Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 54 *Affirmative Action in Higher Education*

January 1998

Turning Back the Clock: The Assault on Affirmative Action

Leland B. Ware

TURNING BACK THE CLOCK: THE ASSAULT ON AFFIRMATIVE ACTION

LELAND WARE[*]

INTRODUCTION

In 1989 the Supreme Court applied strict scrutiny to affirmative action programs created by state and local governments in *City of Richmond v. Croson.*[1] In 1995 the Court extended the *Croson* rationale to the federal government in *Adarand Constructors v. Pena.*[2] The following year, in *Hopwood v. Texas*,[3] the Court of Appeals for the Fifth Circuit held that an affirmative action admission program used by the law school at the University of Texas was unconstitutional.[4] In 1997 the Court of Appeals for the Ninth Circuit reinstated Proposition 209, a ballot initiative that outlawed affirmative action programs in the state of California.[5] This followed

---

* Professor of Law, St. Louis University School of Law. This Article is based on remarks that were presented by the author at the 1997 annual meeting of the Congressional Black Caucus Foundation in Washington, D.C. The author also explored some of the ideas expressed in this Article in his article, *Tales From the Crypt: Does Strict Scrutiny Sound the Death Knell for Affirmative Action in Higher Education?*, 23 J.C. & U.L. 43 (1996).

1. 488 U.S. 469 (1989).
2. 515 U.S. 200 (1995).
3. 78 F.3d 932 (5th Cir. 1996), *cert. denied,* 518 U.S. 1033 (1996).
4. *See id.* at 934.
5. *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692 (9th Cir. 1997), *cert. denied,* 118 S. Ct. 97 (1997). A district court granted a preliminary injunction against the measure on the grounds that it denied women and minorities equal protection of the law in violation of the Fourteenth Amendment of the United States Constitution. *See* 946 F. Supp. 1480 (N.D. Cal. 1996). The Court of Appeals for the Ninth Circuit reversed the trial court. *See*

an earlier decision by the California Board of Regents to ban affirmative action admissions and hiring in the University of California system.[6] This pattern of erosion has caused many observers to predict the demise of affirmative action. This judgment, however, is at best premature. Recent court decisions have been increasingly critical of affirmative action programs, but, thus far, they have stopped short of declaring all forms of affirmative action unlawful.

Affirmative action provokes an unusually sharp reaction from its opponents. Using coded phrases such as "quotas" and "preferential treatment," they proceed from a flawed but widely held assumption that affirmative action necessarily entails the displacement of qualified white males with demonstrably less qualified minorities. On the other side of the debate are affirmative action advocates. They consider the conditions resulting from discriminatory activities from the perspective of groups that have been injured by an elaborate system of racial exclusion. Affirmative action, they contend, promotes equality and advances the unfinished process of desegregation.

The Supreme Court has embraced an approach that treats all race-conscious decisions the same, irrespective of the motives of the decision-maker or the relative positions of the groups that are affected. This view is reflected in the majority opinions in *Croson* and *Adarand*, which held, in effect, that all racial classifications are the same, whether they are reflected in a segregation ordinance from the pre-*Brown* era, or in a policy that is intended to advance the goal of desegregation.[7]

During its 1997-1998 term, the Supreme Court was slated to decide *Taxman v. Board of Education*.[8] This case involved affirmative action in employment, but it had implications that extended beyond the immediate questions that the plaintiff presented. *Taxman* might have decided whether diversity will continue to be a

---

122 F.3d at 711. It found that Proposition 209 was not unconstitutional because it did not create any impermissible legislative classifications or restrict the rights of women and minorities. *See id.* at 701-12.

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

7. *See* 488 U.S. 469 (1989); 515 U.S. 200 (1995).

8. 118 S. Ct. 595 (1997).

justification for affirmative action in educational settings, but the parties settled before the Court issued its decision.[9] This avoided what many observers anticipated as a probable setback for affirmative action. However, this disposition has merely postponed what is surely an inevitable confrontation as cases challenging affirmative action policies are continuously pending in lower courts. One such case will eventually be decided by the Supreme Court.

There is a legitimate debate about affirmative action, but much of the rhetoric appeals to sentiment rather than reason. One example of this is the invocation of "color-blindness" as an argument against affirmative action.[10] This contention has a superficial appeal, but it does not withstand analysis. Color-blindness would treat black and white Americans as if they were similarly-situated when, in reality, they are not. It requires one to discount entirely the history and context of race-relations in America. Color-blindness is the goal to which most of us aspire, but the adoption of such an absolutist approach will not promote equality. The Civil Rights laws of the 1960s did not eliminate the racial hierarchy that segregation created. There are still significant disparities that are directly attributable to the continuing effects of segregation on African-Americans and other people of color. The laws prohibiting discrimination represented a starting point rather than a final solution. Instead of advancing equality, the imposition of a color-blind standard will prolong the inequalities that developed during an era of official racial subordination.

This Article considers the legal and policy issues presented by affirmative action in higher education. Part I examines the evolution of affirmative action jurisprudence in the Supreme Court. Beginning with the 1978 decision of *Regents of the University of California v. Bakke*,[11] the Supreme Court affirmed the validity of affirmative action policies. Nonetheless, a majority of the Justices could not agree on the relevant analytical framework for evaluating the constitutionality of affirmative action programs. After a decade of

9. *See infra* note 90 and accompanying text.

10. *See* DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION: POLITICS, CULTURE, AND JUSTICE IN AMERICA (1996).

11. 438 U.S. 265 (1978).

failing to reach a consensus, the majority of Justices finally decided, in *City of Richmond v. Croson,*[12] to apply strict scrutiny to programs created by state and local governments.[13]

Part II examines the effect of strict scrutiny on college and university affirmative action programs. After *Croson*, the United States Court of Appeals for the Fourth Circuit struck down a race-targeted scholarship program.[14] In a separate case, the Fifth Circuit invalidated a law school's affirmative action admissions policy.[15] The courts in both cases found that the programs did not have a compelling justification and were not narrowly tailored to achieve the goal of enhancing minority enrollment.[16]

Part III examines the problems that were presented by the peculiar facts of *Taxman,* a case that might have undermined the foundation for affirmative action programs established by colleges and universities.[17] Part IV explains the unique justifications for affirmative action in higher education—the most important of which are considerations of diversity and academic freedom. Finally, Part V considers the future of affirmative action in light of the Supreme Court's evolving interpretation of this policy.

I. THE SUPREME COURT'S AFFIRMATIVE ACTION DECISIONS

Cases alleging violations of the Equal Protection Clause of the Fourteenth Amendment[18] are analyzed under three separate standards of review: rational basis, intermediate scrutiny, and strict scrutiny. Segregation ordinances and other laws that classify on the basis of race historically have been subjected to strict scrutiny, the most exacting of these measures. Under strict scrutiny, classifications that are based on race must have a "compelling justification" and the means that the government employs must be "narrowly tailored" to

12. 488 U.S. 469 (1989).
13. *See id.* at 470, 508.
14. *See* Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994), *cert. denied,* 514 U.S. 1128 (1995).
15. *See* Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
16. *See id.* at 934; *Podberesky,* 38 F.3d at 158-60.
17. *See* 91 F.3d 1547 (3d Cir. 1996).
18. U.S. CONST. amend. XIV, § 1.

achieving the goals of the legislation.[19] After segregation in public schools was declared unlawful, the courts struck down other laws that enforced segregation because the laws were not reasonably related to any legitimate governmental goal. Strict in theory almost always meant fatal in fact.

Affirmative action involves racial classifications, but unlike segregation ordinances, it is intended to benefit, rather than disfavor, African-Americans and other minorities. When affirmative action cases first reached the Supreme Court, some of the Justices argued that racial classifications that are used to remedy the effects of discriminatory practices should not be subjected to strict scrutiny.[20] Recognizing that the original premise of affirmative action was a recognition of the need to protect "discrete and insular minorities,"[21] they believed that classifications established to ameliorate the present effects of segregation are not the same as acts of invidious discrimination.[22] This reflected a reformist interpretation that views anti-discrimination laws as a means of rectifying the inequalities that segregation established. Another group of Justices contended that any racial classification is inherently suspect and cannot be justified in the absence of a compelling justification.[23] This debate remained

---

19. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.3, at 575 (4th ed. 1991).

20. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), was the first affirmative action case to reach the Supreme Court. It involved a challenge to the admissions process used by the medical school at the University of California at Davis. *See id.* at 272-77. The Justices issued six separate opinions. Justice Powell's opinion was joined in part by Justices Brennan, White, and Marshall, who also issued a separate joint opinion. *See id.* at 269-320 (Powell, J.); *id.* at 324-79 (Brennan, White, Marshall & Blackmun, JJ., concurring in part and dissenting in part). Separate opinions were authored by Justices White, Marshall, and Blackmun. *See id.* at 379-87 (opinion of White, J.); *id.* at 387-402 (opinion of Marshall, J.); *id.* at 402-08 (opinion of Blackmun, J.). Another opinion was submitted by Justice Stevens, who was joined by Chief Justice Burger and Justices Stewart and Rehnquist. *See id.* at 408-21 (Stevens, J., concurring in part and dissenting in part, joined by Burger, C.J., & Stewart, Rehnquist, JJ.).

21. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

22. *See* NOWAK & ROTUNDA, *supra* note 19.

23. Members of this group have included Justices Warren Burger, William Rehnquist, and, more recently, Antonin Scalia and Clarence Thomas. In the statutory context, one faction of the Court took the position that the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (1994), did not prohibit employers from developing race-conscious hiring and promotion criteria, as long as the employer had an adequate basis for believing that minority candidates had been denied equal opportunities in the

unresolved for more than a decade.

After a change in the composition of the Court, the Court's 1989 *City of Richmond v. Croson*[24] decision ended the deadlock. In *Croson*, a majority of Justices held, for the first time, that strict scrutiny applies to affirmative action plans developed by state and local governments.[25] *Croson* involved a minority contracting program that was established by the City of Richmond, Virginia.[26] Under the program contractors who performed work for the City were required to allocate at least thirty percent of their subcontracts to minority entrepreneurs.[27] The City of Richmond denied the plaintiff, J.A. Croson Company, a city contract because the company failed to satisfy Richmond's minority participation requirements.[28] The company subsequently filed a civil action alleging, among other things, violations of the Equal Protection Clause of the Fourteenth Amendment.[29] When the case reached the Supreme Court, the majority of Justices held that all racial classifications are inherently suspect, including those that are intended to benefit the victims of discriminatory practices.[30] Applying this standard to the facts of the

---

past. The opposing group countered that Title VII forbade employers from considering race or sex when making any personnel decisions. *See, e.g.*, United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (Burger, C.J. dissenting); *see also* Johnson v. Transportation Agency, 480 U.S. 616, 664-68 (1987) (Scalia, J., dissenting, joined by Rehnquist, C.J., and White, J., in parts I and II).

24. 488 U.S. 469 (1989).

25. *See id.* at 493-98.

26. *See id.* at 477-81. Richmond adopted its Minority Business Utilization Plan in 1983, codified as City Code § 12-156(a) (1985), requiring prime contractors to subcontract no less than 30% of the dollar amount of the prime contract to minority business enterprises; this plan did not apply to minority-owned businesses that were awarded city contracts. *See id.*

27. *See id.*

28. *See id.* at 483.

29. *See id.* Initially, the district court upheld Richmond's Minority Business Utilization Plan, and the Fourth Circuit Court of Appeals affirmed. *See* J.A. Croson Co. v. City of Richmond, 779 F.2d 181 (4th Cir. 1985). Croson then sought *certiorari* from the Supreme Court, which vacated and remanded the case for consideration in light of the court's intervening *Wygant* decision. *See* 478 U.S. 1016 (1986). The Supreme Court ultimately affirmed the Court of Appeals's decision to strike down Richmond's program in *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987), as "violating both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment." 488 U.S. at 470 (citing 822 F.2d 1355 (4th Cir. 1987)).

30. *See Croson*, 488 U.S. at 493-98. Justice O'Connor argued that "[c]lassifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

case, the Court found that there was no "compelling justification" for the program because there was not an adequate record of discrimination in Richmond's construction industry.[31] Furthermore, the Court found that the Richmond program was not "narrowly tailored" to achieving the City's stated goal of increasing the number of minority contractors who received city contracts because the goals were not tied to the availability of minority businesses.[32] In striking down Richmond's program, Justice O'Connor's plurality opinion did not entirely foreclose the use of affirmative action. She suggested that programs established to eliminate the lingering effects of discrimination could satisfy the "compelling justification" requirement of strict scrutiny.[33] The opinion also implied that such programs could be "narrowly tailored" if the participation goals were

---

Id. at 493. Central to the majority's conclusion was the idea that "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual." *Id.* (citing Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). The combination of these two ideas led the majority to conclude that "to whatever racial group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making." *Id.* In so holding, the majority rejected the argument that a lower level of scrutiny should apply to racial classifications that have a benign or remedial purpose. According to the Court "[t]he mere recitation of a benign or compensatory purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1." *Id.* at 490.

31. *See id.* at 498-505. The majority asserted that the district court erroneously relied on several factors in finding past discrimination in Richmond's construction industry. First, the district court used an incorrect statistical comparison between the percentage of blacks in Richmond and the percentage of prime contracts awarded to minority firms. The Supreme Court held that the trial court should have compared the number of qualified minority contractors in Richmond to the number of contracts actually awarded to such qualified minority contractors. Justice O'Connor also found that the district court misjudged the probative value of evidence that reflected low minority membership in contractor associations because such low membership could be attributable to a variety of factors independent of race. After eliminating these indicia of past discrimination, the Court held that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry." *Id.* at 505. Without such evidence, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding quota." *Id.* at 499.

32. *See id.* at 507-08. First, the Court criticized the City of Richmond for failing to consider race-neutral solutions. Second, the Court reasoned that the quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* at 507 (citation omitted). Ultimately, the Court found that "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." *Id.*

33. *See id.* at 509.

tied to the availability of minority contractors in the local market area.[34]

Following its *Croson* decision, in *Metro Broadcasting v. FCC*,[35] the Supreme Court affirmed the validity of regulations established by the Federal Communications Commission that granted preferences to minority purchasers of broadcasting licenses.[36] The majority of Justices declined to apply strict scrutiny to the FCC regulations.[37] This decision initially appeared to preserve a lower level of review for federal programs, but five years later the Supreme Court overruled *Metro Broadcasting* with its decision in *Adarand Constructors, Inc. v. Pena*.[38] The Court's holding in *Adarand* specifically extended strict scrutiny to the federal government.[39] This means that affirmative action programs established by states or by the federal government must have a compelling justification and the means that the government chooses to implement the programs must be narrowly tailored to achieving the goals of the legislation. The question today, then, is whether affirmative action programs established by public colleges and universities can survive the exacting requirements of strict scrutiny.

II. THE EFFECT OF STRICT SCRUTINY ON AFFIRMATIVE ACTION IN HIGHER EDUCATION

The Supreme Court has not decided any higher education cases since *Bakke*,[40] but appellate decisions that have applied strict scrutiny

34. After *Croson*, dozens of localities established race-conscious programs following the criteria that were suggested in Justice O'Connor's opinion. Some of these programs have been struck down as unconstitutional; others have survived legal challenges. *See, e.g.*, Associated Gen. Contractors v. Coalition for Econ. Equity, 950 F.2d 1401 (9th Cir. 1991); Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991).

35. 497 U.S. 547 (1990).

36. *See id.* The first FCC regulation treated minority ownership and management as a plus factor during hearings that were held to determine the award of new broadcasting licenses. Under the second policy, the FCC allowed licenses to be transferred to minority-owned business enterprises without a competitive hearing. Both policies were adopted to encourage minority ownership of broadcasting facilities. *See id.* at 556-58.

37. *See id.* at 564-65.

38. 515 U.S. 200 (1995).

39. *See id.* at 227.

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

have not been encouraging to affirmative action proponents. In one case, *Podberesky v. Kirwan*,[41] the United States Court of Appeals for the Fourth Circuit invalidated a University of Maryland program that designated certain scholarships for African-American students.[42] The University created the program after years of failing to satisfy its duty to eliminate the vestiges of *de jure* segregation.[43] After exhausting other strategies, Maryland developed a scholarship program that was targeted at black students.[44] Despite a long and well-documented history of race discrimination at the University of Maryland, the Fourth Circuit found that there was no compelling justification for the program.[45] The court held that the University had not adequately documented discriminatory conduct.[46] The court also found that the scholarship strategy was not narrowly tailored to achieving the University's goal of increasing the enrollment of African-American students because, among other things, the pool of eligible students included out-of-state residents.[47]

---

41. Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994).

42. *See id.*

43. Prior to *Brown v. Board of Education*, 347 U.S. 483 (1954), the NAACP challenged segregation laws in the educational context in several court battles, one of which involved the law school of the University of Maryland. *See* Pearson v. Murray, 182 A. 590 (Md. Ct. App. 1936). After the *Brown* decision, the Department of Health, Education and Welfare's Office of Civil Rights (OCR) began an effort to force Maryland to integrate its colleges and universities. These efforts of the OCR eventually culminated in the creation of the Banneker scholarship program which was at issue in the *Podberesky* litigation. *See* 38 F.3d 147 (4th Cir. 1994).

44. *See Podberesky v. Kirwan*, 838 F.Supp 1075, 1081 (D. Md. 1993). The Banneker scholarship program was the fifth plan that the state proposed to the OCR. The first was submitted in 1970 and rejected in 1973 as inadequate. The OCR accepted a revised plan in 1974, but the OCR later found it necessary to threaten to commence enforcement proceedings based on Maryland's failure to implement the 1973 plan. In 1978, the OCR again concluded that Maryland was not making adequate progress toward desegregating its colleges and universities. The OCR also rejected the state's fourth proposed compliance plan as inadequate. *See id.* at 1080-81.

45. *See Podberesky*, 38 F.3d at 155. Supreme Court Justice Thurgood Marshall was the victim of Maryland's discriminatory policies when he was forced to attend Howard University Law School. Maryland's segregation policy barred him from attending the University of Maryland. *See* MARK V. TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT 1936-1961, at 9 (1994).

46. *See Podberesky*, 38 F.3d at 155.

47. *See id.* at 158-59. The court examined the factors delineated in *United States v. Paradise*, 480 U.S. 149 (1987), to determine whether the program was narrowly tailored to achieving a legitimate governmental interest. These factors included: (1) the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the percentage of minorities in the relevant population; and (4) the impact of

A subsequent case, *Hopwood v. Texas*,[48] involved a challenge to an admissions program developed by the University of Texas School of Law.[49] Three unsuccessful law school applicants filed a civil action alleging that the law school's admission procedure, which considered the ethnicity of minority applicants, violated the Equal Protection Clause of the Fourteenth Amendment.[50] The district court invalidated the University of Texas program because the University considered minority applicants for admission separately from non-minority candidates.[51] However, the district court reaffirmed the validity of affirmative action.[52] The district court held that the program indeed had a compelling justification because of the history of discrimination practiced by the state of Texas.[53] It also found, however, that the program was not narrowly tailored because of the manner in which the University processed the applications.[54]

When the case reached the United States Court of Appeals for the Fifth Circuit, the court issued an opinion that went farther than the trial court's decision.[55] The Fifth Circuit affirmed the district court decision, but specifically rejected the promotion of ethnic diversity as a legitimate academic goal.[56] The Fifth Circuit held that affirmative action is unlawful except when it is used to remedy the effects of past discrimination.[57] Under this approach, affirmative action would be

---

the relief on the rights of third parties. *See Paradise*, 480 U.S. at 171.

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

49. *See id.* at 934.

50. *See id.* at 938.

51. *See id.*

52. *See* Hopwood v. Texas, 861 F. Supp. 551, 582-84 (W.D. Tex. 1994).

53. *See id.* at 569-73.

54. *See id.* at 573-79. The admission process at the University of Texas permitted presumptive admissions based on high undergraduate grades and high LSAT scores. Presumptive denials were made on the basis of low grades and low LSAT scores. The middle range consisted of discretionary admissions that were determined by the admissions committee on an individualized basis. A separate procedure was used to evaluate the qualifications of minority applicants. These were reviewed by three members of an admissions subcommittee. Subject to the chair's review, minority applicants who received two or three favorable votes from the subcommittee were admitted. *See id.* at 557-63. This separation of minority applicants from the rest of the applicant pool was the critical flaw that provided the basis for the majority's ruling against the University of California in *Bakke*. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 320 (1978).

55. *See Hopwood*, 78 F.3d 932 (5th Cir. 1996).

56. *See id.* at 944-48.

57. *See id.* at 949.

permissible only if it is used to remedy discrimination practiced by a specific unit within a university after the program has been authorized by state legislation.[58] In the Fifth Circuit's view, the promotion of diversity in academic settings is a legitimate goal, but ethnicity is an illegitimate consideration in the promotion of diversity.[59] Race, it found, is not a valid proxy for background or experience.[60] The Fifth Circuit panel explained that:

> [S]tate supported schools may reasonably consider a host of factors—some of which may have some correlation with race—in making admissions decisions. . . . A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant's home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider such factors as whether an applicant's parents attended college or the applicant's economic or social background.[61]

This Orwellian definition of diversity would have been satisfied by the 1948 graduating class at the University of Mississippi. Race is not a collateral matter to individuals who are regularly subjected to different and less favorable treatment than whites. African-Americans who live in urban areas would be astonished by the panel's suggestion that the segregated communities in which they live and the segregated schools that they attend do not shape their attitudes and perceptions.[62] Experiences of this sort are not limited to minorities at the lower end of the economic spectrum. High income African-Americans regularly experience discrimination in encounters that range from the petty to the profound.[63] The suggestion that

58. *See id.* at 949-52.
59. *See id.* at 946-47.
60. *See id.*
61. *Id.* at 946.
62. *See id.*
63. *See, e.g.*, ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS (1993).

African-Americans and other minorities do not share unique, racially-defined experiences is simply factually inaccurate. Contrary to the Fifth Circuit's suggestions in *Hopwood*, an African-American student from a public housing project in Chicago's South Side has a far different set of experiences than a white student from an affluent suburb of the same city. The same is true of Mexican-American students from south Texas, where Spanish may be the primary language, or an Asian-American student from San Francisco. The diversity of these individuals' experiences, and the varying perspectives that result from them, are what enrich the academic enterprise.

The diversity analysis was not the only flaw in the *Hopwood* opinion. The Fifth Circuit panel also found that Justice Powell's endorsement of the diversity rationale in *Bakke* "garnered only his own vote and has never represented the view of a majority of the Court in *Bakke* or any other case."[64] As a result, it concluded that "Justice Powell's view in *Bakke* [was] not binding precedent on this issue."[65] This is not an accurate interpretation of *Bakke*. The Supreme Court struck down the University of California's admissions procedure in *Bakke*, but the majority affirmed the validity of affirmative action in general.[66] The debate among the Justices that constituted the majority in *Bakke* was whether to apply strict scrutiny rather than some lower level of review. On this issue, four Justices—William Brennan, Byron White, Thurgood Marshall and Harry Blackmun—believed that affirmative action was constitutionally permissible and should not have been subjected to strict scrutiny.[67] Justice Powell wrote a separate opinion that concurred with the conclusion that affirmative action was permissible, but he would have applied strict scrutiny rather than the lower standard urged by the other Justices.[68] Because Justice Powell approved of affirmative action, but differed from the other Justices on whether to apply strict

64. *Hopwood*, 78 F.3d at 944.
65. *Id.*
66. *See Bakke*, 483 U.S. at 271.
67. *See supra* note 20 and accompanying text.
68. *See Bakke*, 438 U.S. at 289-90. Justice Powell stated that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." *Id.*

scrutiny, the *Bakke* majority would not have agreed with the Fifth Circuit's decision in *Hopwood*, which rejected race as a component of diversity.[69] Contrary to the Fifth Circuit's suggestion, *Bakke* continues to be binding precedent.

The *Hopwood* Panel's assertion that post-*Bakke* decisions require the abandonment of diversity as a justification for affirmative action is also flawed. In *Metro Broadcasting v. FCC*,[70] a majority of Justices upheld the FCC's reliance on diversity as the justification for the award of broadcast licenses to minority entrepreneurs.[71] The holding in *Adarand v. Pena*[72] does not alter this conclusion. *Adarand* and *Metro Broadcasting* differ on the extent of the enforcement powers granted to Congress by the Fourteenth Amendment.[73] The original decision to apply strict scrutiny to affirmative action programs relied heavily on a distinction that the plurality in *Croson* found between the powers granted to states and the authority possessed by the federal government.[74] This distinction was necessary because an earlier decision, *Fullilove v. Klutznick*, endorsed the validity of programs established by the federal government.[75] The result in *Fullilove* was based on the plurality's analysis of Congress's powers under Section Five of the Fourteenth Amendment.[76] In the years that

---

69. As a California court explained in *DeRonde v. Regents of the University of California*, 625 P.2d 220 (Cal. 1981), *cert. denied*, 454 U.S. 832 (1981), "[t]he Brennan opinion, representing the views of four justices, would have upheld the Davis quota system invalidated by the majority in *Bakke*. It may fairly be concluded that a race-conscious law school admission program that did not involve a quota, *a fortiori*, would be sustained by those holding the Brennan view." *Id.* at 225.

70. 497 U.S. 547 (1990).

71. *See id.* at 569.

72. 515 U.S. 200 (1995).

73. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

74. *See Croson*, 488 U.S. at 490-91.

75. *See* Fullilove v. Klutznick, 448 U.S. 448 (1980). In *Fullilove*, the Court validated a procurement program that authorized federal grants to state public works programs only if 10% of the amount of the grant was allocated to minority enterprises. *See id.* (discussing 42 U.S.C. § 6705(f)(2) (1976)).

76. *See id.* at 476. Section Five authorizes Congress "to enforce, by appropriate legislation" the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 5. The *Fullilove* Court found that pursuant to this provision, Congress is authorized to enact legislation designed to eliminate procurement practices that perpetuate the effects of past discrimination. This determination by the plurality provided the basis for the first prong of the heightened scrutiny test applied in *Fullilove*. The second prong addressed whether the use of

followed, several localities enacted minority "set-aside" programs, relying on *Fullilove*.

In *Croson*, Justice O'Connor found that this reliance was misplaced.[77] She reasoned that Congress's power to enact affirmative action programs was based on authority that the states did not possess.[78] She argued that Congress has broad powers under Section Five of the Fourteenth Amendment to eradicate the effects of discrimination, but a similar grant of authority was not given to the states.[79] This distinction provided the analytical foundation for treating state-sponsored affirmative action programs differently from those created by the federal government. Remarkably, when the *Adarand* Court extended the *Croson* rationale to the federal government, the Court did not discuss the Section Five analysis that was so critical to the outcome of *Croson*. *Adarand* overruled *Metro Broadcasting* to the extent that it applied strict scrutiny to the federal government, but it did not consider the critical question that was involved in *Hopwood*: whether diversity constitutes a compelling justification for the purposes of strict scrutiny. Despite the Fifth Circuit's suggestions in *Hopwood, Metro Broadcasting*, the only post-*Bakke* case to consider diversity, reaffirmed its legitimacy as a justification for affirmative action.

Hopwood also failed to give any consideration to the special circumstances of states like Texas that have long practiced *de jure* segregation. In the late 1960s, the Supreme Court held that states which had enacted laws requiring segregation had "an affirmative duty to eliminate all vestiges of the separate educational systems."[80] Inasmuch as elementary and high school attendance is mandatory, and school districts are based on residential districts, lower courts were uncertain as to whether this affirmative duty extended to colleges and universities.[81] Some lower courts held that the affirmative duty did not apply because the decision to attend a

racial and ethnic criteria was a permissible means of achieving the objectives of the legislation. *See* 488 U.S. at 480.

77. *See Croson*, 488 U.S. at 491.
78. *See id.* at 490-91.
79. *See id.*
80. Green v. County Sch. Bd., 391 U.S. 430, 437 (1968).
81. *See* United States. v. Fordice, 505 U.S. 717, 727 (1996).

particular college, they reasoned, was largely a matter of private choice.[82] In these cases, the courts found that the duty to desegregate institutions of higher education was satisfied by the adoption of race-neutral admission policies.[83] Other courts found that the affirmative duty to desegregate applied to colleges and universities.

In *United States v. Fordice,*[84] the Supreme Court held that, like primary and secondary schools, colleges and universities must take whatever steps are necessary to eliminate all vestiges of segregation "root and branch."[85] The Court thus rejected the neutral approach. Given the long and well-documented history of discrimination practiced by Texas educational institutions, the University of Texas was obligated under *Fordice* to take whatever actions were required to eliminate the vestiges of segregation.[86] Because *Fordice* rejected the neutrality argument, an affirmative action admissions program was a permissible means of accomplishing this goal.

The *Hopwood* opinion does not provide a sound basis for the resolution of the affirmative action debate.[87] It redefined diversity, misconstrued *Bakke,* misapplied *Metro Broadcasting,* and ignored *Fordice.* In addition to distorting relevant precedent, *Hopwood* downplayed the effects of discrimination on people of color and exaggerated the consequences of affirmative action for whites. The Fifth Circuit's analysis was badly flawed, if not entirely disingenuous.[88]

III. *TAXMAN V. BOARD OF EDUCATION*

The Supreme Court was slated to decide an employment case, *Taxman v. Board of Education of the Township of Piscataway,*[89] during its 1997-1998 term. *Taxman* was the first employment case to reach the Supreme Court since the Court had decided in *Croson* to

82. *See id.* at 729.
83. *See id.*
84. 505 U.S. 717 (1996).
85. *See id.* at 729.
86. *See id.*
87. *See* 78 F.3d 932 (1996).
88. *See* A. Leon Higginbotham, Jr., *Breaking Thurgood Marshall's Promise,* N.Y. TIMES, Jan. 18, 1998, at 28.
89. 91 F.3d 1547 (3d Cir. 1996), *cert. dismissed,* 118 S. Ct. 595 (1997).

apply strict scrutiny to affirmative action programs. However, the Court never issued an opinion in *Taxman* because, to forestall what was seen as a potential setback for affirmative action, the parties settled the case before the Court could rule on it.[90]

Taxman involved a challenge to affirmative action in employment that was brought under Title VII of the Civil Rights Act of 1964.[91] A different analytical standard has emerged for such challenges brought under Title VII. Beginning with the 1979 decision in *Steelworkers of America v. Weber*,[92] the Supreme Court has held that affirmative action programs are justified under Title VII when there are "manifest . . . imbalances" in the percentage of minority workers in "traditionally segregated job classifications."[93] This lower standard allows employers to establish voluntary affirmative action programs if the percentage of minorities or females in a company's workforce is significantly lower than the percentage of qualified minority workers in the geographic region where the company's facility is located.

The specific issue in *Taxman* was whether affirmative action

---

90. The settlement was effectuated by a coalition of civil rights groups based on their concern that a decision in *Taxman* would have undermined the legitimacy of affirmative action. *See Black & White Case*, 84 ABA J. 33 (January 1998).

91. *See id.* at 1549-50.

92. 443 U.S. 193 (1979).

93. *Id.* at 197. Most of the Supreme Court's affirmative action decisions have arisen in the context of employment. In *Weber*, the Court found that an affirmative action program, which designated a specified number of training positions for black employees, did not violate Title VII of The Civil Rights Act of 1964. Several years later, the Court approved voluntary programs established by governmental employers when it held that sex could be legitimately used as a plus factor in a multi-faceted promotion process. *See* Johnson v. Transportation Agency, 480 U.S. 616 (1987). In *Sheet Metal Workers International Association v. EEOC*, 478 U.S. 421 (1986), the Supreme Court sustained a lower court's decision that required a labor union to admit specific percentages of minority workers after it engaged in discriminatory hiring practices and failed to comply with orders requiring it to abandon its unlawful conduct. *See id.* The Supreme Court also approved negotiated consent decrees that benefited individuals who were not themselves the victims of the employer's discriminatory conduct. *See* United States v. Paradise, 480 U.S. 149 (1987); International Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). In *Firefighters Local Union Number 1784 v. Stotts*, 467 U.S. 561 (1984), the Court held that a consent decree that created temporary hiring and promotion preferences for minority employees, but that did not address layoffs, could not be construed to require the retention of minority workers at a time when non-minority employees were being terminated. In *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), the Court struck down a collective bargaining agreement that required the retention of probationary minority teachers when tenured non-minority teachers were being laid off. *See id.*

considerations warranted laying off a white teacher who had the same seniority rights as a black teacher who the school board retained.[94] In making the decision to fire the white teacher, the school board relied on diversity—in this instance, the desirability of maintaining a racially-mixed teaching staff.[95] The Court of Appeals for the Third Circuit held that the School Board's actions were unlawful.[96] It found that affirmative action is permissible under Title VII, but only when it is used to remedy the present effects of past discrimination.[97] The parties conceded, however, that there was no evidence that the school district had a history of discriminating against black teachers, nor was there an imbalance of black teachers employed by the school system.[98] Because there was no "manifest imbalance" in a "traditionally segregated job classification," the question in *Taxman* was whether the school district's goal of maintaining a racially-diverse teaching population was an adequate justification for laying off a white teacher who had the same seniority as a black teacher who was retained.

In *Bakke,* Justice Powell's opinion recognized diversity as a compelling justification under strict scrutiny.[99] Relying on that opinion, most American colleges and universities have established affirmative action programs that are premised, almost entirely, on considerations of diversity. The legal status of these programs is uncertain because the diversity justification was rejected by the Fifth Circuit in *Hopwood* and by the Third Circuit in *Taxman.* If *Taxman* had proceeded to a Supreme Court decision, this issue would undoubtedly have been addressed by the Justices.

The concerns of the civil rights groups who urged the settlement of the *Taxman* case were well-founded. In two previous cases,

---

94. *See Taxman,* 91 F.3d at 1551.

95. *See id.* The teacher who was not laid off was the only black teacher in the school district's business education department. *See id.*

96. *See id.* at 1565.

97. *See id.* at 1557.

98. *See id.* at 1563.

99. *See Bakke,* 438 U.S. at 311-15. Justice Powell stated that programs designed to attain diverse student bodies are "clearly . . . constitutionally permissible . . . ." *Id.* at 311-12. He went on to say 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." *Id.* at 312.

Firefighters Local Union Number 1784 v. Stotts[100] and *Wygant v. Jackson County School Board*,[101] a Supreme Court that was far more receptive to affirmative action than the present Court held that layoffs could not be used to advance the goal of diversity. The *Wygant* case, for example, involved a school district that laid off tenured white teachers while retaining less senior black teachers.[102] One of the justifications proffered by the school board was the need for black teachers to serve as "role models" for black students.[103] This rationale was rejected. The Court found that, unlike hiring decisions, layoffs impair settled expectations that are based on valuable seniority rights.[104] Using layoffs to maintain a racially-balanced teaching force was not narrowly tailored because it was far too intrusive even in circumstances where affirmative action hiring might have been permissible.[105] The decision in *Wygant* seems to be virtually dispositive of the claims asserted in *Taxman*. The Supreme Court has found that affirmative action cannot justify layoffs that aim to maintain a racially-diverse teaching force. This does not mean, however, that diversity considerations do not justify affirmative action in scholastic admissions.

IV. AFFIRMATIVE ACTION IN HIGHER EDUCATION

Affirmative action is premised on a determination that a simple prohibition against discrimination will not dismantle the elaborate system of racial subordination that segregation policies have created. The most obvious examples of the lingering effects of segregation can be found in public schools and housing patterns in most urban areas. Despite more than thirty years of anti-discrimination laws, the housing patterns that prevail in most cities reflect "hyper-

100. Firefighters Local Union Number 1784 v. Stotts, 467 U.S. 561 (1984).

101. Wygant v. Jackson Cty. Sch. Bd., 476 U.S. 267 (1986).

102. *See Wygant*, 476 U.S. at 272.

103. *See id.* at 272-83.

104. *See id.* In addition, the majority found that the role model theory was invalid because it had "no logical stopping point," and it did not bear a demonstrable relationship to any harm caused by prior discriminatory hiring practices. *Id.* at 275.

105. *See id.* at 283-84. Justice Powell believed that "[o]ther, less intrusive means of accomplishing similar purposes—such as the adoption of hiring goals—[were] available." *Id.*

segregation."[106] Because school attendance zones are based on residential districts, the racial demographics of the public schools reflect the segregated housing patterns of the communities they serve. These conditions persist decades after the laws enforcing segregation were eliminated. The neutral standard that traditionalists urge would ignore these realities and proceed as if segregation never existed. Unlike the neutral standard, affirmative action policies take these conditions into account. Affirmative action gives decision makers an incentive to engage in conduct that is aimed at ameliorating the disparities resulting from decades of racial exclusion. This is the remedial justification for affirmative action programs.

In higher education, this remedial justification has been merged with the long-standing recognition of the value of diversity in academic settings.[107] Under this approach to education, students from different backgrounds are brought together in a single academic community. This mix is considered by many to enrich classroom discussions because of the varying perspectives that students bring to the academic enterprise.[108] Consideration of race in this context does not, as some critics charge, promote racial stereotypes nor does it assume that all minorities think alike.[109] There are, of course, a broad range of perspectives within minority communities. W.E.B. DuBois did not agree with Booker T. Washington.[110] Martin Luther King did not agree with Malcolm X.[111] Thomas Sowell does not agree with bell hooks.[112] There is not a singular "minority" perspective. The point of considering race, however, is that the legacy of discrimination does cause whites and people of color to experience

106. *See* MASSEY & DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

107. *See, e.g., Bakke*, 438 U.S. at 311-15.

108. As the Supreme Court explained in *Keyishaian v. Board of Regents*, 385 U.S. 589 (1967), "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* at 603 (quoting United States v. Associated Press, D.C., 52 F. Supp 362, 372 (S.D.N.Y. 1943).

109. *See, e.g.*, Metro Broad. v. FCC, 497 U.S. 547 (1990) (Scalia, J., dissenting).

110. *See* DAVID LEVERING LEWIS, W.E.B DUBOIS - A BIOGRAPHY OF A RACE, 1868-1919 (1993).

111. *See* TAYLOR BRANCH, PILLAR OF FIRE: AMERICA IN THE KING YEARS, 1963-1965 (1998).

112. *See* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (1992).

life in dramatically different ways; and these experiences shape their perspectives. This difference is what matters for the purposes of determining diversity.

Individuals familiar with the university admissions process know that decisions concerning which students to admit are far more complicated than selecting applicants with the highest grades and test scores.[113] These quantitative factors are merely predictors of performance in an academic setting. The actual question is which individuals should be selected from a pool of students, all of whom are capable of performing in a satisfactory manner. Given the decline in the number of students available to attend any higher education institution, the increase in the number of higher education institutions since the end of World War II, and the shifting demographics of the student population, the question of what constitutes a fair admissions process is far more complicated now than it has ever been. It requires, at a minimum, consideration of the circumstances of individual applicants.

The desirability of diversity in academic environments is well recognized.[114] In the case of admissions, however, the desire for a diverse student body conflicts with the view that the brightest students are entitled to be favored over other applicants. This belief is premised on an unfounded assumption that merit can be accurately measured through a combination of grades and standardized test scores.[115] The arguments of affirmative action opponents are premised entirely on this erroneous assumption. It is well known in academic circles that standardized test scores are not a precise predictor of student performance. The strongest claim that can be made for such examinations is a correlation between performance and scores at the very highest and lowest levels. In the vast middle range, however, where the majority of students fall, the predictive value of such examinations is marginal.[116] Standardized examinations

113. *See* Michael A. Olivas, *Constitutional Criteria: The Social Science and Common Law of Admissions Decisions in Higher Education*, 68 U. COLO. L. REV. 1065 (1997).

114. *See* Neil Rudenstein, *The Uses of Diversity*, HARV. MAG., Mar.-Apr. 1996, at 49.

115. *See* Olivas, *supra* note 113.

116. For an analysis of how this is demonstrated in the context of the Law School Aptitude Test, see Robert R. Ramsey, *Law School Admissions: Science, Art or Hunch?* 12 J. LEG. EDUC. 503, 514 (1960); John A. Winterbottom, *Comments on "A Study of the Criteria For Legal*

are an imperfect measure of white students, but they are even far less reliable predictors for minority students. Standardized examinations also have a disparate impact because the average scores of black and Latino students are lower than the average scores of whites.[117] An over-reliance on test scores will disproportionately exclude minority applicants.[118]

As two of the leading authorities in higher education law have observed, "affirmative action is based on the concept that equal treatment of differently situated individuals may itself produce inequality; different standards for such individuals become appropriate when the use of uniform standards would in effect discriminate against them."[119] The discriminatory effect of standardized examinations was recognized by Justice Powell in *Bakke* when he suggested that race and ethnic background could be considered for the purpose of correcting inaccuracies that result from bias in testing procedures.[120] In *Defunis v. Odegaard*,[121] Justice William O. Douglas argued at length that a selection process that did not consider cultural differences would not promote equality.[122]

Because of the complexities of the process, a decision regarding which applicant is best suited for admission is a complex judgment which should be left to the individual institution. It is not a matter of selecting applicants with the highest grades and test scores, nor should it be. Preferences for the children of alumni, special consideration for in-state students, and weighing athletic, artistic, or

---

Education and Admission to the Bar": An Article by Dr. Thomas M. Goolsby, Jr., 21 J. LEG. EDUC. 75, 79 (1968); Linda F. Wrightman, *Predictive Validity of the LSAT: A National Summary of the 1990-1992 Correlation Studies*, LAW SCHOOL ADMISSION COUNCIL RESEARCH REPORT 93-95 (1993).

117. *See* United States v. Fordice, 505 U.S. 717 (1992).

118. *See* Linda F. Wrightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1 (1997). Wrightman argues that the LSAT is not biased against minority students, but she explains the disparate impact of these examinations on minority students. She also argues against the use of grades and test scores as the exclusive means of determining which students should be admitted.

119. WILLIAM A. KAPLIN & BARBARA A. LEE, THE LAW OF HIGHER EDUCATION (3d ed. 1995).

120. *See Bakke*, 438 U.S. at 306 n.43.

121. Defunis v. Odegaard, 416 U.S. 312 (1974).

122. *See id.* at 327-44 (Douglas, J., dissenting).

musical talents are admissions practices that are not seriously questioned. These are intangible qualities that are not capable of objective measurement. Courts are not equipped to second-guess judgments that evaluate the many considerations that an admission decision requires. These decisions fall within the province of matters that are best handled by academics. As Justice Frankfurter explained in *Sweezy v. New Hampshire*:

> It is the business of a university to provide that atmosphere which is most conductive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university - to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught and who may be admitted to study.[123]

This does not mean that universities are not accountable for invidious discrimination, but it does obligate courts to defer to the judgments of academics in deciding "who may be admitted to study." Affirmative action policies that promote diversity are entitled to the deference that principles of academic freedom require.

V. THE UNCERTAIN FUTURE OF AFFIRMATIVE ACTION

The question for colleges and universities is whether diversity will remain an adequate justification for affirmative action programs. If Justice Powell's reasoning in *Bakke* retains its influence, race legitimately can be used as a factor in a selection process to achieve the goal of student body diversity. The question now is whether a majority of the current Supreme Court Justices will remain faithful to Justice Powell's analysis in *Bakke,* agree with the panel in *Hopwood,* or find some middle ground between the two positions.

The Supreme Court's most recent decisions indicate that its commitment to desegregation is weakening. In *Missouri v. Jenkins,*[124] the affirmative duty to eliminate all vestiges of segregation in public

123. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring); *see also* Keyishian v. Board of Regents, 385 U.S. 589 (1967); *Academic Freedom and Tenure; A Statement of Principles,* 1940 BULL. AM. ASS'N U. PROFESSORS, Feb. 1942, at 84.

124. 515 U.S. 570 (1995).

schools that was originally established in *Green v. County School Board,*[125] was lowered to a standard that merely requires good faith compliance. Under this revised standard, segregation that is not directly attributable to the conduct of school boards will not be considered when a court is determining whether the school district has satisfied its desegregation obligation. This means that almost all urban school districts will be deemed to have reached "unitary" status, even though most of them remain segregated. Because the Court is willing to disregard the continuing segregation in primary and secondary schools, there is no reason to believe that it will take a different view of colleges and universities. When an admissions case finally reaches the Supreme Court, the outcome could be the imposition of a color-blind standard or, at minimum, the elimination of affirmative action except as a remedy for discrimination practiced by an individual institution. Either approach would inevitably result in the re-segregation of higher education.

Affirmative action has been controversial since it first emerged as a social policy in the late 1960s. Despite the intensity of the opposition to affirmative action, during the 1960s and '70s, affirmative action was greeted with enthusiasm in higher education. When affirmative action cases reached the Supreme Court, a majority of the Justices endorsed the validity of the programs, although they could not agree on the applicable standard of review. The opposition to affirmative action continued despite the Court's repeated findings that such programs were permissible. In the early 1980s, the Reagan administration challenged race-conscious remedies at every opportunity. This effort did not succeed at first, but affirmative action became more difficult to justify when the majority decided to apply strict scrutiny in *Croson*. The extension of this heightened level of review to federal programs in *Adarand* has jeopardized the status of all affirmative action programs. The courts are not the only arena in which affirmative action has been challenged. The Ninth Circuit's decision upholding Proposition 209, the California anti-affirmative action initiative, has generated similar proposals in the United States House of Representatives and in several state legislatures.

125. 391 U.S. 430 (1968).

The debate about affirmative action reflects more than a disagreement over legal doctrine and public policy. Affirmative action has become a potent symbol of a perceived threat to white privilege. This is why conservative political leaders have exploited affirmative action to secure the support of voters who are disaffected towards this policy. California's Governor Pete Wilson, a long-time supporter of affirmative action, apparently changed his mind when he thought he could ride the anti-affirmative action bandwagon into the White House. His political aspirations were not successful, but Proposition 209 was the direct result of his efforts. Wilson's strategy appealed to the sentiments of whites who comfort themselves with anecdotes of opportunities lost to "less qualified" minorities. They apparently believe that jobs lost as a result of new technologies, corporate downsizing, and the globalization of production will be restored if the government will simply stop requiring employers to hire "unqualified" minorities. These fears are completely unfounded. The perception that minorities have an unfair advantage is conclusively rebutted by almost every empirical study.

Appeals to emotion should not displace reasoned analysis. The color-blindness argument implies an equitable approach, but it would actually impose a standard that will not promote racial equality. A neutral approach would treat whites and racial minorities as if they were similarly-situated. This disregards the circumstances resulting from three centuries of state-sanctioned discrimination and the continuing effects of those policies on African-Americans and other people of color. Thirty years of anti-discrimination laws have not eliminated the disparities that segregation created. Instead of advancing equality, the imposition of a neutral standard will merely prolong the disparities that segregation created.

Traditional considerations of equity require that individuals injured by unlawful conduct be placed, as nearly as possible, in the position that they would have occupied if the injury had not occurred.[126] If African-Americans and other people of color cannot be placed in the positions that they would have occupied if segregation had not been imposed, they should be provided with some means of

126. *See, e.g.*, Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975).

surmounting the continuing disadvantages that are directly attributable to that system. Affirmative action policies are aimed at rectifying the injuries that segregation inflicted.

CONCLUSION

The ultimate resolution of the affirmative action debate depends upon how the Supreme Court will interpret the Equal Protection Clause of the Fourteenth Amendment. There are at least two competing perspectives. The first perspective views the Fourteenth Amendment and other federal anti-discrimination laws as creating an obligation to eliminate racial discrimination and the historical disadvantages that minorities still endure. Under the second perspective, all institutional decisions must be race-neutral and free from any government-imposed requirements. This latter view ignores the realities of race in America.

The evolution of equal protection jurisprudence cannot be separated from the history of race relations in the United States. In 1868 the Fourteenth Amendment was ratified in reaction to the "Black Codes" that were enacted by Southern states.[127] These laws threatened to return the newly freed slaves to a subordinated status. The Reconstruction era that followed was a period of substantial progress for African-Americans. Schools that provided educational opportunities for black students were established. Blacks were elected to the United States House of Representatives and dozens of state and local governments. This progress was cut short by the Hayes-Tilden Compromise which represented the beginning of the end of Reconstruction. Federal troops were withdrawn from the former Confederacy. Control of state legislatures reverted to the white majorities. African-Americans were subordinated and disfranchised by a pattern of violence and others forms of intimidation.[128]

As the nineteenth century drew to a close, laws that established

127. *See generally* ERIC FONER, RECONSTRUCTION (1990); JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM (1994); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1974).

128. *See* FONER, *supra* note 127.

"Grandfather clauses," poll taxes, and "understanding" provisions nullified voting rights that were established by the Fifteenth Amendment.[129] During the same period, racial segregation was sanctioned by the Supreme Court's decision in *Plessy v. Ferguson.*[130] This case provided the foundation for an elaborate system of state-sponsored subordination developed under the "separate but equal" doctrine. Of course, the facilities that were reserved for African-Americans were always separate, but never equal.

In the late 1930s, a long-range, carefully orchestrated campaign to eliminate segregation was developed by the NAACP. The "equalization" strategy challenged segregation in schools, housing, public transportation, and voting.[131] The NAACP's lawyers initially sought to assure that the segregated facilities provided for African-Americans were actually equal to those reserved for whites without directly challenging the *Plessy* doctrine.[132] After a series of favorable rulings in the equalization cases, the NAACP mounted a direct challenge to segregation itself in *Brown v. Board of Education.*[133] After the *Brown* decision, the courts employed strict scrutiny to invalidate other laws that enforced segregation. A decade later, Congress enacted a series of civil rights laws that prohibited discrimination in employment, public accommodations, voting, and housing.[134] These advances merely represented a starting point for efforts to dismantle the elaborate structure that segregation established. The Southern states reacted to *Brown* with a campaign of "massive resistance" that continued for several years. Serious efforts to desegregate schools did not commence until the early 1970s.

---

129. *See id.*

130. 163 U.S. 537 (1896).

131. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1994); MARK TUSHNET, MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961 (1994).

132. *See, e.g.,* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

133. 347 U.S. 483 (1954).

134. *See* Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1994) (employment and public accommodation); Civil Rights Act of 1968, 18 U.S.C. §§ 245, 2101- 2102, 25 U.S.C. §§ 1301-1341 (1994); The Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb (1994).

During the same period, the relocation of white families to suburban areas accelerated. As a result, segregated housing patterns became even more prevalent.[135] Twenty-five years later, states that practiced *de jure* segregation are still in the process of dismantling segregated educational systems.[136] Private institutions and state-supported schools outside of the South are endeavoring to overcome the effects of practices that excluded minority students.

Whether these institutions should be allowed to maintain race-conscious admissions programs is one of the critical questions presented by the affirmative action debate. As the Court explained in *Brown,* "[i]n approaching this problem, we cannot turn the clock back to 1868 when the [Fourteenth] Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written."[137] The same considerations apply in equal measure to the affirmative action debate. The appeals for color-blindness are a century too late. The demands to end affirmative action are a generation too early. If student body diversity is allowed to remain as a legitimate academic goal, the background and circumstances of individual students is a necessary consideration in the admissions process. Given the history and legacy of segregation, a minority applicant's ethnicity is inextricably intertwined with that individual's opinions, social beliefs, and perspective.

---

135. *See* MASSEY & DENTON, *supra* note 106.
136. *See* United States v. Fordice, 505 U.S. 717 (1992).
137. *Brown,* 347 U.S. at 492.