPARATE IMPACT” AND THE

strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.⁴ It is understandable how that history has made America gun-shy when it comes to addressing the issue of race. Many have tried to brush the issue aside by painting broadly with phrases such as: “[i]n the eyes of government, we are just one race . . . American.”⁵ At best, this view is merely an attempt to ignore the issue. At worst, it is a sophisticated way to cover up the problems associated with the policy of assimilation.⁶

concept “race-based” is the polar opposite of “colorblind.” Neither is acceptable because both run counter to the goal of diversity.

On the other hand, I use the term “race-conscious” to indicate decisions that consciously recognize the social reality of race and the impact it has on the treatment of individuals. See Aleinikoff, *supra*, at 1065 n.19 (using “race-conscious” to refer to a “precognitive stance, a set of assumptions and mental filters that channel and influence what we label a problem, how we perceive it, and how we gather and analyze data”). Recognizing the social reality of race, i.e., that race influences how one perceives reality and how one is perceived by others, is the first and essential step towards stabilizing this country’s “race-relations” and toward allowing America’s different cultures to grow and make our society stronger from the benefits of diversity. See Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 847 (recognizing that “racial cultures form a significant element of what goes into the construction of our social relations” and that realizing this is a “pre-condition to meaningful negotiation of the terms of our social spaces”).

My purposes for using the term “race-conscious” are threefold. First of all, I use the term to emphasize the necessity of recognizing the social reality of race and its external and internal effects on racially diverse individuals. By “external effects of race,” I mean those effects on an individual that stem from society’s different treatment of the racially diverse. By “internal effects of race,” I refer to a diverse individual’s perspective which stems from having experienced life in the context of another culture and having experienced the external effects of race. Second, I intend the term to refer to classifications where race is a threshold question but not the sole factor. Allowing race to be the *sole* determinative factor in a decision, perpetuates the negative external effects of race. This may be avoided by recognizing the precognitive stance of social race while considering other personal characteristics. Third, I use the term “race-conscious” to encourage the positive characterizations of racial/community identification. Race consciousness promotes recognition of the internal effects of race and fosters an atmosphere where racially diverse individuals are encouraged to retain their culture.

This threefold use of the term coincides with what I see as the overarching goal of diversity: to further equality and strengthen our nation by promoting a “race-consciousness” which engenders pride in one’s heritage and acknowledges persons as individuals in the context of the American social reality of which race is an integral part.

4. *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (citing *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)).

5. *Adarand Constructors, Inc. v. Peña*, 116 S. Ct. 2097, 2119 (1995) (Scalia, J., concurring in part and concurring in the judgment).

6. I use the term “assimilation” to refer to the process whereby a host society fails to recognize and accept the validity of the cultural differences of an ethnic group, thereby forcing members of that group to give up their cultural identity and conform to the cultural characteristics and patterns of the host society in order to access social institutions. See Dana C. Chiu, *The Cultural Defense: Beyond Exclusion, Assimilation, and*

Race is both illusion and reality. The common misconception of “genetic race” identifiable by an individual’s morphology is an illusion. However, the social consequences attached to our morphology are reality. Professor Ian Haney-Lopez suggests that “although biological race does not exist, social race is very far from being an illusion in providing a link between what we look like and who we are. Race and identity . . . are relationally tied to one another across the unstable medium of communities.”⁷ Although racial and ethnic groupings are to a large extent social constructs,⁸ race is also a personal characteristic, a reflection of one’s heritage, and often an indication of community and social identity. Those who seek a colorblind nation would have us forget our respective heritages, ignore the social reality of race, and assimilate into the American melting pot.⁹ In contrast, diversity acknowledges and celebrates the salient differences that give our nation strength, and thus provides a foundation for fostering equality through participation and empowerment of diverse groups. One goal of diversity is to raise cultural awareness and destroy the illusion of a genetic race, while preserving and celebrating those cultural differences which

Guilty Liberalism, 82 CAL. L. REV. 1053, 1075 n.152 (1994) (citing MILTON M. GORDON, ASSIMILATION IN AMERICAN LIFE: THE ROLE OF RACE, RELIGION, AND NATIONAL ORIGINS, 71 tbl. 5 (1964)). Assimilationists ignore the contributions of the diverse ethnicities that helped form and continue to shape this country while defining “American” based on a Western European paradigm. See Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 869–871 (1993). Examples of modern assimilationist treatment include the “English-only Movement” which claims that large influxes of non-English-speaking Asian and Latino immigrants threaten our national identity and the Model Minority Myth. See Chiu, *supra*, at 1078–81; see also discussion of Model Minority Myth *infra* Part III.A.

7. Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 61 (1994). Racial representations turns into a form of discrimination that is often overlooked, especially in the case of Asian Americans. See Cynthia K.Y. Lee, *Beyond Black and White: Racializing Asian Americans in a Society Obsessed with O.J.*, 6 HASTINGS WOMEN’S L.J. 165, 171–202 (1995).

8. See Haney-Lopez, *supra* note 7.

9. Assimilation runs counter to diversity as it calls for the destruction of differences and demands the creation of one homogenous society. Professor Sheila Foster has noted that “[a] norm of neutrality toward salient differences unjustly burdens only certain individuals to relinquish their identities in order to make it easier for society to treat all the same.” Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 WIS. L. REV. 105, 151. Moreover, assimilation ignores the benefits already gained from the presence of a diverse population and glosses over the contributions of this nation’s racially diverse people. See, e.g., Stephen Gottlieb, *In the Name of Patriotism: The Constitutionality of “Bending” History in Public Secondary Schools*, 62 N.Y.U. L. REV. 497 (arguing that the one-sided perspective of high school history textbooks prevents students from being exposed to diverse viewpoints on controversial issues). By robbing diverse groups of their place in this nation’s formation, assimilation perpetuates disempowerment and ensures the inability of diverse groups to define their place in society.

strengthen our American heritage. Another goal of diversity is to empower diverse groups and foster their participation in all levels of society in furtherance of equality because diversity is necessarily linked to equality. Moreover, diversity itself is a goal which encompasses the above and seeks to ensure that diverse groups are part of the process that shapes society and their roles within it.

Recent political skirmishes regarding affirmative action,¹⁰ the Supreme Court's recent decision in *Adarand Constructors, Inc. v. Peña*¹¹ and the Fifth Circuit's recent decision in *Hopwood v. Texas*¹² warn that the current use of race-conscious classifications may soon change.¹³ Even though the need to encourage diversity in our nation and in our schools still exists,¹⁴ these recent developments may give pause to university administrations and admissions directors when contemplating their admissions policies. The current backlash against affirmative action and the specter of litigation may discourage university administrators from implementing race-conscious diversity admissions programs. The fact that *Adarand* imposes strict scrutiny on all race-conscious measures may be further discouragement. However, neither political posturing nor the Court's decision in *Adarand* demonstrate that there is no longer a need for race-conscious measures.

10. See President William J. Clinton, Affirmative Action, Address at National Archives and Records Administration (July 19, 1995), in 31 WEEKLY COMP. PRES. DOC. 1334 (July 24, 1995); Interview with Governor Pete Wilson (R-CA), available in LEXIS, News Library, News File (July 19, 1995); Ralph C. Carmona, *UC Should Not Be Caught Up in Partisan Politics*, S.F. CHRON., July 20, 1995, at A23; Proposed Cal. Const. Amend. X (introduced Feb. 17, 1995) (forbidding racial preferences by any state entity, including state educational institutions, except where federally mandated); see also Daniel A. Farber, *The Outmoded Debate over Affirmative Action*, 82 CAL. L. REV. 893, 896-99 (1994) (describing unfavorable public opinion toward affirmative action).

11. 115 S. Ct. 2097 (1995) (requiring the strict scrutiny test for all governmental race-classifications).

12. 78 F.3d 932 (5th Cir.) (declaring the admissions program used by the University of Texas School of Law in 1992 to be unconstitutional), cert. denied, 116 S. Ct. 2581 (1996) (denying certiorari for lack of genuine controversy because the 1992 admissions program was discontinued).

13. "Notwithstanding the Clinton administration's ringing endorsement of affirmative action, Assistant Attorney General for Civil Rights Deval Patrick acknowledged . . . that some federal affirmative action plans will not meet the stricter standards [under *Adarand*]." DAILY REPORT FOR EXECUTIVES, July 21, 1995 (BNA) at A140. However, this by no means indicates that affirmative action, much less the need for it or the use of race-conscious measures, will disappear overnight.

14. White men are 48% of the college educated work force but hold over 90% of the top jobs in the news media, over 90% of the officer positions and 88% of the directorships in American corporations, 86% of the partnerships in major law firms, and 85% of the tenured college professorships. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 154 tbl. 234, 405-07, tbl. 644, 426 tbl. 671 (1993).

This Article argues that diversity is essential to equality because it provides a foundation for equal participation on all levels of society and reduces discrimination on all levels of society. The equal participation of diverse individuals in the decision-making processes of society's institutions will provide those individuals with an opportunity to determine the standards by which they will be judged. Equality hinges on such participation.

Education is the gateway to success in other aspects of life. It has also been noted that the campus is a microcosm of society.¹⁵ Therefore diversity in our student bodies is absolutely essential to achieving diversity in the workplace and elsewhere in society.¹⁶ This Article focuses on diversity in the educational setting as a starting place for equal participation in society. Diversity admissions programs¹⁷ serve the goal of equality by promoting the participation of diverse groups in education. Additionally, diversity admissions programs cultivate racially diverse leaders and, indirectly, create a group of leaders who have been exposed to diverse viewpoints. By increasing participation of diverse groups and enlightening non-diverse individuals to diverse viewpoints and interests, diversity admissions programs further the goal of equality. Diversity in law schools is essential, as a legal education is seen as an important step in creating future judges, attorneys, and legislators.¹⁸ Moreover, a heterogeneous student body in the law school is better equipped to serve the needs of the diverse community. For these reasons, this Article focuses specifically on diversity admissions programs in the law school context. However, much of the analysis is applicable to other educational contexts.

15. Foster, *supra* note 9, at 106.

16. An educational institution's pursuit of a diverse student body has been deemed a compelling interest and, therefore, given greater consideration. See *Bakke*, 438 U.S. at 314 ("[T]he interest of diversity is compelling in the context of a university's admissions program . . .").

17. A diversity program in the context of education is a program that seeks to diversify a school's student body through positive measures to increase enrollment of diverse students. See *infra* notes 30-34 and accompanying text (discussing diversity programs).

18. Lawyers occupy positions in society which enable them to work for the common good. Professor Bill Ong Hing notes:

Lawyers and the legal system play central roles in the resolution of cases involving race relations. Community lawyers play an especially central role in this respect because they have community stature and they represent the racial and ethnic groups caught up in conflict. In spite of all the lawyer bashing, lawyers are often viewed as community leaders and continue to enjoy a certain amount of community respect. . . . Lawyers can either defuse racial and ethnic tensions and build bridges between communities or intensify social divisions depending on how they handle each case.

Because diversity admissions programs benefit society as a whole, this Article is a call for open support of race-conscious diversity programs by all members of society, but especially law school and university administrations, their admissions departments, and the people of diverse communities. Additionally, this Article addresses issues of particular concern to the Asian American¹⁹ community, such as the model minority myth and preference for whites over Asians that glass ceilings represent. Asian Americans are among the fastest growing ethnicities²⁰ and yet one of the least vocal in the political process.²¹ Moreover, Asian Americans are

Bill Ong Hing, *In the Interest of Racial Harmony: Revisiting the Lawyer's Duty to Work for the Common Good*, 47 STAN. L. REV. 901, 931 (1995). With greater exposure to and understanding of diverse viewpoints and individuals during law school, lawyers will be in a better position to build bridges between communities.

19. The term "Asian American" does not represent a monolithic group. Asians have been crossing the Pacific Ocean for the North American Continent since 1565 when the Manila galleon trade between Mexico and the Philippines began. FRED CORDOVA, *FILIPINOS: FORGOTTEN ASIAN AMERICANS* 1, 9 (1983). The first Asian immigrants to settle on soil that is now part of the Continental United States were Filipino "Manilamen" who jumped ship in the Spanish Provincial Capital of New Orleans in 1763. *Id.* at 9; HERBERT R. BARRINGER ET AL., *ASIANS AND PACIFIC ISLANDERS IN THE UNITED STATES* 3 (1993). Chinese immigration began in the 1840s as Chinese laborers left their homes by the tens of thousands to come to the United States. RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 31 (1989) Japanese began arriving in Hawaii in significant numbers beginning in the 1880s and on the mainland in the 1890s. *Id.* at 42. Between 1903 and 1920, 8000 Koreans came to the United States. *Id.* at 53. The Vietnamese, Cambodians, Hmong, and Laotians have immigrated since 1965. BILL ONG HING, *MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY* 124-32 (1993). Pacific Islanders from Samoa, Tonga and Guam have also begun to immigrate.

Even though Asian immigrants come from the various countries mentioned above, the term "Asian Americans" has been used to group us all together. Although the term "Asian American" originated out of the dominant culture's need to categorize, the term also serves as a unifying point for our community. In this Article I use the term "Asian American" in the positive light of community identity, and I include the diverse ethnicities mentioned above. I do not intend the use of the terms "Asian American" and "Asian" to disregard the uniqueness of Pacific Islander ethnicities.

20. Asian Americans, currently 3.5 percent of the population, will provide 14 percent of new growth. *Snapshot of America at Mid-Decade*, CHI. TRIB., Apr. 1, 1997, at 12. Non-white Hispanic Americans, already 11 percent of the population, will provide 40 percent of the future growth. *Id.* The Asian American share of the population will more than double, to 8.2 % in 2050 from 3.5 percent in 1996. Katherine Q. Seelye, *U.S. of Future: Grayer and More Hispanic*, N.Y. TIMES, Mar. 27, 1997, at B16. By the year 2050, non-white, Hispanic Americans will outnumber the nation's total of African Americans, Asian Americans and Native Americans combined, and will account for one-fourth of the population, up from 10.7 % now. *Id.*

21. The 1990 census counted 1.4 million Filipinos nationwide. However, a recent poll conducted by the *Los Angeles Times* reports "political participation [among Filipino Americans] is low." K. Connie Kang, *Filipinos Happy with Life in U.S. but Lack United Voice*, L.A. TIMES, Jan. 26, 1996, at A1. Out of the 19 candidates in the May 3, 1997 elections, there are six women, two African Americans and one Hispanic but no

often used as tools by politicians who paint us either as non-victims of discrimination or as the “model minority.” These politicians point to us as a group that, through a conservative work ethic, has overcome discrimination and in this manner use us as a reason to be colorblind and ignore the need for race-consciousness. This Article also calls upon Asian Americans to support race-conscious diversity programs as a means of fostering Asian American participation in society, enabling us to define our own role, and thereby preempting self-serving politicians’ characterization of Asian Americans.

Race-conscious measures are most often associated with affirmative action. The term “affirmative action”²² historically indicates remedial and backward-looking rationale that have come to bear a negative connotation, especially in the context of non-victims of historical discrimination.²³ In contrast, the goal of diversity encompasses a remedial purpose by recognizing the exclusion of diverse groups and fostering their inclusion in the decision-making processes. Furthermore, it emphasizes the prospective benefits of a robust exchange of ideas, increased cultural awareness, multi-cultural understanding, and racial acceptance. Since the benefits of diversity serve purposes broader than remedying past discrimination, the goal of fostering diversity will remain even after the time when there is no need for remedial action.

The term “diversity program,” as opposed to affirmative action, is used throughout this Article to emphasize the dual rationale embodied in the goal of diversity. The use of the term “diversity” emphasizes the idea that the benefits of fostering diversity will carry forward and affect future generations by exposing them to different perspectives. The goal of diversity extends beyond affirmative action for so-called racial minorities.²⁴ It fosters greater representation by

Asian Americans, despite the fact that Asian Americans are the fastest growing segment of Arlington’s population. Kim Horner, *Few Asians in Local Politics, Experts Say Lack of Experience, Cultural Differences Cited*, DALLAS MORNING NEWS, Mar. 29, 1997, at 1A. “Many Asians do not participate in politics because they have immigrated from countries with oppressive political regimes and they do not have experience dealing with democracies.” *Id.* quoting Muriel Yu, professor at the University of Texas at Arlington. The negative stereotypes of Asian that have emerged from the recent controversy over allegations that China tried to influence the U.S. elections, also made them feel “scapegoated” and leery about entering the political scene. *Id.*

22. Section 706 of Title VII provides that if a defendant is found to have intentionally engaged in or is intentionally engaging in an unlawful employment practice, the court may “order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees . . . or any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g)(1) (1994). This definition of the term “affirmative action” lacks clarity. Does affirmative action entail the use of quotas or so-called “reverse discrimination?” This lack of clarity in defining affirmative action reflects the confusion and miscommunication that engulfs this issue.

23. See discussion of the Model Minority Myth *infra* Part III.A.

24. The use of the term “minority” “belies the numerical significance of the constituencies typically excluded from jurisprudential discourse.” Mari J. Matsuda, *Public*

“outsiders” and members of disempowered groups.²⁵ This Article focuses on race-conscious classifications in diversity programs.

Before going further, some preliminary definitions are in order. Although these concepts will be discussed in more detail later,²⁶ the terms “diversity” and “diversity program” and their use in this Article deserve attention. Diversity is the quality of being different from the majority or dominant culture.²⁷ How that difference manifests itself will vary with each individual. Although each person is unique and in that sense different from the majority, not everyone can be considered diverse. The question is which differences matter? Society has treated race and gender as particularly salient differences.²⁸ Minorities and women historically have been singled out for systematic subordination and oppression.²⁹ Diverse individuals are those whose differences have caused them to experience difficulty in accessing mainstream America. Disempowered groups and individuals are the focus of efforts to increase diversity. This Article focuses on racially diverse individuals and race-conscious classifications. The issue of which differences are particularly salient to diversity admissions programs is addressed later.³⁰

Although efforts to increase diversity are present in many areas of society, the term “diversity program”³¹ as used in this article refers to a program that seeks to diversify a law school’s student body by considering group membership or identity in order to foster the participation of racially diverse groups and thereby increase *meaningful*

Response to Racist Speech: Considering the Victim’s Story, 87 MICH. L. REV. 2320, 2323 n.15 (1989). For this reason, the term “racially diverse” is used in this Article.

25. “Outsider jurisprudence” includes feminist jurisprudence and the jurisprudence of people of color. *Id.* at 2323.

26. *See infra* Part III.

27. In the United States, the current dominant culture is “white” culture. This culture comprises “mainstream” society. This Article uses the term “dominant culture” to indicate the dynamic nature of the definition of diversity. The goal of diversity does not depend upon a particular dominant culture. Regardless of which groups come to power, there will always be those that are disempowered or underrepresented, and thus the goal of diversity will remain.

In this Article, I capitalize the terms Asian American, African American, Black, Hispanic American, and Latino but not “white.” This choice emphasizes the uniqueness of the diverse races. It also emphasizes the diversity of viewpoints among the various ethnicities as opposed to the dominant culture’s largely Western European view and decries any support of an essentialist reduction to minority v. non-minority views.

28. *See Foster, supra* note 9, at 129.

29. *Id.* Other disempowered groups include the economically disadvantaged and the physically challenged.

30. *See infra* Part II.

31. In defining a “diversity program,” I found the thoughts of Paul Brest and Miranda Oshige helpful. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 858 (1995). *See generally id.* at 856 (clarifying their usage of the term “affirmative action”).

exposure³² to diverse points of view. Because diversity programs will vary according to the specific goals of each institution, it is not possible here to delineate a specific diversity program. However, the following general thoughts are offered with regard to an ideal diversity program. There are three stages to attaining a diverse student body:

- (1) recruiting diverse applicants,
- (2) admitting qualified applicants, and
- (3) retaining diverse students.

In order to be effective, a diversity program must make a concerted effort in all three stages. Institutions which are perceived as "white" or "hostile to minorities"³³ have difficulty recruiting diverse applicants. Absent an admissions program that examines the "whole person" of each applicant because it recognizes that meritocratic methods³⁴ are not perfect predictors of ability, diverse applicants may be recruited but may not be admitted. Diverse applicants who are admitted may choose not to attend an institution that is perceived as "hostile to minorities." An institution can alleviate this perception by openly supporting diversity and emphasizing the benefits of the personal characteristic of being diverse. Absent this open support, there may be a stigma associated with the diversity program such that those who are matriculated may subsequently leave. Therefore, a diversity program is one that seeks to diversify a

32. I emphasize *meaningful* exposure to preempt any statement that diversity has been satisfied by hiring disempowered people to fill the lower ranks of an organization and thereby meet a goal of proportional representation. There is no *meaningful* exposure when the disempowered are only hired to perform menial tasks where their ideas do not matter and their thoughts are not heard. Similarly, in the educational context, there is no meaningful exposure when diverse applicants are admitted to give the appearance of a diverse student body but their views and input are ignored.

To have the kind of meaningful exposure to different viewpoints from which we may all benefit, underrepresented groups must be allowed to raise their voices and be heard at all levels. Proportional representation, or quotas, is not a goal of diversity. Rather, diversity seeks to foster equal participation.

33. See *Hopwood v. Texas*, 861 F. Supp 551, 572 (W.D. Tex. 1994) (describing the detrimental effect of the perceptions of the University of Texas School of Law as a "white institution" that was "hostile to minorities" on the school's efforts to attain a diverse student body).

34. It should be noted that what is seen as "meritorious," just as what is seen as a "difference," is defined by the dominant culture. There was no equity when these standards were created. The ideas of diverse groups were not sought when these "meritorious" standards were defined. I state this not as a substantive attack on the standard notions of "merit," but rather as another example of the lack of participation that diversity programs seek to rectify. Diversity programs will foster the participation of diverse groups who can then take part in defining what society as a whole deems "meritorious." See *infra* Part II.A. Throughout this Article, I use the phrase "traditional academic indicators" to refer to what others call "strict meritocratic measures."

university's student body by being conscious of an individual's race as it focuses its efforts on the three areas described above. The focus of this Article is on the use of race-conscious measures at the admissions stage.

Nothing in the above description should be taken to advocate proportional representation, quotas, or the lowering of standards. Nor do the above statements support admitting diverse applicants merely for the educational benefit of students from the dominant culture. Rather, a diversity program seeks to foster participation of diverse groups, cultivate diverse leaders, and promote the meaningful exchange of diverse views for the benefit of all parties. A diversity program may include various measures at each of the three stages described above including aggressive recruitment of diverse applicants, scholarships targeted at disempowered groups, encouragement of student groups on campus to represent the interests and needs of the different groups,³⁵ and considering community ties as a plus factor in the admissions process. However, without the use of race-conscious measures at the admissions stage, efforts at other stages are for naught.

Part I argues that diversity is a compelling interest and that a narrowly drawn diversity program will survive strict scrutiny. Part I also provides background on the development of the diversity concept in the Court's opinions in *Bakke* and *Metro Broadcasting* and the evolution of the strict scrutiny test for race-conscious classifications in Supreme Court cases, paying special attention to the Court's recent decision in *Adarand*. Part I also argues that the Court has left room for the diversity rationale to be considered a compelling state interest capable of surviving strict scrutiny. Part II defines the ideal diversity admissions program and addresses three issues to which diversity programs should give special attention: 1) emphasis on the whole person; 2) inclusion of race as an essential element of any definition of an individual's diversity; and 3) alleviation of any stigma diversity programs may introduce. Part III discusses the inclusion of various Asian ethnicities in diversity admissions programs and encourages Asian Americans to support diversity programs.

35. See U.S. GEN. ACCT. OFFICE, HIGHER EDUCATION: INFORMATION ON MINORITY-TARGETED SCHOLARSHIPS at 10 (1994).

I. THE STRICT SCRUTINY TEST AND ITS IMPLICATIONS FOR RACE-CONSCIOUS DIVERSITY PROGRAMS

A. *Historical Overview of Race-Conscious Measures and the Evolution of the Diversity Concept: Bakke to Adarand*

1. The Evolution of the Diversity Concept

a. Bakke

In 1978, the first major case dealing with race-conscious classifications came before the Burger Court when it addressed an admissions program designed to benefit groups that have suffered discrimination in our society. In *Regents of the University of California v. Bakke*,³⁶ a white male medical school applicant challenged the constitutionality of the admissions program for the University of California at Davis Medical School, a state-run school. Davis' admissions program reserved a number of spaces in its entering class for minority students.³⁷ The special admissions program operated with a special committee, a majority of whom were minorities.³⁸ The 1973 application asked applicants to indicate whether they were economically and/or educationally disadvantaged without providing a formal definition of the term "disadvantaged."³⁹ The 1974 application form asked applicants whether they desired to be considered members of a minority group.⁴⁰ Applications which contained affirmative answers to these questions were forwarded to the special admissions committee.⁴¹ The chairman of the special committee screened each application to see whether it reflected "economic or educational deprivation."⁴² These special applicants were not required to meet the 2.5 grade point minimum that applied to other candidates.⁴³ The special committee assigned each special applicant a benchmark score and presented its top choices to the general admissions committee; the special committee continued to

36. 438 U.S. 265 (1978).

37. *Id.* at 275.

38. *Id.* at 274.

39. *Id.* at 274-75.

40. *Id.* at 274.

41. *Id.*

42. *Id.* at 275. In examining the application for evidence of the applicant's economic or educational deprivation, the chairman noted, among other things, whether "the applicant had been granted a waiver of the school's application fee, which required a means test; whether applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group." *Id.* at 275 n.4.

43. *Id.* at 275.

recommend special applicants until a number prescribed by faculty vote were admitted.⁴⁴ The general admissions committee did not rate or compare the special applicants with the general applicants, but could reject recommended special applicants for specific deficiencies including failure to meet course requirements.⁴⁵

Alan Bakke, a rejected white male applicant, applied to Davis Medical School in both 1973 and 1974. In both years he had better paper credentials than some minority admires.⁴⁶ After the second rejection, Bakke filed suit challenging the special admissions program as a violation of the Equal Protection Clause.⁴⁷ On appeal to the Supreme Court, the University of California Regents, as petitioners, argued that "strict scrutiny" should only apply to "classifications that disadvantage 'discrete and insular minorities.'" ⁴⁸ Four Justices, led by Justice Brennan, agreed with the university and ruled that the appropriate standard was intermediate scrutiny, not strict scrutiny.⁴⁹ These four Justices ruled that any discrimination in Davis' admissions policy was benign because it was designed to remedy past discrimination and did not disadvantage discrete and insular minorities and, therefore, Davis' special admissions program satisfied intermediate scrutiny and was constitutional.⁵⁰

Four Justices, led by Justice Stevens, ruled in Bakke's favor on statutory grounds, without reaching the constitutional question.⁵¹ Justice Stevens continued that it was not necessary to consider whether Davis' admissions program violated the Equal Protection Clause of the Fourteenth Amendment because it violated section 601 of the Civil Rights Act of 1964⁵² which clearly prohibits "the exclusion of 'any' individual from a federally funded program on the

44. *Id.*

45. *Id.*

46. Justice Powell's opinion, citing the trial court's record for a comparison of Bakke's "traditional criteria" with an average of special admires' "traditional criteria," states that "[i]n both years, applicants were admitted under the special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's." *Id.* at 277.

47. *Id.* at 277-78.

48. *Id.* at 287-88 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938)).

49. *Id.* at 359 (Brennan, White, Marshall and Blackmun, JJ., concurring in the judgment in part and dissenting in part). These four Justices concluded that "racial classifications designed to further remedial purposes 'must serve *important* governmental objectives and must be *substantially related* to achievement of those objectives.'" *Id.* (citing *Craig v. Boren*, 429 U.S. 190, 197 (1976)(emphasis added)).

50. *Id.* at 368-79.

51. *Id.* at 411-12, 421 (Stevens, J., with whom Burger, C.J., Stewart & Rehnquist, JJ. join, concurring in the judgment in part and dissenting in part).

52. 42 U.S.C. § 2000d (1994).

ground of race⁵³ even if the exclusion does not carry with it a racial stigma.⁵⁴

Justice Powell's concurring opinion, announcing the Court's judgment, rejected the Regents' argument that strict scrutiny should only apply to classifications that disadvantage discrete and insular minorities and cast the decisive vote in favor of Bakke. Justice Powell, however, did not state that all race-conscious classifications were unconstitutional, but rather, set two acceptable justifications for race-conscious classifications: 1) remedying the disabling effects of identified discrimination and 2) creating diversity in the student body.⁵⁵ Nevertheless, Justice Powell, applying strict scrutiny, found that the Regents failed to prove that Davis' special admissions program was necessary to further either of these substantial state interests.⁵⁶

Justice Powell stated that the medical school's goal of "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,"⁵⁷ was akin to attempting to remedy societal discrimination rather than specific instances of discrimination.⁵⁸ Justice Powell further stated that the Regents' "broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality"⁵⁹ and as such, the Regents are in no position to make judicial, legislative, or administrative findings of constitutional or statutory violations.⁶⁰ Because there were no findings of constitutional or statutory violations (i.e., no "identified discrimination"), Justice Powell ruled that the Regents failed to carry the burden of justification for this rationale.⁶¹

With regard to the university's goal of fostering diversity, Justice Powell held that the Regents failed to prove that the university's race-based classification was necessary to promote the interest of diversity.⁶² Justice Powell stated that "when a State's

53. *Bakke*, 438 U.S. at 413.

54. *Id.* at 414. Justice Stevens' opinion also stated that "the question whether race can ever be used as a factor in an admissions decision is not an issue in this case" because the trial court's order did not include any "broad prohibition against any use of race in the admissions process . . ." *Id.* at 409-11.

55. *Id.* at 307, 311-13.

56. Although Justice Powell's decision uses the term "substantial interests," the sum of his opinion makes it clear that Justice Powell applied a strict scrutiny test and took the position that both of these goals would satisfy strict scrutiny.

57. *Id.* at 306 (citation omitted).

58. *Id.* at 307-09.

59. *Id.* at 309.

60. *Id.*

61. *Id.* at 310.

62. *Id.* at 320.

distribution of benefits or imposition of burdens hinges” on race, the State must prove that such a “classification is necessary to promote a substantial state interest.”⁶³ Additionally, “the diversity that furthers a compelling state interest encompasses a [broad] array of qualifications and characteristics of which racial or ethnic origin is but a single *though important* element.”⁶⁴ Although Justice Powell ruled against the Davis program, he did declare that educational diversity may be legitimately served by a “properly devised admissions program involving the competitive consideration of race and ethnic origin.”⁶⁵

Justice Powell’s opinion employs the first two parts of a race-conscious perspective as earlier defined.⁶⁶ First, Justice Powell made clear that considering race as a plus is acceptable in the educational context. In acknowledging that race is an important element of the compelling interest of diversity, Justice Powell recognized the social reality of race. Justice Powell addressed the internal effects of race when he stated that “[t]he atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”⁶⁷ Second, in striking down the Davis admissions program that used race as the sole criteria for preferring certain applicants, Justice Powell promotes a decision-making processes where race is an important factor, but not the only one.

b. Metro Broadcasting

The Court addressed affirmative action in the federal context and the diversity rationale in *Metro Broadcasting, Inc. v. FCC*.⁶⁸ *Metro Broadcasting* considered the constitutionality of the Federal Communications Commission’s (“FCC” or “Commission”) minority⁶⁹ preference policies. The FCC had two programs which were designed to increase broadcast diversity by rewarding minority

63. *Id.* (emphasis added). Given that Justice Powell’s opinion found diversity to be a compelling state interest and therefore an acceptable justification for race-conscious classifications, this finding presumably focuses on the fact that Davis’ program was race-based, as opposed to race-conscious.

64. *Id.* at 315 (emphasis added).

65. *Id.* at 320.

66. See *supra* note 3.

67. *Bakke*, 438 U.S. at 312–13 (citing Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WKLY. 7, 9 (Sept. 26, 1977)).

68. 497 U.S. 547 (1990).

69. The FCC defined “minority” as including “those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction.” *Id.* at 553 n.1 (quoting *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 980 n.8 (1978)).

ownership and participation in management of broadcast licenses.⁷⁰ The first of these programs focused on minority procurement of new licenses. When the Commission held a comparative hearing to compare mutually exclusive (technologically incompatible) applications for new radio or television stations, it considered minority ownership and participation in management a “plus” to be weighed together with all other relevant factors.⁷¹ The second program, the “distress sale” policy, increased minority opportunities to receive reassigned and transferred licenses. When a radio or television broadcaster was designated for a revocation hearing, or their renewal application was designated for hearing, the “distress sale” policy allowed that broadcaster to assign the license to an FCC-approved minority enterprise.⁷²

The Court’s opinion, delivered by Justice Brennan, held that broadcast diversity is, “*at the very least*, an important governmental objective”⁷³ and a justification for federal race-conscious classifications. The Court noted that the FCC and Congress had both forward- and backward-looking justifications for these programs. The Court stated:

Congress found that “the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communication.” Congress and the Commission do not justify the minority ownership policies strictly as remedies for victims of this discrimination, however. Rather, Congress and the FCC have selected the minority ownership policies primarily to promote programming diversity, and they urge that such diversity is an important governmental objective that can serve as a constitutional basis for the preference policies. We agree.⁷⁴

The Court accepted a diversity program with both backward and forward-looking rationales.

The Court applied a race-conscious perspective when it accepted the FCC’s rationales. In recognizing that the backward-

70. Although at the time of this writing, the Court’s recent decision in *Adarand* has partially overruled *Metro Broadcasting*, *Adarand* only addresses the standard of scrutiny and does not address the FCC’s policies. The specific policies addressed in *Metro Broadcasting* still exist today. See Text of “Affirmative Action Review” Report to President Clinton Released July 19, 1995, 1995 Daily Lab. Rep. (BNA) 139 d30 (July 20, 1995).

71. *Metro Broadcasting*, 497 U.S. at 557.

72. *Id.*

73. *Id.* at 567 (emphasis added).

74. *Id.* at 566 (quoting H.R. CONF. REP. No. 97-765, at 43 (1982)).

looking portion of the FCC's rationale was premised on a congressional finding that the present underrepresentation of minorities stemmed from past discrimination in the field of mass communication, the Court acknowledged that racially diverse individuals are often judged on the color of their skin and treated differently because of their race. Similarly, in accepting the forward-looking portion of the FCC's rationale, the Court applied a race-conscious perspective recognizing the internal effect of race and acknowledging that racially diverse individuals will have a different perspective because of their race. The majority was careful to reject the notion that it was employing impermissible stereotypes in accepting the internal effect of race:

The predictive judgment about the overall result of minority entry into broadcasting is not a rigid assumption about how minority owners will behave in every case but rather is akin to Justice Powell's conclusion in *Bakke* that greater admission of minorities would contribute, on the average, to the "robust exchange of ideas." To be sure, there is no ironclad guarantee that each minority owner will contribute to diversity [of views]. But neither was there the assurance in *Bakke* that minority students would interact with non-minority students or that the particular minority students admitted would have typical or distinct "minority" viewpoints.⁷⁵

The Court recognized that not *all* racial minorities will exhibit viewpoints different from the dominant culture. It is sufficient that a racially diverse broadcasting industry will produce "more variation and diversity than will one whose ownership is drawn from a single racially and ethnically homogeneous group."⁷⁶

The Court stated that "it is axiomatic that broadcasting may be regulated in light of the First Amendment rights of the viewing and listening audience and that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'"⁷⁷ "Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission."⁷⁸ The Court upheld the FCC's policies and practices designed to increase the ownership of broadcast enterprises by racial minorities, stating that "[t]he Commission's minority ownership policies bear the *imprimatur* of

75. *Id.* at 579-80 (citing *Bakke*, 438 U.S. at 312).

76. *Id.* at 579.

77. *Id.* at 567 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

78. *Id.*

long-standing congressional support and direction and are substantially related to the achievement of the important governmental objective of broadcast diversity.”⁷⁹

Because the Court applied an intermediate standard of scrutiny in *Metro Broadcasting*, and declared that broadcast diversity is an “important governmental objective,” it is not clear whether broadcast diversity would also be considered a compelling interest and pass muster under a strict scrutiny review as established in *Adarand Constructors, Inc. v. Peña*.⁸⁰

2. The Evolution of the Strict Scrutiny Test and *Adarand*'s Implications for Diversity

The issue of the proper standard of review for racial classifications was raised two years after *Bakke*, when the Court addressed a challenge to remedial race-conscious action on the federal level in *Fullilove v. Klutznick*.⁸¹ Chief Justice Burger's opinion, announcing the judgment of the Court, observed that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.”⁸² However, Chief Justice Burger's opinion did not “adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as, *Bakke*”⁸³ or any other traditional standard of equal protection review, but rather, formulated a two-part test based on a distinction between the powers of Congress and the

79. *Id.* at 600.

80. 115 S. Ct. 2097 (1995). However, in his dissenting opinion in *Adarand*, Justice Stevens stated that “[t]he proposition that fostering diversity may provide a sufficient interest to justify [a diversity program] is *not* inconsistent with the Court's holding today—indeed, the question is not remotely presented in this case—and I do not take the Court's opinion to diminish that aspect of our decision in *Metro Broadcasting*.” *Id.* at 2127–28. Justice Stevens' dissent is discussed further *infra* notes 112–115.

81. 448 U.S. 448 (1980) (upholding the 10% set-aside for minority-owned businesses that Congress included in the Public Works Employment Act of 1977).

82. *Id.* at 491.

83. *Id.* at 492. Chief Justice Burger's opinion did state that “the [Minority Business Enterprise] provision [of the Public Works Employment Act of 1977] would survive judicial review under either ‘test’ articulated in the several *Bakke* opinions.” *Id.* Chief Justice Burger's decision not to adopt strict scrutiny as outlined by Justice Powell in *Bakke* should not be seen as diminishing *Bakke*. “Chief Justice Burger's noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm.” *Adarand*, 115 S. Ct. at 2132 (Souter, J., dissenting) (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring, joined by Burger, C.J.))

powers of the states.⁸⁴ Chief Justice Burger's opinion upheld the program on the ground that Congress, more than any other state or federal government organ, has broad and comprehensive remedial power with which it may remedy past societal discrimination and enforce equal protection guarantees.⁸⁵ Just as in *Bakke*, the Court's decision in *Fullilove* did not contain a majority opinion. The Court left the issue of the proper standard for race-conscious measures unresolved.

For the next nine years after *Fullilove*, the Court was unable to concretely define the standard of scrutiny to be used for state and local governments' race-conscious classifications.⁸⁶ The lower courts were left floundering.⁸⁷ In 1989, the Court finally resolved the issue

84. *Fullilove*, 448 U.S. at 473. The two part test first asked "whether the objectives of [the] legislation are within the power of Congress," and second asked "whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment." *Id.*

85. *Id.* at 483-84. In his concurring opinion, Justice Powell argued that the plurality had essentially applied strict scrutiny as described in *Bakke* even though the plurality opinion chose not to articulate which standard it used. *Id.* at 495-96.

86. In *Wygant v. Jackson Board of Education*, the Court held that a collective bargaining agreement which protected recently hired minority teachers against layoffs in a state-run school was unconstitutional because it was not narrowly drawn to further the compelling state interest of remedying past discrimination. 476 U.S. 267 (1986). However, the Court was unable to form a majority opinion as to the proper standard of scrutiny to be applied to race-conscious measures. Justice Powell's opinion, in which Chief Justice Burger, and Justices Rehnquist and O'Connor joined, applied strict scrutiny. *Id.* at 274. Justice White, voting with the plurality, chose not to address the issue of a proper standard of review. *Id.* at 294-95 (White, J., concurring in the judgment).

In *Local 28 of the Sheet Metal Workers' Int'l. Ass'n v. EEOC*, the Court upheld a race-conscious remedy against a union that had been found guilty of racial discrimination in violation of Title VII, but, once again, the Court did not define the proper standard of review. 478 U.S. 421 (1986). Part V of Justice Brennan's opinion, in which Justices Marshall, Blackmun, and Stevens joined, states: "[w]e have not agreed . . . on the proper test to be applied in analyzing the constitutionality of race-conscious remedial measures. . . . We need not resolve this dispute here, since we conclude that the relief ordered in this case passes even the most rigorous test . . ." *Id.* at 480 (citations omitted).

In *United States v. Paradise*, the Court upheld a 1972 federal district court order that required half of the Alabama Department of Public Safety's subsequent promotions to be awarded to African Americans as a remedy for blatant discrimination. 480 U.S. 149 (1987). Justice Brennan's opinion, in which Justices Marshall, Blackmun, and Powell joined, states: "[A]lthough this Court has consistently held that some 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. We need not do so in this case, however, because we conclude that the relief ordered survives even strict scrutiny analysis . . ." *Id.* at 166-67 (footnote omitted).

87. See, e.g., *Kromnick v. Sch. Dist. of Philadelphia*, 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

for state and local governments when it applied strict scrutiny in *Richmond v. J.A. Croson Co.*⁸⁸ In *Croson*, the Court applied strict scrutiny to the City of Richmond's ordinance, a minority business utilization "set-aside" plan, and held that it violated the Fourteenth Amendment's equal protection clause. Justice O'Connor's opinion, speaking for a majority of the Court, held that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,"⁸⁹ rather, strict scrutiny applies to all race-conscious measures adopted by the states.⁹⁰ The Court's primary objection to the Richmond set-aside was its arbitrariness.⁹¹ Justice O'Connor's opinion stated that the "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination."⁹² Nevertheless, part III-B of Justice O'Connor's opinion, speaking for five Justices, suggests that a more carefully crafted set-aside plan may pass constitutional muster.⁹³

Although *Croson* alleviated some confusion by determining that the Fourteenth Amendment requires strict scrutiny of all state and local government race-conscious actions, *Croson* did not address the standard of review required by the Fifth Amendment for the federal government's race-conscious actions.⁹⁴ In using an intermediate

makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable."), *cert. denied*, 469 U.S. 1107 (1985).

88. 488 U.S. 469 (1989). The case has six separate opinions. Justice O'Connor's opinion (in which Chief Justice Rehnquist, and Justices White, Kennedy and Stevens joined as to Parts I, III-B, and IV) constituted the opinion of the Court. Justices Stevens and Kennedy each filed opinions concurring in part and concurring in the judgment. Justice Scalia filed an opinion concurring in the judgment. Justice Marshall filed a dissenting opinion in which Justices Brennan and Blackmun joined. Justice Blackmun filed a separate dissent, joined by Justice Brennan.

89. *Id.* at 494 (O'Connor, J., writing for a four-Justice plurality of the Court holding that strict scrutiny applies to all government classifications by race) (citing *Wygant*, 476 U.S. at 279-80 (O'Connor, J., concurring in part and in judgment)). Although this part of Justice O'Connor's opinion carried the weight of only four justices, Justice Scalia's concurring opinion also expressed the view that strict scrutiny is to be applied to all governmental classifications by race. *Id.* at 520 (Scalia, J., concurring).

90. *Id.* at 493.

91. *Id.* at 498-506.

92. *Id.* at 506.

93. *See id.* at 503 (noting that fine-tuned statistical analysis indicating a large difference between eligible Minority Business Enterprises and actual Minority Business Enterprise membership could give rise to an inference of discriminatory exclusion, thereby creating a compelling interest).

94. *See, e.g.,* *Shurberg Broadcasting of Hartford, Inc. v. FCC*, 876 F.2d 902, 959 (D.C. Cir. 1989) ("*Croson* certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences."); *Winter Park Communication, Inc. v. FCC*, 873 F.2d 347, 366 (D.C. Cir. 1989) ("The unresolved ambiguity of *Fullilove* and *Croson* leaves it impossible to reach a firm opinion as to the

scrutiny approach, *Metro Broadcasting* created an inconsistency regarding the appropriate standard of review for federal, as opposed to state, race-conscious classifications. After *Metro Broadcasting*, courts applied different standards of judicial review for governmental race-conscious actions depending on whether federal or state government action was at issue. The line was clearly drawn for state government action; if state government action was at issue, strict scrutiny applied. However, when federal government action was involved, intermediate scrutiny applied if the program in question was for "benign" purposes, but strict scrutiny applied if the program in question was not for a benign or remedial purpose. The Court recently eliminated all this inconsistency by ruling that the appropriate standard of scrutiny to be applied to all race-conscious actions, whether state or federal, is strict scrutiny.⁹⁵

*Adarand Constructors, Inc. v. Peña*⁹⁶ involved a contract that came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987 ("STURAA").⁹⁷ Section 106(c)(1) of STURAA provided that "not less than 10 percent" of the appropriated funds "shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals."⁹⁸ The Court held "that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."⁹⁹ Clarifying its holding, the Court stated: "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental

evidence of discrimination needed to sustain a congressional mandate of racial preferences."), *aff'd sub nom. Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990).

95. Although some may mourn the death of intermediate scrutiny for benign race-conscious classifications, and perhaps with good cause, some comfort may be taken in the fact that the lines have finally been drawn with some clarity. We need no longer worry what standard the Court will apply. Now the task is to define diversity programs that will meet this standard.

96. 115 S. Ct. 2097 (1995).

97. Pub. L. No. 100-17, 101 Stat. 145.

98. 101 Stat. at 145. STURAA adopts the definition of "socially and economically disadvantaged individual" found in the Small Business Act, 15 U.S.C. § 637 which defines "socially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. § 637(a)(5), and "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). STURAA also adds that "women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection." § 106(c)(2)(B), 101 Stat. at 146.

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

interests.”¹⁰⁰ To the extent that *Metro Broadcasting* allowed varying standards of review, *Adarand* overruled that case.¹⁰¹

Justice O’Connor, announcing the judgment of the Court, stated that, by adopting intermediate scrutiny as the standard of review for congressionally mandated “benign” racial classifications in *Metro Broadcasting*, the Court departed from prior cases in two ways: by turning its back on *Croson* and by undermining propositions laid out in previous cases.¹⁰² Justice O’Connor explained:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.¹⁰³

Justice O’Connor went on to state that “despite the surface appeal of holding ‘benign’ racial classifications to a lower standard,” the Court’s decision in *Adarand* would uphold the view expressed in *Croson* because “it may not always be clear that a so-called preference is in fact benign.”¹⁰⁴

Justice O’Connor also stated that *Metro Broadcasting* rejected the proposition of “congruence between the standards applicable to federal and state racial classifications” and in so doing undermined the propositions of “skepticism of all racial classifications, and consistency of treatment irrespective of the race of the burdened or benefited group” that previous decisions established.¹⁰⁵

100. *Id.*

101. *See id.* at 2112–13.

102. *Id.*

103. *Id.* at 2112 (quoting *Croson*, 488 U.S. at 493 (plurality opinion of O’Connor, J.)).

104. *Id.* (quoting *Bakke*, 438 U.S. at 298 (opinion of Powell, J.)).

105. *Id.* Earlier in her decision, Justice O’Connor identified three principles that the Court’s cases through *Croson* had established with respect to governmental racial classifications: skepticism, consistency, and congruence. “Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.” *Id.* at 2111.

The three propositions undermined by *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited,’—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.¹⁰⁶

The Court adopted a strict scrutiny test in order to protect the personal rights of individuals, regardless of their race, and to ensure that “government may treat people differently because of their race only for the most compelling reasons.”¹⁰⁷ Although Justices Scalia and Thomas, in their concurrences, expressed the view that there can never be a “compelling interest” to justify the government use of a race-conscious classification,¹⁰⁸ Justice O’Connor made clear that the Court “wish[ed] to dispel the notion that strict scrutiny is ‘strict in theory, but fatal in fact.’”¹⁰⁹ Justice O’Connor noted that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it,”¹¹⁰ and she stated that “[w]hen race-conscious action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the ‘narrow tailoring’ test this Court has set out in previous cases.”¹¹¹

Even though *Adarand* provides that strict scrutiny applies to all governmental race-conscious classifications, the decision does not address diversity as a compelling interest. In his dissenting opinion, Justice Stevens points out that *Metro Broadcasting*’s holding did not turn on its application of “intermediate scrutiny.”¹¹² “Indeed, I have always believed that . . . the FCC program we upheld in [*Metro Broadcasting*] would have satisfied any of our various standards in affirmative-action cases—including the one the majority fashions today.”¹¹³ Justice Stevens differentiated *Metro Broadcasting* from previous cases stating that “[w]hat truly distinguishes *Metro Broadcasting* from our other affirmative-action precedents is the

106. *Id.* at 2112–13 (citation omitted).

107. *Id.* at 2113.

108. *Id.* at 2118–19.

109. *Id.* at 2117 (quoting *Fullilove*, 448 U.S. at 519 (Marshall, J., concurring)).

110. *Id.*

111. *Id.*

112. *Id.* at 2127 (Stevens, J., dissenting).

113. *Id.*

distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was *intended to achieve future benefits* in the form of broadcast diversity.¹¹⁴ Regarding *Adarand's* effect on this “distinctive goal” of achieving future benefits through diversity, Justice Stevens states that “the proposition that fostering diversity may provide a sufficient interest to justify [a diversity] program is *not* inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.”¹¹⁵

This reasoning should bear even greater weight for the goal of attaining a diverse student body.

B. Diversity as a Compelling Interest¹¹⁶

The purpose of this Article is not to criticize nor support the strict scrutiny test for race-based classifications. Rather, this Article

114. *Id.* (emphasis added).

115. *Id.* at 2127–28.

116. A note regarding jurisdiction over private universities is required. Title VI of the Civil Rights Act of 1964 prohibits schools that receive federal funding from discriminating on the basis of race, color, or national origin. 42 U.S.C. § 2000d (1994). Title VI regulations issued by the Department of Education prohibit recipients of federal funding from “utiliz[ing] criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing the accomplishment of the objectives of the program as respect to [sic] individuals of a particular race, color, or national origin.” 34 C.F.R. § 100.3(b)(2) (1987). In 1988, Congress amended the “program or activity” language of Title VI to “mean all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education.” Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3, 102 Stat. 28 (1988). Because a private university’s admissions practices are part of its “operations,” Title VI applies to the admissions practices of private universities that receive federal funds. Therefore, private schools that receive federal funding most likely must adhere to Title VI.

It is unclear whether private institutions will be held to the strict scrutiny standard set by *Adarand*. Such a determination would require application of the state action doctrine. “There is no formal test for the amount of contacts with government which will subject a private person’s activities to the restrictions of the Constitution.” JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 12.3, at 463 (4th ed. 1991). The Court has stated that determining whether state action exists must be done on a case by case basis. *See, e.g.,* *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961). It is unclear whether indirect federal assistance in the form of tuition paid by student loans would be sufficient to require private institutions to be subject to strict scrutiny. *See* Lisa P. Baar, *The Higher Education Amendments of 1992: Resolving the Conflict over Diversity Standards and Institutional Eligibility for Title IV Aid*, 30 HARV. J. ON LEGIS. 253, 285–89 (stating that the constitutionality of students’ use of federal grants and loans, like those disbursed under Title IV, to attend religiously affiliated institutions is an open question but that cases suggest that such use would not violate the Establishment Clause). However, to be on the safe side, private institutions should create diversity admissions programs that would meet constitutional muster.

advocates the creation of race-conscious diversity programs and takes the position that educational institutions must understand the status of the law and draft race-conscious diversity programs that fit within it. A diversity program that utilizes race-conscious measures will be constitutional if it passes the two prongs of the strict scrutiny test, in other words, if it 1) furthers a compelling interest and 2) is narrowly tailored.

1. The Effect of *Hopwood* on the Concept of Diversity as a Compelling Interest

A university's interest in attaining a diverse student body was first endorsed as a compelling interest in *Bakke* where Justice Powell stated, "the interest of diversity is compelling in the context of a university's admissions program"¹¹⁷ [I]t is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."¹¹⁸ The need for an environment which would foster a "robust exchange of ideas" makes the goal of diversity "of paramount importance in the fulfillment of [a university's] mission."¹¹⁹ This is especially true in the law school environment.¹²⁰

The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned.¹²¹

Despite the Supreme Court precedents in this area, the Fifth Circuit Court of Appeal has recently decided that the use of race as a factor by the University of Texas School of Law ("UT" or "the law school") for the purpose of diversity was *per se* unconstitutional.¹²² The following discussion addresses the impact of the *Hopwood* decision upon drafters of diversity admissions programs.

117 438 U.S. at 313.

118. *Id.*; see also *Hopwood v. Texas*, 861 F. Supp. 551, 571 ("[O]btaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications.").

119. *Id.*

120. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 634 (1950).

121. *Id.*

122. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

In *Hopwood v. Texas*, four rejected non-minority applicants¹²³ challenged UT's 1992 admissions program alleging violations of equal protection.¹²⁴ UT's 1992 admissions program, consisted of two tiers: an admissions committee comprised of nine professors, two assistant deans, and four students; and a minority subcommittee comprised of three members of the admissions committee.¹²⁵ Upon receiving an application, the school color-coded it based on the applicant's Texas residency status and the applicant's race or ethnicity.¹²⁶ The race or ethnicity classification was divided into Black/African American, Native American, Asian American, Mexican American, Other Hispanic, white, or Other.¹²⁷ Each applicant was assigned a Texas Index number ("TI"), as calculated by the Law School Data Assembly Service ("LSDAS"), which reflected the applicant's GPA and LSAT score.¹²⁸ Once an initial determination of the quantity and Texas Index numbers of the applicant pool was made, Professor Johanson drew initial presumptive admission and presumptive denial lines based on the TI's and created three zones: presumptive admit, presumptive denial, and discretionary.¹²⁹ Committee members reviewing the files in the discretionary zone placed less emphasis on the applicant's numbers and instead carefully reviewed the applicant's qualifications as reflected in the applicant's entire file.

123. The plaintiffs were Cheryl Hopwood, a white female, and three white males, Douglas Carvell, Kenneth Elliott, and David Rogers. *Id.* at 937-38.

124. *Id.*

125. *Id.* at 937. Professor Johanson, a member of this minority subcommittee, was also the chair of the admission's committee. *Id.*

126. *Hopwood*, 861 F. Supp at 560. The district court's opinion points out that presumptive denial and admit lines were drawn higher for nonresident applicants. *Id.* at 561 n.22. Judge Smith's opinion neglects to mention that the applicant files were also color-coded according to Texas residency. 78 F.3d at 937.

127. *Hopwood*, 78 F.3d at 936 n.4.

128. *Id.* at 935.

129. *Id.*; *Hopwood*, 861 F. Supp at 560-61. "Those applicants with a high TI reflect a high LSAT and high grades in a rigorous major at a leading undergraduate institution were admitted by Johanson, who had unilateral authority to admit any applicant in this category without further consultation with the full admissions committee." *Id.* at 561. Applicants whose TI's fell above the presumptive admission line but were "inflated by high grades in a noncompetitive major or at a 'weak school' or if there was some other 'questionable feature of [their] file' were placed into a discretionary category. *Id.* The files of applicants whose TI fell below the presumptive denial line were reviewed by one or two members of the admissions committee to determine if the "TI adequately reflected the applicant's likelihood of success in law school or competitive standing relative to the entire applicant pool." *Id.* "[A]s a result of this review [some] files were upgraded . . . to the discretionary zone." *Id.* In addition to the applicants whose files were moved from one of the other zones, the discretionary zone was comprised of "those applicants whose TI's fell between the presumptive denial line and presumptive admission lines." *Id.*

The standards UT used to assess applicants differed based on race and national origin in two ways.¹³⁰ First, Johanson's determination of the presumptive admission and denial TIs varied between non-minorities and minorities, so that the presumptive denial score for non-minorities was higher than the presumptive admission score for minorities.¹³¹ Second, the admissions committee had different procedures for reviewing non-minority and minority files in the discretionary zone.¹³² Non-minority files were divided into stacks of thirty which were reviewed by three members of the admissions committee.¹³³ A minority subcommittee reviewed all the minority files.¹³⁴ Each member of the minority subcommittee was to be part of the three-person subcommittees that reviewed the non-minority files.¹³⁵ Instead of each minority subcommittee member performing an individual review, as was the procedure for the non-minority files, the minority subcommittee met as a group and reviewed each minority applicant's file.¹³⁶ The members of the minority subcommittee attended the meetings of the full committee and provided a summary of the files the subcommittee believed to be good applicants for admission,¹³⁷ however the subcommittee's decisions on individual minority applicants were virtually final.¹³⁸

130. The district court decision in *Hopwood* and the subsequent appeal conflict as to the compositions of the minority and non-minority groups and the manner in which these groups' admissions files were treated. Judge Smith's circuit court opinion states that only African Americans and Mexican Americans received the benefit of a separate admissions track. *Hopwood*, 78 F.3d at 936 n.4. However, the district court opinion merely states that the presumptive admit and denial lines were drawn differently for African American and Mexican American applicants. *Hopwood*, 861 F. Supp. at 562.

It is unclear how other diverse applicants were grouped, either with the non-minorities or with the African American and Mexican American applicants, for purposes of 1) presumptive admit and denial determination and 2) discretionary zone review procedures. However, I submit that the fact that there was no comparison between minority and non-minority files, as opposed to the exact composition of the groups, was the critical flaw in UT's diversity admissions program.

131. *Hopwood*, 78 F.3d at 936.

132. *Id.* at 937.

133. *Id.* at 936. Committee members were required to screen five stacks but no one person reviewed all the files in the discretionary zone. *Hopwood*, 861 F. Supp. at 562.

134. *Id.*

135. *Id.*

136. *Id.* Student members of the subcommittee attended the meetings but were not voting members of the subcommittee. *Id.* at n.30.

137. *Id.* at 562.

138. *Hopwood*, 78 F.3d at 937. The law school's 1992 program differed from the ideal diversity program because, in addition to the goal of diversity, the law school's 1992 program was designed to remedy *proven* past discrimination. This fact becomes relevant when discussing the remedy's numerical goals and the percentage of minorities in the relevant population, the third factor in determining whether a race-conscious measure is narrowly tailored. *See infra* Part II.C.1.c.

Judge Smith, announcing the majority opinion of the three judge panel,¹³⁹ held that “any consideration of race or ethnicity by the law school for the purpose of achieving a diverse student body is not a compelling interest under the Fourteenth Amendment.”¹⁴⁰ Judge Smith supported this position with the following rationale: 1) Justice Powell’s opinion in *Bakke* garnered only his own vote and therefore “is not binding precedent” on the issue of diversity as a compelling interest; 2) subsequent Supreme Court decisions regarding education state that only remedial state interests will justify racial classifications; and 3) the “classification of persons on the basis of race for the purpose of diversity frustrates, rather than facilitates, the goals of equal protection.”¹⁴¹ These rationales are flawed.

To support his argument that *Bakke* lacks precedential value, Judge Smith points out that no other Justices joined in Justice Powell’s “lonely” opinion.¹⁴² Judge Smith also states that the four-Justice opinion which would have upheld the special admissions program under intermediate scrutiny “implicitly rejected Justice Powell’s position.”¹⁴³ While it is true that no other Justices joined in Justice Powell opinion that educational diversity is a compelling interest, any special admissions program that satisfies Justice Powell’s standard would be approved by a majority of the *Bakke* Court. Therefore, Justice Powell’s opinion is tantamount to an opinion by the Court.¹⁴⁴ Moreover, the majority opinion in *Metro Broadcasting* which upheld broadcast diversity as a compelling interest was comprised of Justice Stevens and the same four Justices who Judge Smith claims “implicitly rejected Justice Powell’s opinion.”¹⁴⁵ Justice Powell’s opinion that diversity is a compelling

139. The case was heard before Circuit Judges Smith, Wiener, and DeMoss. Judge Wiener entered a special concurrence which concluded that the law school’s program was unconstitutional. However, Judge Wiener disagreed with the other judges’ determination that diversity could never be a compelling interest. *Id.* at 962.

140. *Id.* at 944 (emphasis added).

141. *Id.*

142. *Id.*

143. *Id.* at 944 (quoting *Bakke*, 438 U.S. at 326 n.1) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

144. See Vincent Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CAL. L. REV. 21, 23 (1979); see also *Hopwood*, 78 F.3d at 964 n.18 (Wiener, J., concurring) (“[W]hen and if the Supreme Court addresses this case or its analog, the Court will have no choice but to go with, over, around, or through Justice Powell’s *Bakke* opinion.”).

145. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 457, 457 (1990). Although the interests of broadcast diversity and educational diversity are distinct and separate from one another, the majority in *Metro Broadcasting* can be inferred to have supported educational diversity had that been the issue in that case, even under a strict scrutiny analysis. See *Adarand Constructors, Inc. v. Peña*, 116 S. Ct. 2097, 2127–28 (1995)

interest is not as lonely as Judge Smith would tend to believe. Absent a specific ruling from the Supreme Court to the contrary, *Bakke* is still good law which all lower courts must follow.¹⁴⁶

Judge Smith states that “[n]o case since *Bakke* has accepted [educational] diversity as a compelling state interest under a strict scrutiny analysis.”¹⁴⁷ Judge Smith has interpreted this lack of a definitive statement from the Court as suggesting that diversity does not constitute a compelling interest.¹⁴⁸ However, the reason no case has affirmed educational diversity as a compelling interest is only because the issue has not yet come before the Court. After *Bakke*, case law has merely decided the proper standard of review for race-conscious classifications. Judge Smith points to *Adarand* as calling *Bakke* into question.¹⁴⁹ However, *Adarand* did not question the precedential value of *Bakke*, instead addressing only *Bakke*’s expression of a proper standard of review.¹⁵⁰ Even the Supreme Court’s denial of certiorari in *Hopwood*¹⁵¹ does not suggest that diversity is not a compelling state interest. The Supreme Court’s refusal to hear the case for lack of a live controversy¹⁵² cannot not be interpreted as an endorsement of Judge Smith’s analysis.¹⁵³ Moreover, even if the existing case law suggests otherwise, Judge Smith’s position is merely an extension of recent Supreme Court precedent and not the law.¹⁵⁴

Finally, Judge Smith states that “[d]iversity fosters, rather than minimizes, the use of race” and that case law has “sufficiently established that the use of [race] simply to achieve racial heterogeneity, even as part of the consideration of a number of fac-

(Stevens, J., dissenting) (“[T]he proposition that fostering diversity may [be a compelling interest] is *not* inconsistent with the Court’s holding today . . . and I do not take the Court’s opinion to diminish that aspect of our decision in *Metro Broadcasting*.”).

146. See *Hopwood*, 78 F.3d at 963 (Wiener, J., concurring) (“[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.”).

147. *Id.* at 944.

148. *Id.* at 944–45.

149. *Id.* at 944 (citing *Adarand*, 115 S. Ct. at 2109).

150. *Adarand*, 115 S. Ct. 2097. Additionally, as Judge Wiener points out in his dissenting opinion, the full quote questions *Bakke* and its progeny regarding the proper test.

151. *Texas v. Hopwood*, 116 S. Ct. 2581 (1996).

152. Justice Ginsburg’s opinion, in which Justice Souter joined, notes that the petition for certiorari does not challenge the lower courts’ judgment that UT’s 1992 admissions program was unconstitutional. *Id.* at 2581. Justice Ginsburg noted that the petitioners acknowledged that UT’s 1992 admissions program was discontinued and that the petition solely presented a challenge to Judge Smith’s rationale. *Id.* “Accordingly, we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition.” *Id.*

153. See *Affirmative Action Confusion*, L.A. DAILY J., July 8, 1996, at 6.

154. See *Hopwood*, 78 F.3d at 963 (Wiener, J., specially concurring).

tors, is unconstitutional.¹⁵⁵ However, the Supreme Court has not declared the use of race as a criterion for determining diversity to be unconstitutional. On the contrary, Justice O'Connor has expressly stated that *Adarand's* adoption of the strict scrutiny test does not indicate the end of race-conscious classifications. "The point of [the strict scrutiny test] is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking."¹⁵⁶

2. The Continuing Importance of Diversity as a Compelling Interest

Hopwood bears little precedential value and *Bakke* remains the controlling law on this subject. Therefore, attaining a diverse student body continues to be a compelling interest¹⁵⁷ in itself because it contributes to academic freedom, a special concern of the First Amendment.¹⁵⁸ Moreover, diversity should be seen as a compelling interest because it is essential to equality.

Since *Bakke*, members of the Court have recognized that promoting diversity is a legitimate goal.¹⁵⁹ It is likely that Justices Stevens, Ginsburg, Breyer and Souter will support a narrowly tailored race-conscious diversity admissions program.¹⁶⁰ It seems

155. *Id.* at 945-46.

156. *Adarand*, 115 S. Ct. at 2113; see also *Hopwood*, 78 F.3d at 963-64 ("Justice O'Connor expressly states that *Adarand* is not the death knell of affirmative action—to which I would add, especially *not* in the framework of achieving diversity in public graduate schools") (citing *Adarand*, 115 S. Ct. at 2117).

157. *Regents of the Univ. of Cal. v Bakke*, 438 U.S. 265, 314 (1978).

158. *Id.* at 312 ("Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), cited in *Bakke*, 438 U.S. at 312; *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter J., concurring) ("It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.") quoted in *Bakke*, 438 U.S. at 312.

159. "The goal of providing 'role models' . . . should not be confused with the very different goal of promoting racial diversity among the faculty." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 288 n.* (1985) (O'Connor J., concurring in part); "In the context of public education, it is quite obvious that a school board may reasonably conclude that an integrated faculty will be able to provide benefits to the student body that could not be provided by an all-white, or nearly all-white faculty." *Id.* at 315 (Stevens, J., dissenting) (footnote omitted); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 600 (1990) (Brennan, J. plurality opinion).

160. See, e.g., *Adarand*, 115 S. Ct. at 2127 (Stevens, J., dissenting) (joined by Ginsburg, J.) ("The proposition that fostering diversity may provide a sufficient interest to justify [a racial classification] is *not* inconsistent with the Court's holding today."); *Bakke* amicus curiae brief by Ruth Bader Ginsburg and Frank Askin on behalf of the American Civil Liberties Union et al.; urging reversal; *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991) (opinion by Breyer, C.J.) (upholding a race-conscious promotion program that was narrowly tailored to further a compelling interest).

equally likely that Justices Scalia, Thomas, Rehnquist, and Kennedy will not support such a program.¹⁶¹ Given the 4-4 split among the Justices on the issue of diversity, Justice O'Connor may carry the day should the Court again address the issue of diversity admissions programs in higher education. In her dissenting opinion in *Metro Broadcasting*, Justice O'Connor, speaking for four justices, stated: "modern equal protection doctrine has recognized only one [compelling] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications."¹⁶² Taken by itself, this statement paints a bleak picture for diversity admissions programs. However, there may be cause for guarded optimism. "Because of [her] opinion in *Wygant*,¹⁶³ and because . . . [*Croson* did not prohibit the government] from considering race in those circumstances, it is difficult to believe that Justice O'Connor would vote to prohibit any consideration of race for the purpose of promoting racial diversity in a state university's body"¹⁶⁴

Although Justice O'Connor's opinion in *Adarand* imposes strict scrutiny on all racial classifications, she has extended an open invitation to consider education in different terms than construction contracts¹⁶⁵ when she stated that "strict scrutiny *does* take 'relevant

161. See, e.g., *Adarand*, 115 S. Ct. at 2118 (Scalia, J., concurring in part and concurring in the judgment) ("In my view, government can never have a 'compelling interest' in discriminating on the basis of race"); *Id.* at 2119 (Thomas, J., concurring in part and concurring in the judgment) ("[Racial classifications] ultimately have a destructive impact on the individual and our society."); *Minnick v. Cal. Dept. of Corrections*, 452 U.S. 105, 127 (1981) (Rehnquist, J., concurring) (agreeing with Justice Stewart's dissent, in which he argued that the lower court erred in holding that the state could consider race in making promotion decisions but joining the court's dismissal of certiorari on jurisdictional grounds); *Metro Broadcasting*, 497 U.S. at 631-38 (Kennedy, J., dissenting).

162. *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., joined by Rehnquist, C.J., and Scalia and Kennedy, JJ., dissenting).

163. In *Wygant*, Justice O'Connor endorsed the "promotion of racial diversity . . . in the context of higher education" as being "sufficiently 'compelling' . . . to support the use of racial considerations in furthering that interest." *Wygant*, 476 U.S. at 286. Justice O'Connor also implicitly approved of the goal of "promoting racial diversity among the faculty" of a school. *Id.* at 288. However, it is significant that Justice O'Connor's decision in *Adarand* does not mention her support for these issues when discussing the Court's opinion in *Wygant*. *Adarand*, 115 S. Ct. at 2109.

164. NOWAK & ROTUNDA, *supra* note 116, § 14.10 at 689 (footnotes omitted).

165. See Akhil Amar & Neal Katyal, *Beyond Bakke*, L.A. DAILY J., Aug. 15, 1995, at 6. Amar and Katyal identify three essential ways that universities are different from government contracting: "First, set-aside contracts are often given to minority-controlled corporations, not *individuals*," whereas accepting a candidate for admission "operates directly on an individual level." *Id.* "Second, contracts are jobs that the government wants done, but education is principally concerned with investing citizens

differences' into account—indeed that is its fundamental purpose. The point of [subjecting racial classifications to strict scrutiny] is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making."¹⁶⁶ By not ruling that the use of race is per se unconstitutional, Justice O'Connor leaves room for "legitimate uses of race" among which could be educational diversity. If Justice O'Connor supports diversity as a compelling interest, it seems at least possible, and perhaps likely, that a narrowly tailored diversity admissions program would be upheld.

C. Defining a Narrowly Tailored Diversity Program

In order to pass constitutional muster, a diversity program must be "narrowly tailored to further a compelling interest."¹⁶⁷ The Court has identified four factors to consider in determining whether race-conscious remedies are appropriate: 1) the effectiveness of alternative remedies; 2) the duration and flexibility of the relief; 3) the relationship between the remedy's numerical goals and the percentage of minorities in the relevant population; and 4) the impact of the relief on the rights of third parties.¹⁶⁸ Where applicable, the University of Texas School of Law's 1992 admissions program will be used as a point of reference for addressing these four factors.

1. The Effectiveness of Alternatives

In 1994, the United States General Accounting Office studied the use and perceived value of minority-targeted scholarships by undergraduate, graduate, and professional schools.¹⁶⁹ The study indicated that some school officials opined that elimination of minority-targeted scholarships would hinder their ability to recruit and retain minority students.¹⁷⁰ Moreover, the study revealed that school officials who believed that minority-targeted scholarships

with skills." *Id.* "A cash bonus is a blatant race-based handout, while a seat in a chemistry class is a hand-up." *Id.* "Third, contracts are awarded to" minority-controlled firms without any "logical stopping point" whereas "higher education . . . can be the ramp to a level playing field—with no further affirmative action—for the rest of your future." *Id.*

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

167. "[A] racial affirmative action program might be upheld if the Court found that it was narrowly tailored to promote diversity, it did not involve stigmatizing or stereotyping persons on the basis of race, and it did not involve the use of numerical goals or quotas . . ." NOWAK & ROTUNDA, *supra* note 116, § 14.10 at 688.

168. *United States v. Paradise*, 480 U.S. 149, 171 (1987) (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481 (1986) (opinion of Brennan, J.)).

169. U.S. GEN. ACCT. OFFICE, *supra* note 35, at 1.

170. *Id.* at 9 (footnote omitted).

were less helpful in their efforts to foster diversity identified an "aggressive minority recruitment campaign" as contributing to their success in recruiting and retaining minority students.¹⁷¹ These findings suggest that diversity admissions programs are necessary to further the goal of a diverse student body.

Because of Texas' past discriminatory practices, the University of Texas Law School has developed a reputation as a "white institution."¹⁷² "Recent racial incidents, although not officially sanctioned by the school, have reinforced the perception that the university is hostile to minorities and has hurt its ability to recruit minority students."¹⁷³ Additionally, many public schools in Texas continued to have a substantial degree of racial and ethnic segregation during the decades in which the majority of 1992 law school applicants attended primary and secondary school.¹⁷⁴ "This segregation has handicapped the educational achievement of many minorities. The ultimate effect of the inferior educational opportunity, combined with the lower socioeconomic status of minorities in Texas, is a disproportionately smaller pool of minority applicants to law school."¹⁷⁵ Given these problems, it is unlikely that the law school could achieve a diverse student body without a race-conscious admissions program.¹⁷⁶ "Alternatives, such as minority scholarships and increased minority recruitment, while effective tools in conjunction with the [diversity admissions program], would not be effective means by themselves to meet the compelling governmental interests of true diversity and remedying the effects of past *de jure* segregation."¹⁷⁷

Institutions which have been fortunate to not have had *de jure* segregation in their past may justify the need for a race-conscious admissions program to obtain a diverse student body along similar lines. Even though there has not been any *de jure* segregation in an institution's history, the institution may still have developed perceptions as being a "white institution" or as hostile to minorities which may hurt its ability to recruit diverse students. This may be especially true at the more prestigious law schools. An institution's elite status may deter diverse applicants, particularly those of lower

171. *Id.* at 10. Other factors the schools identified as contributing to their schools' success in recruiting and retaining minority students included "minority student associations on campus, minority administrators, and faculty members who served as role models for minority students, and academic support services for minority students having trouble with their classes." *Id.*

172. *Hopwood*, 861 F. Supp at 572 (citation omitted).

173. *Id.* (citation omitted).

174. *Id.* at 573.

175. *Id.*

176. *See id.*

177. *Id.* at 573-74.

economic status, from applying. Even if active recruiting or increased numbers of diversity scholarships could alleviate the problem of a small applicant pool, without a race-conscious admissions program, many of the diverse applicants may not be admitted. Moreover, the perception that the institution is traditionally white (which translates to hostile to minorities) could prevent accepted applicants from matriculating. Ultimately, those who matriculate may be driven to leave an institution where they feel unwelcome. This illustrates the importance of the three stages of a diversity admissions program as mentioned previously¹⁷⁸ (recruitment, admission, and retention) and why there must be a concerted effort at each stage of the process. Efforts in one stage, without corresponding efforts in another will not produce a diverse student body. At a minimum, race-conscious measures at the admissions stage are necessary to admit significant numbers of diverse students.

Most law schools do not publicize the relevant data necessary to make a determinative conclusion with regards to the impact of race-conscious measures.¹⁷⁹ Moreover, some scholars opine that an end to race-conscious measures would leave many of the nation's law schools wanting for African American, Latino, and Native American students.¹⁸⁰ "[T]he luck of the draw, supplemented by a general policy of seeking students with different backgrounds and life experiences, will achieve diversity in almost every important respect *except* race and ethnicity."¹⁸¹ Thus, a diversity program that does not employ race-conscious methods would likely prove to be ineffective.

a. Duration and Flexibility

Two goals of diversity have been articulated to set the temporal parameters of diversity admissions programs: 1) reducing the gap between the credentials of diverse applicants and those of applicants from the dominant culture and 2) achieving a representative per-

178. See *supra* notes 29–32 and accompanying text.

179. Farber, *supra* note 10, at 913–14 (1994). The fact that racially diverse professionals earn less than their white counterparts with equal educations shows that discriminatory practices in the community from which the school's applicant pool is derived could conceivably perpetuate the lower economic status of the disempowered groups. Although evidence of the lower economic status of disempowered groups, by itself, would seem to be a weak foundation on which to base a race-conscious diversity program, it might be persuasive if a nexus could be drawn between such evidence and the great expense of a law school education resulting in a small applicant pool.

180. See Brest & Oshige, *supra* note 31.

181. *Id.* at 863 n.26 (emphasis deleted).

centage of diverse students in the entering classes. These goals are problematic from the perspective of creating diversity. First, the goal of narrowing the gap in credentials rigidly focuses on meritocratic measures and ignores the beneficial characteristic of being diverse. Instead of narrowing this gap, the drafters of programs might consider eliminating it by creating one set of presumptive admission and denial lines and defining "equally qualified" zones.¹⁸² Second, the goal of achieving a representative percentage of diverse students in the entering classes may be justified at schools which have had *de jure* discrimination in their history, but a diversity program does not advocate proportional representation. Since the composition of diverse students may change throughout the years, a diversity program must adapt and change with the changing demographics of each student body.

A definition of diversity that uses specific threshold factors provides a viable alternative to affirmative action programs with strictly defined numerical goals. The goal of promoting the meaningful exchange of diverse views is essential to education and will exist as long as the need for education exists. Unlike affirmative action rationales for admissions programs,¹⁸³ there is no definitive end to the goal of achieving diversity. Diversity programs recognize the long lasting benefits of exposure to different people's perspectives and give credit to applicants for being diverse, even in the absence of past discrimination. The lack of an endpoint in the achievement of diversity may seem troublesome to some. However, recognizing the persistent social reality of race mandates the continued use of race as one factor in promoting diversity.

A program must remain flexible in order to effectively promote diversity. Such flexibility may be achieved in the following ways: (1) adaptation of its goals in accordance with the changing demographics of the applicant pool; (2) examination of all aspects of diversity in order to place each applicant on equal footing; and (3) periodic review of the program's results and creation of timetables and goals to improve the effectiveness of the program. Additionally, since the type of diversity program advocated in this Article does not advocate any lowering of standards, an institution is not required to

182. See *infra* note 217 and accompanying text.

183. With regard to duration, the court in *Hopwood* noted that "the law school has not stated precisely how long it envisions maintaining its [race-conscious] admissions program." *Hopwood*, 861 F. Supp. at 575. The court noted that "as the minority applicant pool improved, the admissions committee made the decision not to admit greater numbers of minority students but to attempt to close the gap in credentials of minority and non-minority students . . . to the point where affirmative action will not be required to achieve a representative percentage of minorities in the entering classes." *Id.* These observations by the court focus on the affirmative action element of the law school's program and do not address the duration of the diversity portion.

admit minority applicants whose traditional academic indicators render them unqualified.¹⁸⁴ However, a diversity program should be flexible in other ways. A diversity program also must be “flexible enough to consider all pertinent elements of diversity in light . . . of the particular qualifications of each applicant, and place them on the same footing for consideration.”¹⁸⁵ This approach coincides with a diversity program’s emphasis on the whole person of the applicant and runs counter to strict adherence to inflexible academic ratings. Applicants should be allowed to indicate whether they wish to be considered diverse because they possess any of the previously stated, factors or characteristics.¹⁸⁶ Admissions offices must place

184. In *Paradise*, the decision from which the four factors of a narrowly tailored affirmative action program originate, Justice Brennan noted that a plan requiring one-Black-for-one-white promotion was flexible in that it could be waived if no qualified Black candidates were available. *United States v. Paradise*, 480 U.S. 149, 177(1987).

185. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978).

186. See, e.g., *University of San Diego School of Law, Application for Admission for Juris Doctor Program 2* (1995) (giving applicants the option to indicate diversity characteristics in question 15). In generating its 1997 application for admission, the University of San Diego School of Law decided against asking whether the applicant wishes to have any relevant diversity factors (including racial or ethnic diversity, physical disability, economic background, or history of overcoming hardship) considered in the evaluation of the application. *University of San Diego School of Law, Application for Admission for Juris Doctor Program 1* (1997). Possibly, this question was removed in response to the so-called California Civil Rights Initiative “CCRI” and other political pressures against race-conscious measures. It is precisely this type of overreaction to political rhetoric that this Article aims to dissuade.

A brief note on the CCRI is warranted. Proposition 209 amends Article I of the California State Constitution by adding section 31, which states: “[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,” therefore prohibiting the adoption of race- or gender-based affirmative action programs in the public sector. CAL. CONST. art 1, § 31(a). On November 6, 1996, the day that Proposition 209 passed by a margin of 54% to 46%, a group of civil rights advocates including the NAACP and the Coalition for Economic Equity, filed suit to stop its implementation. *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1520 (N.D. Cal 1996) (order granting preliminary injunction). The court restrained and enjoined the implementation of Proposition 209 pending trial or final judgment in the action. *Id.* at 65–66. On April 8, 1997 a three-judge motions panel of the Ninth Circuit ruled that the measure does not violate the Equal Protection Clause of the United States Constitution. Pamela A. MacLean, *9th Circuit Panel Lifts Prop. 209 Injunction*, L.A. DAILY J., Apr. 9, 1997 at A1. The panel was originally seated only to consider a stay of the preliminary injunction but, following oral arguments, announced that it would rule on the merits. *Id.* The plaintiffs will seek a full eleven judge hearing by the Ninth Circuit Court of Appeals and the issue may ultimately be decided by the United States Supreme Court.

For purposes of this Article, it is important to note two things. First, a properly crafted diversity admissions program that defines merit to factor in racial diversity should not fall within the language of Proposition 209. See CAL. CONST. art 1, § 31(a). Second, even if Proposition 209 is ultimately held to be constitutional, it does not affect the ability of private institutions to implement affirmative action programs.

greater emphasis on the personal statement where applicants have an opportunity to explain how they are diverse and relate ties to their ethnic communities.¹⁸⁷ Such ties may take the form of “participat[ion] in a student organization like la Alianza, or public[ation of] an article exploring the concerns of her community, or work[ing] in a capacity which directly benefited her community.”¹⁸⁸ By giving the personal statement great weight in combination with traditional academic indicators a diversity program will allow more flexibility by considering the qualities of all applicants who apply as diverse. Finally, a diversity program must be flexible in that, like the University of Texas law school’s program, it is regularly reviewed and adjusted to evaluate the program’s necessity and efficacy.¹⁸⁹ A diversity program should be flexible enough to target various elements of diversity after regular evaluation of its goals and efficacy determines that those elements may be lacking.

b. *Relationship of the Numerical Goals
to the Relevant Population*

Since diversity programs do not seek proportional representation and set no numerical goals, it is difficult to determine how goals will be applied to a diversity program that does not include an aspect of remedying past discrimination. One of the four factors set forth by the Court in *Paradise* to determine the appropriateness of race-conscious remedies is the relationship between the numerical goals and the relevant population.¹⁹⁰ The application of this factor to diversity programs is problematic, particularly when such programs do not have a remedial rationale. The relevant population element of this factor is difficult to define as well.¹⁹¹ The relevant pool from which diverse applicants are selected will vary from school to school. Furthermore, the fact that most law schools accept applicants from around the nation makes it difficult to see how the relevant pool will be determined. School-specific statistics regarding the recruitment of minorities and their subsequent graduation from

187. Haney-Lopez, *supra* note 7, at 56 (arguing that an applicant has “community ties” in cases where the applicant has clear public affiliation with his or her community); See Brest & Oshige, *supra* note 31, at 876 (advocating an intermediate position between leaving an applicant’s diversity entirely up to the applicant’s self-identification and allowing the institution to undertake an independent assessment of an applicant’s membership in a particular racial group).

188. Haney-Lopez, *supra* note 7, at 56.

189. *Hopwood*, 861 F. Supp. at 575.

190. *United States v. Paradise*, 480 U.S. 149, 171 (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481 (1986)).

191. *Id.* at 171.

specific schools may be used to evaluate this element.¹⁹² Additionally, the school's goals will determine its admissions preferences. A school that is trying to build the state bar may give preference to recruiting in-state students likely to stay in the state.¹⁹³

Although the Fifth Circuit did not address the flexibility of UT's 1992 admissions program, the district court in *Hopwood* found that this factor was easily met under the facts in that case. The district court noted that the law school did not set "goals that reflect the percentage of minorities in the general population or the percentage of minorities attending college [but rather set goals that were] generally in line with the percentages of black and Mexican American college graduates in the State of Texas."¹⁹⁴ Because these goals stemmed from the Office of Civil Rights' investigation¹⁹⁵ and the resulting Texas Plan, the court found them to be "reasonable and logically related to the size of the relevant pool of minority prospects for higher education."¹⁹⁶ However, the problem still remains for schools that did not participate in *de jure* discrimination. Ultimately, this factor may not be applicable to diversity programs that do not have a remedial rationale.

c. Impact on the Rights of Individual Applicants

The *Bakke* court took great exception to the fact that Davis' admissions program created a quota isolating the ethnically diverse applicants from comparison with other candidates for the available seats.¹⁹⁷ This practice constituted a facial intent to discriminate against other applicants and a disregard of their individual rights as guaranteed by the Fourteenth Amendment.¹⁹⁸ Similarly, the constitutional infirmity of UT's 1992 program was that it failed to compare each individual applicant with the entire pool of applicants, but instead compared applicants only to others of the applicant's race.¹⁹⁹ The district court in *Hopwood*, focusing on the remedial aspect of UT's program, stated that while "overcoming the effects of past dis-

192. See U.S. GEN. ACCT. OFFICE, *supra* note 35, at App. IV (describing a study of six schools that used minority-targeted scholarships in recruitment, retention, and graduation of racial or ethnic minorities).

193. See *infra* note 230 and accompanying text.

194. *Hopwood*, 861 F. Supp. at 575.

195. See *id.* at 556 (stating that the court-ordered investigation conducted by the Department of Health, Education and Welfare Office for Civil Rights found that Texas retained vestiges of its former *de jure* racially segregated system of public higher education, and that Hispanics were significantly underrepresented in state institutions).

196. *Id.* at 575.

197. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978).

198. See *id.* at 320 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1947)).

199. *Hopwood*, 861 F. Supp. at 579.

crimination is an important goal . . . [t]he preservation and protection of individual rights are equally important."²⁰⁰ Through application of the same reasoning, diversity programs of the type discussed in this Article should not trammel the rights of individual applicants.

In order to protect individual rights there must be a one-to-one comparison between all applicants.²⁰¹ A diversity program must allow the diverse applicants to compete with all other applicants. This will likely entail the admissions committee having to read the files of all applicants within the discretionary zone.²⁰² This would not preclude the use of "equally qualified zones" as described earlier. Rather, the use of "equally qualified zones" may be a way an admissions program could divide the files into manageable groups. It is not necessary, nor is it feasible, for each individual member of the admissions committee to read each individual applicant file. By having the entire pool of "discretionary" applicant files reviewed by one committee, the committee members can then make more appropriate comparisons between the applicants.²⁰³ As a supplementary measure, it may also be useful to have student group review.²⁰⁴ In addition, another way to ensure that all applicants are compared together, thereby protecting each applicant's individual rights is to have the final authority to admit all applicants reside in one entity. That one entity, after reviewing all recommendations made by those who reviewed the files, and after comparing each applicant with the

200. *Id.*

201. See *Bakke*, 438 U.S. at 318; see also *Hopwood*, 861 F. Supp. at 577-78.

202. Subsequent to the initiation of the *Hopwood* litigation, the University of Texas Law School altered its admission procedures to provide for individual review of all applications by a single committee. However, the law school has maintained its admission preferences for African Americans and Mexican Americans. *Weekend Edition: Affirmative Action in Higher Education to High Court*, (NPR radio broadcast, June 11, 1995), available in LEXIS News Library, SCRIPT File.

203. See *Hopwood*, 861 F. Supp. at 577, (citing testimony of Paul Brest, Dean of the Stanford Law School).

204. Some law schools provide applicants with the opportunity to have their files reviewed by a student group of their own race. These student group assess the applicant's diversity and then make recommendations on the applicant's admissibility. Although it may be argued that the student review of only racially diverse applicants amounts to a separate admissions procedure for the racially diverse, this is not the case. It does not follow that all applicants must be given the opportunity for student review in order to justify its usage for diversity applicants. It should suffice that all the files are being reviewed by the entire admissions committee. Diversity student review of racially diverse applicants would be a needed step in accurately gauging the diversity of a particular applicant. It is reasonable to assume for example, that a professor who is part of the dominant culture will not have as much experience to relate to an applicant's personal statement describing growing up in an Asian American family as an Asian American student may have. The professor may require the opinion of an Asian student as an advisor to glean more insight into the applicant's diversity.

entire pool, will be able to make an individualized decision. This procedure serves the function of insuring that the individual's rights are protected. Although this process may seem burdensome and inconvenient, these costs are small in relation to the many benefits of increasing diversity in a student body. In sum, the best way to alleviate any suspicion that there may be an unconstitutional review procedure or an impermissible quota is to have a single entity review all the files, ensuring that a certain number of admissions slots are not set aside for particular groups.

II. THE IDEAL DIVERSITY PROGRAM

As stated previously, diversity, in the general sense, is the personal characteristic of being different from the majority or dominant culture.²⁰⁵ Although diversity may be defined in these general terms, diversity admissions programs require a more specific definition. Many educational institutions' admissions departments avoid using specific definition of diversity. This avoidance may be due in part to the amorphous nature of the concept and the criteria upon which it is based, and in part because of the fear that promulgating a specific definition could subject them to litigation. Some programs may fall into the trap of using a definition of diversity that is so broad that it ceases to be useful in terms of recruiting individuals from disempowered groups. Specificity is achieved not by numbers or percentages, but by the use of specific threshold questions. In order to avoid this trap and create an effective diversity program, a specific definition of diversity that will withstand strict scrutiny is required. In *Bakke*, Justice Powell stated that "[t]he diversity that furthers a compelling state interest encompasses a [broad] array of qualifications and characteristics of which racial or ethnic origin is but a single *though important* element."²⁰⁶ Given this, it stands to reason that a definition of diversity that considers other elements in addition to race will withstand strict scrutiny. What constitutes diversity will be based on various factors including the applicant's race, gender, whether the applicant hails from a location which would add geographic diversity to a particular student body, and the institution's goals and history.²⁰⁷

Although the elements which an institution chooses to consider as part of its definition of diversity may include any number of personal characteristics, there are characteristics which should exclude an individual from being considered diverse and ensure that others

205. See *supra* note 27 and accompanying text.

206. *Bakke*, 438 U.S. at 315.

207. Brest & Oshige, *supra* note 31, at 856.

are included in the definition. Individuals from the dominant culture are not diverse. To say that the dominant group or viewpoint is not diverse is a tautology. However, this statement is not an advocacy for an essentialist reduction of the various multicultural viewpoints to majority and non-majority perspectives. Moreover, an individual from the dominant group may have significant life experiences which provide that individual and diverse viewpoint. This points out the distinction between "group diversity" and "individual diversity." Although diversity programs are targeted at disempowered groups, their objective is to examine each applicant as an individual, not merely as a member of a group. Race is not only a social grouping, it is a personal characteristic. The question, then, is whether ethnic individuals who have been assimilated will qualify as diverse or whether they merely compound the dominant culture. The answer lies in broadly evaluating each applicant in terms of what qualities the applicant possesses which could benefit the institution.

Diversity programs must target disempowered groups as a starting point to seeking diverse individuals. The disempowered status of outside groups makes their presence especially relevant to a school's educational mission and requires special consideration to ensure representation of their views.²⁰⁸ However, this does not preclude ethnic individuals who are fortunate enough to be able to access mainstream society from qualifying as diverse. Selena Dong has observed, "[w]hile educational diversity may justify giving some

208. *Id.* at 872. This raises the question of whether economic disadvantage in itself is a sufficient threshold factor for diversity. The answer is "no." Although the views of economically disadvantaged whites are valid, they are no more important, and should not be given more weight than, the views of the economically disadvantaged who are racially diverse. Programs that only focus on socioeconomic factors essentially place more importance on the views of economically disadvantaged whites and disregard the salient difference of race and the importance of cultural diversity. This statement doesn't attempt to invalidate the experience of poor whites. Rather, it seeks to emphasize the validity of the experience of poor people of color and recognize that there is a tangible difference in the quality of these two experiences.

In response to the recent attacks on race-conscious programs, some schools have changed their diversity admissions programs to focus on "economically disadvantaged" applicants. Telephone interview with Joy P. St. John, Student Member, 96-97 UCLA Faculty Admissions Committee (April 3, 1997). In light of the so-called California Civil Rights Initiative ("CCRI"), the Faculty Senate Admissions Committee at the University of California at Los Angeles School of Law, changed their admission policy by not considering race and focusing on socioeconomic factors. *Id.* However, this is an unnecessary and ineffective reaction. Economic disadvantage is not a suspect class; race and gender are. Moreover, preliminary data indicate that the number of diverse students at UCLA will decrease as a result of the new admissions program; out of the entire 1997 applicant pool, only 23 Black applicants would be admitted, and only three would be expected to matriculate. *Id.* As of April 2, 1997, UCLA had admitted 850 out of 900 expected total admits and only 21 admits were Black. *Id.*

racial minority groups preferential treatment relative to [the dominant culture] this goal should never be used to justify giving [the dominant culture] preferential treatment relative to a minority group."²⁰⁹

However, group identification, be it with a disempowered group or the dominant culture, is not dispositive of an individual's diversity or lack thereof. Whether an individual is diverse does not depend solely upon his or her membership in certain racial groups, socio-economic status, or social or political viewpoints. Rather, diversity extends as a combination of these factors, and, in the final analysis, is a personal characteristic measured by the individual's ability to add to the diversity of the student body. The purpose of a diversity program is to increase the representation of the disempowered, thereby fostering a robust exchange of ideas. Most often this is accomplished by focusing on disempowered groups in order to give disempowered individuals the opportunity to have their voices heard. However, it is conceivable that an institution could find that an individual member of the dominant culture would add to the diversity of the student body because of their varied life experiences or some other factor deemed relevant by the institution. Similarly, an individual's identification with a group that is traditionally considered disempowered does not, in and of itself, indicate that the individual is diverse.

The challenge comes in establishing a balance between recognizing the disempowered status of certain groups and protecting the rights of individuals. One way to resolve this tension is to employ a two-part process: the first part focusing on whether the applicant is a member of a group which historically has been discriminated against; the second focusing on the applicant's ability to add a level of diversity which the school, to a degree, is lacking. Because "[a] meaningful evaluation between [all applicants]" is "a crucial element for protection of individual rights,"²¹⁰ all applicants should be given the chance to show diversity. Specific diversity programs may choose to include other factors such as unusual life experience (single mother, unique job, etc.) as threshold tests. However, racial diversity should always be included in evaluating who will be considered diverse. Once an applicant passes the threshold tests, usually by demonstrating membership in a disempowered group, it is up to the individual to prove his or her diversity in the personal statement. It is at this point that the individual's community ties and

209. Selena Dong, "Too Many Asians": *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN L. REV. 1027, 1029 (1995). Admissions programs that focus on socio-economic factors and disregard race essentially give preferences to poor whites over racially diverse applicants.

210. *Hopwood*, 861 F. Supp. at 578; see also *Bakke*, 438 U.S. at 318.

his or her commitment to promoting diversity should be given consideration.

The purpose of diversity programs, fostering a robust exchange of ideas by increasing the representation of the disempowered, may be served directly by admitting disempowered individuals, or indirectly by admitting individuals who, while not having experienced difficulty accessing mainstream society, are committed to increasing the representation of the disempowered. An applicant who presents a history of commitment to increasing diversity may reasonably be expected to continue that commitment at law school. Brest and Oshige caution that "an inquiry into an applicant's cultural identification can easily blur into an inquiry into his [or her] social or political viewpoints."²¹¹ Brest and Oshige go on to disagree with the suggestion, "that there are 'black' and 'white' ways of thinking, and with the possible implication that affirmative action is not served by admitting conservative minority students."²¹² However, given the fact that a diversity program seeks to ensure the adequate representation of disempowered groups in order to foster the robust exchange of ideas, admitting an applicant whose life experiences indicate a commitment to increasing diversity and therefore whose goals coincide with the goals of the program, would only seem logical.

In addition to the above thoughts on the definition of diversity applicable to an admissions programs, there are three important points institutions should consider. First, emphasis on the whole person is essential to achieving a diverse student body. Second, race-conscious admissions programs are necessary to achieve a diverse student body. In light of the stringent requirements imposed by the strict scrutiny test, some institutions may be inclined to ignore race as a consideration or to adhere strictly to academic indicators for determining acceptable applicants. However, it is neither necessary, nor beneficial to adopt such rigid measures. Third, the work of a diversity program does not end once the diverse applicants matriculate. Rather, a diversity program must take steps to ensure that the diverse students are not stigmatized and thereby discouraged from raising their voices and contributing to the exchange of ideas, or worse yet, forced to leave school because of the hostility of the educational environment.

211. Brest & Oshige, *supra* note 31, at 876.

212. *Id.*

A. *Emphasis on the Whole Person*

The ideal diversity program will not use traditional academic measures as its sole criteria for admittance but instead will admit qualified applicants based upon an examination of the whole person. With regards to determining who is qualified for admission, law schools have traditionally looked at academic indicators which are intended to predict an applicant's academic performance. These usually include the applicant's grade point average ("GPA") from their undergraduate school and the applicant's score on a standardized test, the Law School Aptitude Test ("LSAT"). Together, the GPA and the LSAT score are used to obtain an index number which admissions committees use to determine which applicants to accept.²¹³ The use of these index numbers as a starting point in admissions programs is justified by a need for efficiency because the number of applicants for a limited number of seats renders an extensive or individualized screening process impractical.²¹⁴ However, the need for efficiency does not excuse selection of applicants based on minimal differences in index numbers without assessing whether such differences are meaningful.²¹⁵ Professor Michael Selmi explains:

If there is a .3 correlation between LSAT scores and first year law school grades, then only 9% of the variance in grade point averages will be explained by LSAT scores. This [indicates] . . . that the test does not provide the explanation [for the remaining variance]. Instead, other factors such as study habits, interest in the subject matter or effort may be better, or stronger, predictors of first-year grades than the test itself [I]n educational decisions, schools will often have access to information that may provide insight into whether an applicant possesses these other factors that were not accounted for by the test. . . . The point here is that just as there is no reason to ignore test scores altogether, there is no reason that test scores should be afforded more weight than they deserve. Test scores have no talismanic quality—they may provide use-

213. The use of index numbers varies at each institution. Such information often is not publicly available.

214. Cf. Michael Selmi, *Testing for Equality: Merit, Efficiency, and the Affirmative Action Debate*, 42 UCLA L. REV. 1251, 1256 (1995) (explaining how efficiency concerns cause employers to rely on employment tests to screen job applicants).

215. Cf. *id.* at 1261 (citation omitted) (1991) ("Strict top-down ranking of candidates . . . assumes that even very small differences in test scores represent meaningful and accurate distinctions in terms of the level of job performance to be expected after hire.").

ful information, but a particular test score does not provide reliable or precise comparative information"²¹⁶

In sum, many applicants falling between an institution's presumptive admission and presumptive denial scores may have score differences which are statistically meaningless. Among these "equally qualified"²¹⁷ applicants, a candidate's ability to add to the diversity of the student body should be given consideration as a meritorious trait.

Many critics of diversity admissions programs claim that race-conscious measures compromise merit. However, the concept of merit and the goal of racial diversity are not mutually exclusive.²¹⁸ "Admissions officials across the nation, from Berkeley to Harvard, agree" that maintaining or improving the prestige of an educational institution is compatible with commitment to substantial minority representation.²¹⁹ Although the traditional interpretation of the term

216. *Id.* at 1264, 1276 (footnotes omitted) (emphasis added).

217. This is not to say that all applicants whose index numbers fall within the zone between presumptive admission and its presumptive denial are equally qualified. This zone may be rather large and is dependent on the admissions program. Nevertheless, within this zone smaller bands may be drawn within which the index numbers are not reliably different. These bands would better identify equally qualified applicants. Selmi, *supra* note 214 at 1275-76 (stating that bands or zones created by standard error of measurement can be used reliably to differentiate test scores and even when this method is not used initially, a court may apply such methodology in its review).

218. GABRIEL J. CHIN ET AL., BEYOND SELF-INTEREST: ASIAN PACIFIC AMERICANS TOWARD A COMMUNITY OF JUSTICE, A POLICY ANALYSIS OF AFFIRMATIVE ACTION, II.B [1] n.33 (1996). Professors Gabriel Chin, Sumi Cho, Jerry Kang, and Frank Wu quote Berkeley's chancellor, Chang-Lin Tien, as stating, "The numbers dispel the notion that diversity has somehow sacrificed the quality of [Berkeley]. In fact, the diversity has been coupled with rising standards." *Id.* at II.B.2.a (citing Chang-Lin Tien, *Affirming Affirmative Action*, in COMMON GROUND: PERSPECTIVES ON AFFIRMATIVE ACTION . . . AND ITS IMPACT ON ASIAN PACIFIC AMERICANS, 19, 20 (1995))

219. *Id.* at n.35 (citing JOEL DREYFUS & CHARLES LAWRENCE, III, THE BAKKE CASE: THE POLITICS OF INEQUALITY 128 (1972)) ("discussing a remarkable increase in standardized test scores and grades among Berkeley law students between 1967 and 1976, and of medical students nationwide between 1957 and 1975"); Jean Webb, *The 6 Percent Solution: Yale Law School's Admissions Process*, YALE LAW REPORT, Spring 1994, at 15-16 (noting that Yale is the most selective law school in the country and had a 1/3 minority representation in the 1993 incoming class); Peter Appleborne, *The Debate on Diversity in California Shifts*, N.Y. TIMES, June 4, 1995, § 1 at 1 (quoting Bob Laird, admissions director at the University of California at Berkeley, as saying, "[t]here's a myth that in the course of diversifying the campus we've lowered our standards. . . . By any measure, the opposite is true. . . . [T]he current freshman class is stronger than the one 10 years ago."); Bruce Weber, *Inside the Meritocracy Machine*, N.Y. TIMES, Apr. 28, 1996, § 6 (Magazine), at 44, 46, 56 (noting that Harvard College is simultaneously increasingly selective and committed to substantial minority representation); Philip J. Cook and Robert H. Frank, *The Growing Concentration of Top Students at Elite Schools*, in STUDIES OF SUPPLY AND DEMAND IN HIGHER EDUCATION (Charles Clotfelter and Michael Rothschild, eds. 1993).

merit has been viewed in terms of past academic performance, the concept is actually much broader. Merit may be defined as “the ability to contribute to the achievement of valid institutional goals.”²²⁰ No conception of merit is universal because different institutions may have different goals.²²¹ Professors Chin, Cho, Kang, and Wu provide the following example:

[A] law school like Stanford, seeking a national student body, would define merit differently in some ways than would, say, the University of Montana, which might aim to build the state bar by recruiting in-state students likely to stay in Montana. And though both are state-sponsored schools, City University of New York’s focus on public interest law might make it value different qualities in prospective students than the University of Montana, though both want to produce excellent lawyers.²²²

How admissions officials define the term “meritorious” will depend on the goals and purposes of their respective schools.²²³ Being colorblind and not being able to consider race as a factor in the admissions process may very likely prohibit a school from attaining some of its goals.

Many schools admit students whom they hope will become civic and community leaders. For better or worse, these communities are sometimes racially defined. A school wholly blind to race, however, would be unable to consider the fact that certain applicants may become political, spiritual, and artistic leaders of such communities. Not only would such a school be deprived of having such an alumna, but that applicant would have been treated unfairly. Refusing to consider the potential suggested by an applicant’s leadership skills and background would foreclose full evaluation of her merit.²²⁴

220. CHIN ET AL., *supra* note 218, at n.33 citing Richard H. Fallon, Jr., *To Each According to His Ability, From None According to His Race: The Concept of Merit in the Law of Anti-Discrimination*, 60 B.U. L. REV. 815, 872 (1980) (emphasis omitted), (“[Professor Fallon notes that this conception of merit] describes the reality of most programs of university admissions.”).

221. CHIN ET AL., *supra* note 218, at II.B.1 [1] (noting that the Olympic Ski Team would define merit differently than would the Foreign Service of the State Department, although both organizations seek excellence).

222. *Id.* at II.B.1 [2].

223. *See id.* at II.B.1 [1] (stating that the very notion of merit fundamentally turns on the goals and purposes of a particular institution).

224. *Id.* at II.B.2c [3].

Admissions programs need not choose between merit and diversity; they can have both. This Article calls upon law school admissions programs to recognize the merits of diversity and redefine their concept of merit accordingly.²²⁵

B. Race as a Crucial Element of Diversity

The ideal diversity program ensures the representation of disempowered groups and uses race-conscious methods to accomplish this goal. In addition to any other factors an institution may deem necessary to include in its definition of diversity, race should always be included as a crucial element of the definition, and as a threshold test. Although race has been viewed by some as an irrelevant factor,²²⁶ ignoring the importance of race in today's society creates an unyielding colorblind society that fails to understand the benefits of racial diversity. Furthermore, *Bakke*, the current controlling case in this area, considers race an important element of the compelling state interest in diversity.²²⁷

In *Bakke*, Justice Powell emphasized that race is not the only element to be considered in diversity. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single *though important* element."²²⁸ However, *Bakke* does not stand for the principle that race cannot be considered as a factor in admissions. Justice Powell merely stated that an admissions program that "focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity."²²⁹ Nevertheless, *Bakke* has been viewed as subordinating the civil rights of minorities by setting a tone of inflexibility and racial insensitivity in the admissions process.²³⁰ Professor Roy Brooks uses post-*Bakke* admissions at the University of California at Davis Medical School, the defendant in *Bakke*, to illustrate this point.

225. The concept of merit is discussed in light of why Asian Americans should support race-conscious diversity admissions programs, *see infra* at Part III.B.

226. *See, e.g.,* *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (stating that the "ultimate goal [is] to eliminate . . . from governmental decision-making such irrelevant factors as a human being's race") (O'Connor, J.) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1985)) (Stevens, J., dissenting) (footnote omitted); *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)); *id.* at 7517-18 (Scalia, J., concurring in part and concurring in the judgment).

227. *Bakke*, 438 U.S. at 315.

228. *Id.* (emphasis added).

229. *Id.*

230. ROY L. BROOKS, *RETHINKING THE RACE PROBLEM*, 32 (1990).

In 1978, this medical school, like other state educational institutions throughout the country, restructured its admissions process to comply with *Bakke*. The redrawn affirmative action plan did not, however, yield more or even the same number of new African American students as the pre-*Bakke* plan did; in fact, it produced far fewer. The medical school at Davis has experienced a "sharp decline in black enrollment since 1978. [An affirmative action specialist's] assessment of Davis' post-*Bakke* affirmative action plan . . . asserts that the plan "unfortunately didn't do as much as it could have. . . . It lacked a certain human touch, . . . too much reliance was placed on evaluation of a student's application, rather than [evaluation] of 'a human person.'"²³¹

Professor Brooks states that "*Bakke*'s rejection of . . . racial preferences has been read incorrectly by colleges and universities as providing a mandate to assume an inflexible or insensitive attitude toward minority applicants."²³²

Refusal to consider race in admissions decisions seems an unnecessary overreaction to concerns about individual rights. Colleges and universities should examine the whole person of an applicant for admission, particularly the applicant's race. "[R]ace, like gender and illegitimacy, is an immutable characteristic which its possessors are powerless to escape or set aside."²³³ Although race and ethnicity are social constructions which spring from a "need to make racial categorizations in a racially divided, or at least, a racially diverse society,"²³⁴ the internal effects of race, are an inherent element of one's being that affects one's experiences and perceptions. This is not an essentialist statement that all people classified in a particular racial group will think alike or have the same experiences and background, nor a claim that the importance of a diverse student body depends on such a false notion. However, diversity programs should acknowledge that people of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views on many issues including legal doctrine and policy.²³⁵

231. *Id.* at 101–02.

232. *Id.* at 102. It remains to be seen what damage the Fifth Circuit's *Hopwood* decision will have, despite its lack of precedential value.

233. *Bakke*, 438 U.S. at 360 (Brennan, White, Marshall and Blackmun JJ., concurring in part) (citation omitted).

234. ELAINE H. KIM, *ASIAN AMERICAN LITERATURE: AN INTRODUCTION TO THE WRITINGS AND THEIR SOCIAL CONTEXT* xii (1982).

235. *See id.*

Rather than trying to escape or set aside race, people should embrace social and cultural differences and be proud of their heritage. Furthermore, even though racial categorizations are often used to stereotype racial minorities, they may also serve to unite the people that are classified under them. Although unifying the various diversity groups is not an intended purpose of a diversity program, it is an added benefit. The bonds formed among fellow diverse students may become the bonds between future community leaders. The external effects of race and their historic use as oppressive tools may cause the use of race as a way to achieving equality, to be questioned. Nevertheless, the potential exists for race to be used as a useful tool, both in achieving equality and in strengthening the unity of diverse communities.²³⁶

C. Avoidance of Stigma Against Diversity Program Beneficiaries

The ideal diversity program will take positive steps to ensure that the specter of stigma does not preclude the program's direct beneficiaries from engaging in the meaningful exchange of ideas.²³⁷ Race-conscious classifications have been criticized for promoting notions of racial inferiority and perpetuating the "politics of racial hostility."²³⁸ A common misconception is that diversity programs that utilize race-conscious classifications use race as their sole consideration.²³⁹ It has been said that "[s]uch policies may embody stereotypes that treat individuals as the product of their race,

236. Advocating that the social construct of race as a means of embracing racially diverse peoples' heritage is not intended to add fuel to the fire of those who would use racial stereotypes to perpetuate patterns of discrimination. Neither is it a statement that all people classified in a certain racial category think alike or necessarily share common perspectives. The races are comprised of unique individuals whose personal perspectives affect their view. All African Americans do not think alike, just as all Filipinos do not think alike, nor do all Chinese, nor all whites. However, the existence of the need to categorize signifies a uniqueness about a people. Each people potentially bring with them to the table perspectives that no other race can bring. That perspective is grown from their collective perceptions and the culture they share.

237. All people at a given campus benefit from diversity programs because they gain from the meaningful exposure to those who are different from them and because these programs further the goal of a society that takes account of race to transcend racism. However, in this context, "beneficiaries" refers to those applicants who were actually admitted under a diversity program.

238. *Croson*, 488 U.S. at 493; see also *Metro Broadcasting*, 497 U.S. at 603 (O'Connor, J. dissenting) ("The dangers of [racial classifications] are clear . . . They endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict.")

239. For example, Cheryl Hopwood, the named plaintiff in *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994), complained that the University of Texas Law School admissions program "only looked at race. They didn't look at anything but race." *Weekend Edition*, (NPR radio broadcast, June 11, 1995).

evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.²⁴⁰ Given the use of index numbers to identify equally qualified applicants among whom diversity may be used as a deciding factor in admissions, administrators of educational institutions should take a stronger stance in support of diversity programs and emphasize this fact. Administrators must emphasize to the student body and the community at large that race is not used as the *sole* factor in admissions decisions but rather as one of many factors when considering equally qualified applicants.²⁴¹ By doing so, administrators may begin to destroy the myths that race-conscious measures admit less qualified applicants or that race-conscious measures constitute reverse racial discrimination. Furthermore, this open support for diversity as a beneficial characteristic would help to alleviate much of the stigma felt by the beneficiaries of such programs as well as any perceptions that race-conscious measures paint the beneficiaries as victims requiring special treatment.²⁴²

Emphasizing that diversity programs do not admit lesser qualified applicants, but rather serve to differentiate among equally qualified applicants, can abate resentment felt by individuals who are not included in the diversity programs. The difficult task of alleviating the resentment felt by members of the dominant culture may be best achieved by fostering recognition of the worth of individuals, independent of their demographics, thereby increasing people's meaningful exposure to those who are different from them.²⁴³ Emphasizing that diversity is used only as a factor to distinguish among equally qualified candidates responds to the criticism that diversity programs admit minority group members who would not be admitted on their own "merits." Moreover, the use of

240. *Metro Broadcasting*, 497 U.S. at 603–04 (O'Connor, J., dissenting). Even if this criterion is barred, this has not prevented its use by the Government or by citizens who comprise the majority culture.

241. The above discussion prompts a quick observation regarding academic support programs. Classifying all diversity applicants as candidates for academic support programs fosters resentment and perpetuates stigma and the myth that those students would be unable to succeed on their own merits. Admission to academic support programs should be based on academic performance alone and not on membership in a diversity group. Given that index numbers are used to determine equally qualified applicants and an applicant's diversity is considered a "plus," an individual's diversity is independent of his or her academic potential.

242. Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241, 1316 (1993).

243. See Brest & Oshige, *supra* note 31, at 863 ("We believe that encounters among students from different backgrounds - especially within an academic institution that seeks to encourage intergroup relations and discourse - tend to reduce prejudice and alienation.").

race-conscious classifications and community ties as plus factors to distinguish among equally qualified applicants is not racial discrimination, but rather an emphasis on the beneficial quality of being diverse.²⁴⁴ Extolling the virtues of being diverse may serve to develop a deeper sense of self-pride among the beneficiaries of diversity programs, giving them the confidence and strength to overcome the stigmas imposed by others.

Whether beneficiaries of diversity programs actually recognize a stigma has been questioned. Professor Stephen Carter describes his own experiences with the feelings of inferiority that affirmative action can create.²⁴⁵ However, Brest and Oshige note that in Bron Raymond Taylor's study of affirmative action by the California Parks and Recreation Department, beneficiaries related that, by opening doors for advancement, the Department's program "enhanced [their] self-esteem and self-regard."²⁴⁶ Professor Frank Wu goes so far as to say that the "supposed stigmatizing effects of affirmative action should not be given much credence" because these effects can be attributed just as much to the programs as to the attacks on them, because these attacks "insinuate that every member of any minority group has accomplished what she has only by special pleading."²⁴⁷

These positions aside, the potential for stigmatization exists. Administrations which employ diversity programs can minimize any stigma such programs may engender by extolling the virtues of being diverse and emphasizing these virtues to the student body and society at large.

III. THOUGHTS FROM AN ASIAN AMERICAN PERSPECTIVE

This Article affirms the necessity of diversity programs as a whole and does not advocate the inclusion of any particular group into a diversity program. That having been said, I feel called to

244. Asking an applicant to describe his or her "community ties" can fuel the applicant's own interest in these community ties. My conversations with fellow students who are beneficiaries of diversity programs have provided this insight. One Filipino student stated that his awareness of how he has benefited from his school's diversity admissions program, provides him with insights into class reading materials. He also commented that it has increased his desire for, and advocacy of, cultural awareness.

245. See generally STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY, Pt. I. (1992).

246. Brest & Oshige, *supra* note 31, at 870 (citing BRON RAYMOND TAYLOR, AFFIRMATIVE ACTION AT WORK 83-85, 194-95 (1991)).

247. Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B. C. THIRD WORLD L. J. 225, 275 (1995).

“raise my voice”²⁴⁸ and make a few observations regarding Asian Americans and diversity programs.

A. *On the Model Minority Myth and Law School Admissions*²⁴⁹

Even though Asian immigrants come from various countries,²⁵⁰ the term “Asian Americans” has been used to group us all together. This failure to differentiate between the different Asian ethnicities²⁵¹ allows the majority to group all Asian Americans under the “model minority” stereotype. The model minority myth is detrimental to Asian Americans in two ways. First, Asian Americans are described as successfully assimilated into American society because we are “hardworking, intelligent, and successful,”²⁵² especially as compared to other people of color. On the other hand, the myth says that Asian Americans, while skilled in math and science, have low verbal abilities and community skills, are one-dimensional “grinds,” and lack personality and individuality.²⁵³ Politicians use the first part of the myth to attack race-conscious admissions programs as either victimizing Asian Americans at the expense of other people of color, or unnecessary in light of the success of one minority group.²⁵⁴ The sec-

248. I borrow this phrase from Professor Robert Chang whose work I have found influential. See Chang, *supra* note 242, (announcing an Asian American Moment to the legal academy).

249. See generally TAKAKI, *supra* note 19, at 474–84 (1989); Wu, *supra* note 247, at 228–40; Chang, *supra* note 242 at 1258–65.

250. See *supra* note 19 and accompanying text.

251. I offer a personal example of this inability to differentiate between Asian American ethnicities. Last year, a fellow student (white) who is usually well-meaning, approached me (Filipino American) and another fellow student (Korean American) and told us that he wished we had been in his Constitutional Law class that afternoon. When we asked him why, he replied that they were discussing *Koremastu* and it would have helped to have had “your people’s personal insight.”

Other examples of the inability of the majority culture to differentiate are more harmful, as evidenced by the brutal beating of Vincent Chin in 1982. Chin, a Chinese American, was beaten to death by two white autoworkers in Detroit, Ronald Eben and his stepson, who thought he was Japanese and blamed him for the loss of jobs in the American automobile industry. See *Justice Dep’t Reviewing Chin Case*, UPI, Sept. 12, 1986, available in LEXIS, Regnews Library, UPI File.

252. See U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S 19 (1992); see also Wu, *supra* note 247, at 238 n.65 (listing various articles about the model minority myth).

253. Brest & Oshige, *supra* note 31, at 893–94 (describing the model minority stereotype) (footnotes omitted).

254. For example, California Governor Pete Wilson stated, “Twenty years ago if a more qualified African American student was denied a position in a college class because of his or her skin, we called it discrimination and rightly condemned it. But now, Caucasians and Asian Americans are being discriminated against in the name of affirmative action.” Prepared Statement of California Governor Pete Wilson Before the

ond part of the myth pigeon-holes Asian Americans into specific fields (such as engineering or nursing) and reinforces glass ceilings in employment.

This model minority myth has led "public policy makers and corporate leaders to . . . dismiss the idea that [Asian Americans] have any problems that require serious attention."²⁵⁵ Some scholars have noted that this "laissez-faire approach" to all Asian Americans persists "notwithstanding the tremendous heterogeneity among the ethnicities that make up the racial category Asian Pacific Americans."²⁵⁶ The model minority myth has had the same effect on some admissions programs which now fail to consider Asian Americans as diversity applicants.²⁵⁷ For example, the Stanford Asian and Pacific Islander Law Students Association (APILSA) wrote a memorandum to the faculty of Stanford Law School, questioning the Stanford Law School's treatment of all Asian ethnicities in aggregate and the school's failure to include any of them in the diversity admissions program.²⁵⁸ Stanford's APILSA called for the school's admissions program to recognize the "unique experiences" of the various Asian and Pacific Islander ethnicities and advocated consideration of underrepresented Asian and Pacific Islander ethnicities as a positive factor in admissions decisions.²⁵⁹

In a recent law review article, Paul Brest, the Dean of the Stanford Law School, noted that the number of Asian American law students has grown over the last decade and appears to continue to grow with a large majority of these students being Chinese, Korean, or Japanese Americans.²⁶⁰ Brest continued, "[t]o the extent that the status of recent immigrants is tractable and improves over time, one would expect more group members to attend professional schools."²⁶¹ This disregards the fact that Filipinos are less represented in colleges and graduate schools than Japanese and

Senate Judiciary Committee, 1996 FED. NEWS SERV., Apr. 30, 1996, available in LEXIS, News Library, Fednew File.

255. *Good for Business: Making Full Use of the Nation's Human Capital*, Daily Lab. Rep. (BNA) No. 52, at d30 (Mar. 16, 1995) (describing the effect of the Model Minority Myth in corporate America).

256. See CHIN ET AL., *supra* note 218, at III.B.3 [1] n.103 ("[D]ifferent Asian ethnic groups have markedly different average incomes" citing Paul Ong and Suzanne J. Hee, *Economic Diversity*, in THE STATE OF ASIAN PACIFIC AMERICA: ECONOMIC DIVERSITY, ISSUES AND POLICIES 31-56 (Paul Ong ed., 1994)).

257. See Grace W. Tsuang, *Assuring Equal Access of Asian Americans to Highly Selective Universities*, 98 YALE L. J. 659 (examining the admissions criteria used at the University of California at Berkeley, Stanford, Harvard, and Brown Universities).

258. Brest & Oshige, *supra* note 31, at 855.

259. *Id.* at 855-56 (footnotes omitted). APILSA included Pacific Islanders, Filipinos, and Southeast Asians as underrepresented groups.

260. *Id.* at 896-97.

261. *Id.* at 897.

Chinese Americans.²⁶² Filipinos are not recent immigrants so there must be some other explanation for their underrepresentation in higher education and in the legal profession.²⁶³ Moreover, assuming that the Asian ethnic sub-groups that are relatively new additions to the Asian American classification would follow the lead of their predecessors is an implicit acceptance of the model minority myth. This implicit acceptance perpetuates the myth and is therefore unacceptable.

A law school should consider the educational value of having students or faculty members from “disadvantaged Southeast Asian or Pacific Island groups—especially those whose cultures are quite different from those of most others at the school and who by virtue of size or the school’s geographic locale may be of significance in the professional lives of its graduates.”²⁶⁴ In light of the recent changes in the landscape surrounding race-conscious measures,²⁶⁵ perhaps cautious support from school administrations is the best that advo-

262. *Id.* at 896 n.269. For example, the 1996 graduating class from the University of San Diego School of Law contained 318 Juris Doctor candidates only 18% of the class were members of minority groups. However there were only three Filipinos. This is especially striking given the large Filipino population in San Diego. See Clark Brooks, *Who We Are: Migration is Putting New Face on San Diego County*, SAN DIEGO UNION TRIB., Aug. 11, 1996, at 3.

263. A statistical analysis of the underrepresentation of Filipinos is beyond the scope of this Article.

Professor Wu suggests that many Asian Americans rank the practice of law low on their list of choices of profession for themselves or their children. Frank Wu, *The Second Most Despised Profession*, L.A. DAILY J., August 25, 1995 at 6. Wu relates a story told by Professor Harold Koh of Yale University, in which Koh’s father told him that being a lawyer was the “second least respected profession” in Korean culture, ranked only above “acting.” *Id.* Business, engineering, medicine, science and “anything else that might . . . provide a regular income” rank above the legal profession. *Id.* Although the Filipino American experience is unique among the Asian American experience in that the Philippines was a United States territory, Filipinos have similar perception regarding the law as a career. Speaking as a Filipino American, I can recall my parents pushing me towards a career in medicine, engineering, even business - but never the law. Finally, my parents acquiesced when they learned that I intend to pursue a career as a professor. They are both educators.

264. Brest & Oshige, *supra* note 31, at 897.

265. California has often been in the forefront, leading the country in changing the legal landscape. The recent decision by the University of California Regents to discontinue the practice of considering an applicant’s race in the admissions process and the so-called California Civil Rights Initiative exemplify the “shaky” ground. See *supra* note 205 describing how CCRI has caused UCLA’s new admissions program to focus on socio-economic factors and disregards the merit of race.

These two incidents are also examples of how politicians, California Governor and Presidential Candidate Pete Wilson specifically, can minimize the importance of race-conscious classifications and the goals of diversity to serve political ends. See, e.g., Clarence Page, *The Golden State’s Image is Starting to Tarnish*, CHI. TRIB., July 23, 1995, at C3 (noting that Governor Wilson supported affirmative action until he decided to run for the Republican presidential nomination).

cates of race-conscious measures can hope for at this time. However, this Article advocates greater support of race-conscious measures.

B. *On Whether Asian Americans
Should Support Diversity Programs*

Aside from the support from school administrations, diversity programs require the support of the Asian American community as well. Although there may be an increasing number of Asian American ethnicities that are relatively well-represented, there are those that remain under-represented. Furthermore, despite the widely held belief that Asian Americans have succeeded in accessing mainstream America, out of the entire American legal profession in 1990 Asian Americans comprised only 1.4% of the lawyers and only 1.02% of the total number of judges.²⁶⁶

Asian Americans have been painted as being the victims of race-conscious classifications. Race-conscious classifications have been targeted as the reason why Asian Americans are being denied admission to highly selective schools. This argument states that if schools would use a strictly meritocratic system and discontinue the use of racial preferences, more higher-scoring Asian Americans would be admitted. Alternatively, race-conscious classifications and the call for diversity have been criticized as allowing a preference for whites over Asians. This section addresses these two assertions and calls for the Asian American community (inasmuch as there is a unified community) to support the use of race-conscious methods towards the goal of diversity in order to dispel these myths.

Some Asian Americans argue against race-conscious measures as being inherently unfair. They accuse the quotas for other groups of "taking" admission slots from Asian Americans."²⁶⁷ These Asian Americans appear to advocate a strict "meritocratic" system which would allow "fair competition" between all groups on the basis of test scores.

Asian Americans have been deliberately painted as innocent victims of race-conscious measures as a justification for discontinu-

266. Pat K. Chew, *Asian Americans: The "Reticent" Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 19 (1994).

267. See, e.g., Dong, *supra* note 209 at 1029 n.7 (describing the double bind that Asian American leaders face in dealing with the issue of affirmative action); *Future Watch: Affirmative Action Plays an Active Role on Campuses* (CNN television broadcast, July 23, 1995), available in LEXIS News Library; SCRIPT File (interviewing Asian American students who felt that race-conscious measures did not allow the best qualified individuals to be educated).

discontinuing their use.²⁶⁸ The reliance on test scores as the sole means of determining the most qualified applicants is flawed²⁶⁹ and ignores the merits of diversity. Advocating a system that looks only to test results furthers the loss of our culture. The majority culture would never let itself be squeezed out by “higher-scoring Asians” who are already viewed as being overrepresented.²⁷⁰ In fact, the existence of “upper limit quotas” for Asian Americans at some universities has been examined.²⁷¹ In a “purely meritocratic system,” Asian Americans can easily be disadvantaged by the manipulation of seemingly neutral factors.²⁷² Some scholars note that “Asian Americans would be disadvantaged if a university gave greater weight to the verbal portion of the SAT exam or no credit for non-European foreign language skills.”²⁷³ Because universities have manipulated test scores in precisely this manner, “we should be skeptical about claims that academic merit is a scientifically measurable characteristic that can be gauged objectively.”²⁷⁴ Asian Americans should support the use of race-conscious measures to further diversity in order to prevent the emergence of a system that ignores the merits of cultural diversity.

Professor Wu states that “[t]he real risk to Asian Americans is that they will be squeezed out to provide proportionate representation to whites, not due to the marginal impact of setting aside a few spaces for African Americans.”²⁷⁵ Some have criticized diversity programs which call for proportional representation as creating quotas for whites when there are “too many Asians.”²⁷⁶ However, diversity does not call for proportional representation, nor does it ever call for the majority to disadvantage an outside group, even in the course of benefiting another group. If a differential standard of review, subjecting race-conscious measures favoring whites over other groups to strict scrutiny and subjecting race-conscious measures advantaging disempowered groups to intermediate scrutiny, were to have become the standard, it may have alleviated the danger of diversity

268. See, e.g., Wu, *supra* note 247, at 267–75, 277–81 (citing Michael S. Greve, *The Newest Move in Law Schools' Quota Game*, WALL ST. J., Oct. 5, 1992, at A12).

269. See *supra* Part II.A.

270. The sponsors of the California Civil Rights Initiative, the anti-affirmative action ballot proposal, refer to Asian Americans as having become overrepresented in prestigious universities. *Living by the Numbers*, S.F. CHRON., Feb. 12, 1995, at Z1.

271. See, e.g., Tsuang, *supra* note 257.

272. CHIN ET AL., *supra* note 218 at II.B.2.b [2].

273. *Id.*

274. *Id.*

275. Wu, *supra* note 247, at 226.

276. See, e.g., Dong, *supra* note 209 at 1054 (stating that the diversity rational perpetuates discrimination and exclusion by requiring Chinese Americans to score higher on entrance exams than whites).

programs reserving quotas for whites.²⁷⁷ However, this theoretical safe-haven was destroyed by *Adarand*. In order to alleviate the danger of upper limit quotas, Asian Americans must advocate race-conscious measures to further diversity programs which recognize the benefits of exposure to varying cultures and do not call for proportional representation. Whatever else Asian Americans decide about race-conscious measures, "we should not allow ourselves to be used to attack other people of color."²⁷⁸ Moreover, Asian Americans must understand their heterogeneity and advocate race-conscious measures that assist underrepresented Asian ethnicities.

CONCLUSION

The time will come when past discrimination will be remedied and there will no longer be a need for remedial race-conscious measures. Obviously, that time is not now.²⁷⁹ "Regrettably, discrimination on the basis of race, ethnicity, religion, gender and disability persists in this country: not just the effects of past discrimination, but current, real-life, pernicious discrimination. Last year . . . the Federal government received over 91,000 complaints of discrimination in employment alone."²⁸⁰ In fact, discrimination is expanding, even finding its way into cyberspace.²⁸¹ However, even after past discrimination has been remedied, it will still be desirable to take someone's race into consideration when determining their contribution to the diversity of the community. Diversity programs acknowledge the internal effects of race and recognize the fact that an individual's race colors his or her perceptions and foster meaningful interaction and exchange of diverse viewpoints. Therefore, diversity programs have a purpose that outlives remedying past discrimination.

277. *See id.* at 1051-57.

278. Mari J. Matsuda, *We Will Not Be Used*, 1 UCLA ASIAN AM. PAC. ISLANDS L.J. 79, 80-81 (1994).

279. As Justice O'Connor recognized in *Adarand*, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality . . ." *Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995).

280. *Prepared Testimony of Deval L. Patrick, Assistant Attorney General, Department of Civil Rights Division, before the committee on the Judiciary Subcommittee on the Constitution*, 1995 FED. NEWS SERV., July 20, 1995, available in LEXIS, News Library, Fednew File.

281. *See E-mail Is Becoming a Conduit of Prejudice on Many Campuses*, N.Y. TIMES, Feb. 16, 1997, § 1 at 40 (describing an incident involving a hate message that was sent via electronic mail to 700 members of the Asian Students Association at Indiana University in Bloomington on January 31, 1997).

“ ‘Distinctions between citizens *solely* because of their ancestry’ [are] ‘odious to a free people whose institutions are founded upon the doctrine of equality.’ ”²⁸² Ensuring equality does not entail excluding a person’s race from his or her persona or requiring that we all assimilate into one. A person’s race reflects their heritage. It is a part of them—a part to be proud of and to cherish. Understanding another person’s race and culture may help to better understand their perspectives. The key is to accept race and go beyond race to deal with all persons as individuals. This is the goal of “erasing the color lines.” Erasing color lines is not a call for “color-blindness” or racial ignorance. It is of utmost importance to keep traditions and cultural values alive for future generations. Furthermore, a balance must be struck between passing on cultural values and not perpetuating animosity among racial or ethnic groups.

This nation of diverse individuals should never forget the roles different races played in building this country and guiding its future. Diversity is not equivalent to assimilation. Assimilation entails being swallowed up into the dominant culture. Diversity is about coming together to form a new identity—an American identity.

Although the benefits of a diverse student body seem evident, the diversity argument for affirmative action has been criticized by some scholars as creating a stigma. For example, Professor Richard Delgado cautions:

In law school admissions, for example, majority persons may be admitted as a matter of right, while minorities are admitted because their presence will contribute to ‘diversity.’ . . . The assumption is that such diversity is educationally valuable to the majority. But such an admissions program may well be perceived as treating the minority admittee as an ornament, a curiosity, one who brings an element of the piquant to the lives of white professors and students.²⁸³

The risk of stigma may be nullified by increased open support for diversity programs as means of differentiating between equally qualified applicants, extolling the merits of a diverse cultural heritage, and furthering the compelling interest of diversity. Part of the reason why a person may be stigmatized is that they are a “curiosity” and new to a traditionally homogenous environment. However, diversity programs that create meaningful interaction

282. *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (emphasis added) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)).

283. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 570 n.46 (1984).

among people of diverse backgrounds and viewpoints, foster understanding and acceptance. The danger of stigma should not cause the disempowered to forgo their quest for representation. Only by meaningful exposure to diverse people can we learn from one another and go beyond demographic categories to appreciate individuals as individuals.

The United States is the most racially diverse nation on Earth. Our community consists of representatives of other nations' cultures and people. We have much to learn from one another. Unfortunately, our opportunities to do so and utilize the knowledge gleaned from history are diminished by opportunistic politicians who use their positions on race-conscious classifications to ride the popular emotional trends and further their careers. Nevertheless, race-conscious measures should be used to increase diversity, the benefits of which will ride above the turbulence of the political winds. However, because of the history of abuse associated with race-based classifications,²⁸⁴ we are asked to ignore our individual cultures and backgrounds and simply be "American." Asking people to deny their history is equally as damaging. Although benefits and burdens should not be allocated among individuals based on "the assumption that race or ethnicity determines how they act or think,"²⁸⁵ race-conscious classifications need not divide the nation into the type of racial blocs Justice O'Connor feared, and lead to "an escalation of racial hostility and conflict."²⁸⁶ Such results will follow only if race-conscious classifications are used as the *sole* indicator of how an individual would think or act.

Race is an important part of a person's history, perhaps more so because it is partially a social construct. This nation's racial and ethnic diversity is something to be proud of and it should be nurtured. Every race whose people comprise this nation has added to its history and continues to shape its future. By fostering meaningful exposure to diverse people and viewpoints, our nation can move beyond race to view individuals as individuals. Focusing on *persons* as individuals entails consideration of their race. For these reasons, diversity admissions programs that focus on *persons* as individuals by considering their race should be encouraged.

284. *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy J., dissenting) (noting that the opponents of race-conscious classifications may base their opposition on the claim that such classifications "destroy the dignity of the individual" and "open the door to discriminatory actions against [minorities] in the passions of tomorrow").

285. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 603 (1990) (O'Connor, J., dissenting).

286. *Id.*

