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## Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs

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# Silent Beneficiaries: Affirmative Action and Gender in Law School Academic Support Programs

BY DARLENE C. GORING\*

## INTRODUCTION

This Article was developed from a qualitative investigation<sup>1</sup> of racial and gender issues that arise in law school academic support programs. The qualitative investigation initially focused on the pervasiveness of racial and gender discrimination against students and faculty members involved with academic support programs.<sup>2</sup> Sixteen

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<sup>1</sup> The group interviews were jointly conducted by the author and Dr. Beth Goldstein, Professor of Educational Policy, Studies & Evaluation, University of Kentucky College of Education. Dr. Goldstein separately interviewed two students who did not participate in any academic support programs.

<sup>2</sup> See generally Judith G. Greenberg, *Erasing Race from Legal Education*, 28 U. MICH. J.L. REF. 51, 51, 83 (Fall 1994) (discussing the presumption underlying academic support programs that assume that skills enhancement will put Black students on equal footing with their white counterparts, while denying the "fundamental differences between African American and white students' identities or to possible pro-white biases in legal education, the substance of those programs reasserts the superficiality of any differences. Because skills deficiencies can be remedied, such deficiencies do not challenge the perceived sameness of African-American and white law students." *Id.* at 83-84.); Kristine S. Knaplun & Richard H. Sander, *The Art and Science of Academic Support*, 45 J. LEGAL EDUC. 157 (1995) (discussing quantitative investigation and evaluation of performance of students in academic support programs at the University of California at Los Angeles); Paul T. Wangerin, *Perspectives on Higher Education: Law School Academic Support Programs*, 40 HASTINGS L.J. 711 (1989) (evaluating academic support programs in law school); AN INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS, LAW SCHOOL ADMISSION SERVICES (1992)

female law students<sup>3</sup> participated in this investigation by agreeing to group and individual interviews concerning their overall law school experiences and their experience with academic support programs.<sup>4</sup>

(describing components necessary to implement a formal academic support program in law school).

For a comprehensive analysis of affirmative action in the law school admissions process and an evaluation of academic support programs, see Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 *How. L.J.* 443, 450 (1983).

<sup>3</sup> Profile of female law student participants:

AGE:	20-25	26-30	31-45	
	10	5	1	
RACE:	Black	White	Other	
	6	9	1	
YEAR IN LAW SCHOOL:	First	Second	Third	
	9	6	1	
RETENTION PROGRAM:*	CLEO	AcadSup '94	AcadSup '95	Sum
	2	4	8	8

\*Some students participated in more than one retention program.

This investigation was intentionally designed to solicit the views and concerns of women participants in the academic support program at the subject law school. However, the views of male law students are an important component of this dialogue regarding the appropriateness of academic support and other types of affirmative action programs in law schools. Upcoming investigations will explore this issue, and questions regarding race and gender, from the perspective of male academic support participants.

<sup>4</sup> In 1994, the subject law school established a formal academic support program. The goal of the program is to assist first year law students in mastering learning strategies needed to complete a successful first year. The program is not a doctrinal tutorial for first year classes. It focuses on study skills, methods for organizing course materials, outlining, and exam taking.

Fourteen participants are current or former members of law school academic support programs. Two participants were interviewed because they were invited, but chose to withdraw from the academic support program.

All interviews<sup>5</sup> were preserved on audiotape and transcribed. Because we agreed to maintain the anonymity of the participants, the students seemed eager to openly express their views. However, after conducting the first interview session, several subtle themes underlying the students' comments began to emerge which indicated limits to their eagerness. A number of the students were reluctant to acknowledge that they derived any benefits from affirmative action<sup>6</sup> programs. Other students became

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The Program consists of several components. Most of the students interviewed in this study participated in a year long academic support program. This program provides academic and tutorial assistance to its participants on a weekly basis throughout the academic year. The participants are taught by students and faculty members, and are given the opportunity to experiment with a variety of learning techniques. The Program also includes a week-long summer program conducted prior to the beginning of the first year of law school. Participants in this program are exposed to traditional law school classes, legal skills training, and individual and group learning environments that are designed to introduce the participants to the academic rigors of law school.

Two of the students interviewed for this study also participated in the six-week summer institute operated by the Council on Legal Education Opportunity ("CLEO"). CLEO is a national program that provides a "preview of the law school experience . . . [to] socially and economically disadvantaged college graduates" who are interested in attending law school. The CLEO program "includes courses derived from the first year law school curriculum, emphasizing legal methods and techniques while focusing extensively on abstract thinking, legal analysis and synthesis." COUNCIL ON LEGAL EDUC. OPPORTUNITY, ALL ABOUT CLEO (1995).

<sup>5</sup> Interviews with participants occurred on Sept. 6, Sept. 13, and Nov. 6, 1995.

<sup>6</sup> In their dissenting opinion in *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), Justices Stevens and Ginsberg noted: "[T]he term 'affirmative action' is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad." *Id.* at 2121. The author believes, however, that the more accurate meaning of the term "affirmative action" has been lost and replaced by individual impressions, not of what affirmative action is, but of how affirmative action affects people's lives. As a result, for the purposes of this Article, the term affirmative action shall have the following definition:

uncomfortable when the subject of affirmative action was raised, and disassociated themselves when the topic was discussed. This subtle disassociation began to separate the group along racial boundaries. As a result, the focus of the qualitative investigation, and this Article, was modified to incorporate the students' views on the intersection of race, gender and affirmative action.

## I. FINDINGS

### A. *Tokenism*

Many jurists and commentators question the viability of affirmative action programs<sup>7</sup> because of the resulting perception that the participants are intellectually and academically inferior. Several of the students we interviewed were eager to challenge this perception and to discuss their own struggle to come to terms with the role affirmative action has played in their lives. At the subject law school, as with most American Bar Association accredited law schools, white women and minorities account for a small percentage of the total student population.<sup>8</sup> The women

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The broader societal concept of affirmative action encompasses any positive effort by business or educational institutions to advance the employment status of target groups. In the words of one scholar:

Affirmative action can be defined as attempts to make progress toward substantive, rather than merely formal, equality of opportunity for those groups, such as women or racial minorities, which are currently underrepresented in significant positions in society, by explicitly taking into account the defining characteristic— sex or race — which has been the basis for discrimination.

SUSAN D. CLAYTON & FAYE J. CROSBY, JUSTICE, GENDER AND AFFIRMATIVE ACTION 3 (1992).

<sup>7</sup> See generally Ken Feagins, *Wanted — Diversity: White Heterosexual Males Need Not Apply*, 4 WIDENER J. PUB. L. 1 (1994). Feagins argues for elimination of race-based group affirmative action preferences in favor of an individualized application of preferences to “minorities who have been harmed by the perpetuation of purposeful discrimination,” and “reasonable accommodation for qualified white males who are harmed as a result of minority-based classifications.” *Id.* at 46. He asserts that modifications to existing affirmative action programs will eliminate the resentment that white males experience as a result of race-based preferences. See also Paul D. Carrington, *Diversity!*, 1992 UTAH L. REV. 1105 (discussing negative implications of race and gender based affirmative action quotas in higher education).

<sup>8</sup> Fall 1994 Law School attendance figures for ABA-Approved Law

interviewed in this study all agreed that their limited numbers raise presumptions about their intellectual abilities among their male counterparts. Commentators have observed that male students require some tangible evidence of intellectual competence in order to justify the presence of the white women and minorities in law school. In the absence of such justification, the men simply dismiss them as "tokens"<sup>9</sup> or "affirmative action babies." Several students spoke with an underlying degree of anger about the necessity to overcome this presumption:

I would rather them group me . . . and get the extra help and then go ahead and get my grades. Okay, if you are going to label me as a token, I might as well be a good one as far as that. Of course everybody has different views, like oh, gosh, I wish I didn't have to come in this program, but you might as well take the help, that's the way I figure and do what you have to do.

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Schools indicates that 128,989 students were enrolled in juris doctor programs, including 55,808 women, and 24,611 minorities. The minority group classification includes students who identify themselves as Black, not of Hispanic Origin; American Indian or Alaskan Native; Asian Pacific Islander; Mexican-American; Puerto Rican; and Other Hispanic American. A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL 1994 (Rich L. Morgan, American Bar Association Section of Legal Education and Admissions to the Bar ed., 1994). It is important to note that minority women are counted in enrollment figures for both minority students and for women. Telephone Interview with Rick Morgan, Data Specialist, American Bar Association (Apr. 23, 1996).

<sup>9</sup> See Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994). Professor Guinier notes that the perception of women as tokens has a detrimental impact on their performance:

Our claim is that the proportional scarcity of "elite women" sets up a dynamic of virtual tokenism, in which the more numerically significant women students are nevertheless treated as, or self-identify as, "tokens." This dynamic exists in both the manifest and latent structure of the Law School, as well as in both the actual treatment of female students and their perception of their treatment by male students and faculty. As with true tokens, the dynamic of virtual tokenism reinforces limitations on the opportunity for success of women law students. Also similar to true tokens, many female students at the Law School enter the institution with identical credentials and then differentiate significantly from their male peers in terms of academic achievement, voluntary class participation, and interaction with faculty.

*Id.* at 78 (citations omitted).

I don't want people to think I'm just here because I'm a woman.

I ignore it, even I thought it. If somebody is going to pull that crap, I wouldn't think about, I wouldn't allow it to keep popping in my head even if I really kind of deep down thought it, that's irrelevant, we're all here now. It's kind of like you walk in after you get in and the slate's clean. Your scores mean nothing, your GPA [Grade Point Average] means nothing. You just walk in here and it's like you're the same until the first semester grades come out and you get ranked all over again. So it's kind of like, well who cares how I got in, I got in, I'm just as good as you now. . . .

One of the white female students interviewed in this study discussed "tokenism" as a function of age, not gender. When asked whether she perceived herself as a token, she replied:

No, no. There are lots of females. I'm obviously the oldest. I hope I'm not here for that reason. I hope that's not it. It does kind of make, not make me feel bad but make me . . . it has a negative effect. If someone would tell me that I was here for that reason it would kill me. For someone to think that I didn't have the academic ability and they just let me in because they needed an older woman, it would just kill me.

*B. Stigma*

When the formal academic support program at the subject law school was implemented in 1994, the faculty members administering the program assumed that participation in the program would impose a double stigma<sup>10</sup> on the students, based in part on their existing status as

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<sup>10</sup> See generally *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1978) (plurality opinion) ("Classifications 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 politics of racial hostility."); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (plurality opinion) ("Preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth."); *DeFunis v. Odegaard*, 416 U.S. 312, 343 (1974) (Douglas, J., dissenting) ("A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions.").

members of racial<sup>11</sup> or gender-based minority groups, and in part because of their participation in the program. After numerous discussions about the issue of stigma, the law school faculty administering the program concluded that their ability to address the imposition of stigma was at best limited, and more realistically, nonexistent.<sup>12</sup> As a result, the faculty decided to address any problems on a case-by-case basis, and hope that the students were mature enough to respond appropriately to any problems. Although this *laissez-faire* approach was most expedient for the faculty members, the students were left to make their own decisions about their response to the stigma associated with their participation in the program:

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<sup>11</sup> See generally John K. Wilson, *The Myth of Reverse Discrimination in Higher Education*, 10 J. OF BLACKS IN HIGHER EDUC. 90 (Winter 1995-1996) (attributing the stigma associated with affirmative action programs to an ongoing perception that unqualified Blacks have been the recipients of educational benefits at the expense of white males). Wilson states that:

There is no doubt that affirmative action often stigmatizes those who benefit from it, but mainly this is because the myth of reverse discrimination denigrates the abilities of minorities. Minorities admitted to elite colleges or hired for top faculty positions are widely presumed to be unqualified beneficiaries of an undeserved preference. The fact that the charge is untrue does not always mitigate the harmful effects it produces, from minorities doubting their own abilities to racist assumptions about them by others. But it is racism, not affirmative action, that stigmatizes minorities.

*Id.* at 90.

<sup>12</sup> See AN INTRODUCTION TO ACADEMIC ASSISTANCE PROGRAMS, LAW SCHOOL ADMISSION SERVICES (1992) (concluding that the stigma associated with the selected for participation in academic support programs can not be eliminated, but can be addressed by law schools that acknowledge that value of affirmative action,

[w]here academic institutions demonstrate a clear commitment to provide the highest quality education experience to students with special needs, and place a high value on the type of education provided in a sound academic assistance program — that is, a carefully constructed, logically developed curriculum tailored to enhance individual student strengths and remedy individual student deficiencies — the stigma that may attach to the experience will be diminished. On the other hand, support program students who receive more individualized education services than the mainstream will more likely consider themselves stigmatized when faced with institutional ambivalence toward the academic assistance that they receive.

*Id.* at 5).



I felt like I let myself down. Like I was so concerned about, like embarrassing myself. Now I don't know why, it seemed silly, but I was traumatized by the whole thing and I felt like I kind've sneaked into the room one afternoon a week. No one in the group really talked about anything outside of the group. I never told any of my friends that I was doing it and they all talked about it but I just felt really strange about the whole thing, but now I realize that was kind've silly and I would encourage everyone not to feel that way.

I guess what was running across my mind is that when other people see us coming to these academic . . . programs, what are they going to think? Do they automatically put group names on people who are attending these classes, oh, she's here because she is this, or she's here because she's female, or she is here because she is Black and she needs us to help her out? So I just wonder how other people perceive the group that goes, and I mean, personally I don't care. . . .

I still think about it sometimes. I still feel like since I was participating in the [summer academic support program], I think about it, I mean. I kind of try to compare like what people who weren't in the program, how they are doing and how they are understanding with what I'm doing now and I just wonder if I'm up to par a lot of time. But I still think about that sometimes, that I'm not as quite as smart as I thought I was when I first came in. I wasn't full of myself but I'd worked really hard in undergrad and I sacrificed a lot of fun times for studying and I felt like that I had a 4.0 every single semester of my college career except for one and I just felt like I was the smartest person or next to the smartest person in the class. I guess when I was put in the, invited to the program that it kind of, it made me feel a little funny and it made me think well maybe I'm not as smart as I always thought I was or maybe I was fooling myself and I was only memorizing and not really actually gaining knowledge.

I don't have a problem with it. I don't care who knows . . . if this program actually ends up being a help to all of us, they're going to wish they had been in there and they're going to be like, "that's not fair because you had this and I didn't and that's the reason you did better than me on this." I don't care. I'll tell them if they ask me, I don't care. And I don't think we're stigmatized as far as the fact that we're in this program because I think if the admissions committee didn't think we were qualified or didn't think we could make it, why would they accept us into the university in the first place. So, that's pretty much my stand.

I just look at it as an added advantage kind of like [another student]. It's kind of like sacred but I don't mind telling anybody.

One student spoke very candidly about the stigma she felt because of the racial composition of the academic support program. The stigma this student associated with the program was so significant that after attending the first meeting, she refused to participate in the program:

When I walked in that classroom and saw who was in there, I felt a stigma . . . Well, it just made me feel like, why was I picked, just because of the assortment of people who were there . . . I was wondering why all of us were picked. What, like, did we, was our GPA something different or were we all stupid, you know. I don't know, but that's the way I felt. I don't know. Prejudice on my part . . . walking into that room didn't strike me as being the best and the brightest, looking at the people who were there. Just a general impression, not a fact.

She recalled that there were about fifteen students in attendance at the first meeting. This student described the group as “[m]inorities, either age-wise or color or someone who had been out of school for a long time or a while.” Because of the group’s composition, she recalled feeling “like I had been picked out as one of the dumb ones and it did make me wonder what the criteria was.” During the interview of this student, it was clear that the stigma she experienced has negatively influenced her law school experience.

Another student noted that the stigma associated with the program was the result of the identification of some students by the faculty as specifically in need of academic support. Instead, the student advocated a program that would be open to all students on a voluntary basis:

If it's across the board well then they would think that there is a study group for people and I'll stay in if I need it. If it's a voluntary study group. If you feel like you need extra help come. Because if they say it's because I identified myself in my personal statement wouldn't that be what I was doing anyway, I would be saying that I need extra help. So offer it to everyone and if I was a person who would have identified myself on a personal statement well then I'm just identifying myself a step later. Isn't that really, I mean how can they say that you have identified myself when I thought I was getting a scholarship. And so, if it is supposed to be because I identified myself well then, let everyone have the opportunity to identify themselves knowingly. Not

because something was said identifying yourself as wanting to be in a study group. There may have been something about would you be willing to be in a study group. Well, sure, I'll check that, yeah. But I don't want to be in a study group at school because I won't do well. You know, who needs that pressure.

Vocal opposition to affirmative action came from one biracial student who views affirmative action as too stigmatizing. The biracial student noted that:

I guess I don't hold the popular view, I think minorities and women will always be in law school regardless of affirmative action, there are a lot of bright, articulate women out there, minorities and I think we can still do it, you know without the affirmative action. Personally, I know this is going to sound awful, I don't like affirmative action to a certain extent because every time people blame it, it's like a crutch for them, to say you're here because of affirmative action and I always had the feeling if it's not there they can't blame it on anything, I'm here because I'm qualified. Maybe I have my head in the sand, I don't know. I don't see how men and women are unequal, I don't see it, we are all here for the same goals and I think we are all part of an equal field. Maybe I'm wrong, maybe I'm totally blind.

C. *Concerns Regarding Legal Challenges to Affirmative Action Programs*

1. *Race-based Affirmative Action Programs*

The question that provoked the most open and frank discussion addressed the students' views on the decline of affirmative action initiatives in law school admissions and retention programs. It was not unexpected that the students divided along racial lines when discussing this issue. Without exception, the Black students acknowledged the importance of affirmative action programs in law schools<sup>13</sup> and ex-

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<sup>13</sup> See generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995) (examining the role that affirmative action programs can play to ameliorate the circumstances of a number of disadvantaged racial and ethnic groups, including African Americans, Latinos, Asian Americans, and Native Americans); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043

pressed concerns over recent court decisions that seem to predict the elimination of affirmative action programs:

Definitely, yes. I really do believe it. That's one of the reasons that I'm here. Well I think that when I first looked into going to law school I said this is one of the issues that I wanted to fight for but it looks that as though by the time I get out of law school I'll be fighting to get it back. I mean, you know, it's just it would definitely have a profound effect, I believe, and it worries me because I just don't think that we'll get that chance to prove ourselves if affirmative action is eliminated that we have now. And I just worry about future generations. I worry about my sister coming after me. How is it going to be for her. It's something I think about pretty much daily actually.

It kind of angers me and it's a little frightening because it's like okay, affirmative action this year, what's next. It's like these white males are in power and it's like a disease, like what is going to stop them, you know. There is no vaccine or something. It's like, they were getting more and more power taken away, something that was meant to bring about a bit more evenness to give some people a chance that they won't have otherwise. Yeah, it bothers me. I kind of feel helpless about it.

One theme underlying the comments expressed by all of the students interviewed for this study was the impression that affirmative action programs are primarily race-based, not gender-based, initiatives. Since this perception was so pervasive among the study participants, this Article will explore the constitutional treatment and protection afforded to race and gender-based classifications that serve as the framework upon which the views of the students participating in this study were formed. Since its decision in *Regents of the University of California v. Bakke*,<sup>14</sup> the

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(advocating the implementation of mandatory quotas or numerical goals in the admission of minorities to institutions of higher education because notwithstanding the visibility of successful Black lawyers, and myths about the success of affirmative action, Blacks are still underrepresented in the legal profession).

<sup>14</sup> 438 U.S. 265 (1978) (plurality opinion) (holding that race-based medical school admissions program violated the Equal Protection Clause of the Fourteenth Amendment). The inability of the Supreme Court to reach a consensus opinion in this case leaves open the question of whether institutions of higher education may consider race as a constitutionally permissible factor for the purpose of recruiting and retaining a diverse student body. This author is currently developing an article that will thoroughly examine this issue, and the

United States Supreme Court has applied an increasingly exacting standard of constitutional review to race-based affirmative action programs, but has remained inexplicably silent regarding the constitutionality of gender-based affirmative action programs. This is a difficult concept to accept, especially when white women, who may not be detrimentally affected by the elimination of certain affirmative action programs, challenge the importance or fairness of race-based programs. The uncertainty surrounding the continuation of affirmative action programs for women and minorities in higher education fosters the students' perception that the composition of law school classes in the future will not resemble the diversity that is characteristic of our society.<sup>15</sup>

As one student noted:

Well, basically it makes me angry that they're going to take up or are trying to take away affirmative action because you can look at the number of women and minorities that are here in the law school and you can tell that as far as Black people this was the biggest class we've had and as far as women there are less women here. And if, you know, if they take that away I just have the feeling that it is going to be all white men . . . because you have people who are racist who are in power as well and they will use their power to keep people out. And I think this is one of those things that gives those underprivileged people who didn't have an opportunity to actually get an opportunity to get the chance. I think the number is going to decrease rapidly. It's not just the law school, it's everywhere.

The Black law students in this study expressed legitimate concerns that law schools will revert to havens for privileged white males as the constitutional review of race-based preferences becomes more exacting. As recently as 1995, the United States Supreme Court, in *Adarand Constructors, Inc. v. Peña*, held that the United States Constitution's

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significance of the decision in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996) and its impact on race-based admission and retention criteria in legal education.

<sup>15</sup> The levels of racial, ethnic, and gender diversity in law schools today are a relatively recent phenomenon. For a history of the gradual integration of women and minorities in legal education, see generally CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 49-59 (2d ed. 1993); J. CLAY SMITH, JR., *EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944* (1993); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM 1850S TO THE 1980S* (1983).

guarantee of equal protection<sup>16</sup> requires the court to apply the “strictest judicial scrutiny” to any race-based classifications imposed by federal, state or local governments.<sup>17</sup> The strict scrutiny analysis requires a proponent of race-based affirmative action programs to “show that its purpose or interest is both constitutionally permissible and substantial, and that use of the classification is ‘necessary . . . to the accomplishment’ of [the proponent’s] purpose or the safeguarding of its interests.”<sup>18</sup> Application of the strict scrutiny analysis to these programs is an almost insurmountable hurdle to overcome.

In *Adarand*, the plaintiff challenged the constitutionality<sup>19</sup> of the Department of Transportation’s (“DOT”) practice of awarding additional compensation to general contractors if the contractors “hired subcontractors certified as small businesses controlled by ‘socially and economically disadvantaged individuals.’”<sup>20</sup> The Court of Appeals for the Tenth Circuit affirmed the district court’s grant of DOT’s motion for summary

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<sup>16</sup> The Fourteenth Amendment to the United States Constitution provides, in pertinent part: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

<sup>17</sup> *Adarand*, 115 S. Ct. at 2113.

<sup>18</sup> *Bakke*, 438 U.S. at 305 (plurality opinion) (citing *In re Griffiths*, 413 U.S. 717, 721-22 (1973)).

<sup>19</sup> The plaintiff, *Adarand Constructors*, alleged violations of the equal protection component of the Fifth Amendment’s Due Process Clause, which provides, in pertinent part: “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. *See Adarand*, 115 S. Ct. at 2105-06.

<sup>20</sup> *Adarand*, 115 S. Ct. at 2102. The Court stated that the Small Business Act

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,” . . . and it defines “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.”

*Id.* (citing 15 U.S.C. § 637(a)(6)(A)). DOT extended the definition of “socially and economically disadvantaged individuals” to include women, pursuant to the Surface Transportation and Uniform Relocation Assistance Act of 1987, 23 U.S.C. § 101 (1987). *Adarand*, 115 S. Ct. at 2103.

judgment.<sup>21</sup> The Supreme Court, however, vacated this decision, noting that the Court of Appeals, as a result of its reliance on *Fullilove v. Klutznick*<sup>22</sup> and *Metro Broadcasting, Inc. v. FCC*,<sup>23</sup> erroneously applied a lenient standard of review to determine the constitutionality of DOT's program.<sup>24</sup> The Supreme 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."<sup>25</sup> As a result, the Court remanded the case for evaluation under the appropriate standard of review.<sup>26</sup>

Underlying the Court's application of the strict scrutiny analysis to race-based affirmative action programs is the long held treatment of race as a constitutionally suspect classification.<sup>27</sup> Unlike racial classifications, gender-based classifications are not constitutionally suspect,<sup>28</sup> and therefore are not subject to the strict scrutiny analysis that is imposed on racial classifications.

The Supreme Court justifies its heightened review of race-based programs by relying on three propositions — skepticism,<sup>29</sup> consistency,<sup>30</sup> and congruence.<sup>31</sup> These three propositions justify the court's

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<sup>21</sup> *Adarand*, 115 S. Ct. at 2101.

<sup>22</sup> 448 U.S. 448 (1980) (holding that the Public Works Employment Act of 1977, 42 U.S.C. § 6701, which required 10% of federal funds for public works projects go to minority contractors, is constitutional).

<sup>23</sup> 497 U.S. 547 (1990) (holding that Federal Communication Commission minority preference policies do not violate the Equal Protection Clause).

<sup>24</sup> *Adarand*, 115 S. Ct. at 2112.

<sup>25</sup> *Id.* at 2113.

<sup>26</sup> *Id.* at 2118.

<sup>27</sup> In *Bakke*, Justice Powell concluded that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." *Bakke*, 438 U.S. at 291 (plurality opinion).

<sup>28</sup> *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982) (holding that the denial of a male applicant for admission violated equal protection).

<sup>29</sup> *Adarand*, 115 S. Ct. at 2111 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986) (opinion of Powell, J.)). Justice O'Connor's opinion for the majority in *Adarand* notes that skepticism is inherent in "[a]ny preferencebased on racial or ethnic criteria," and as such "must necessarily receive a most searching examination." *Id.*

<sup>30</sup> The concept of consistency requires courts to apply the "strict scrutiny" test to all race-based classifications. *Id.*

<sup>31</sup> Congruence demands that courts apply the same equal protection analysis

application of the strict scrutiny test to any equal protection challenge of race-based classifications. The Supreme Court in *Adarand* defines the principle of consistency as “whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection.”<sup>32</sup> The use of this principle allows the Court to ignore history and the continued existence of racism in our society by treating remedial and invidious racial classifications in the same manner. Although Justice Scalia in his concurring opinion in *Adarand* notes that “[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race,”<sup>33</sup> the Supreme Court has yet to realistically approve a remedial measure that adequately eliminates the systemic vestiges of slavery and racism that are pervasive in this society.

Given the narrow parameters within which race-based affirmative action programs may withstand the strict scrutiny analysis, this constitutional standard has become “strict in theory, but fatal in fact.”<sup>34</sup> Justice O’Connor in *Adarand* notes, however, that although the Court must give a “detailed examination, both as to ends and as to means,”<sup>35</sup> the Supreme Court would uphold constitutionally permissible race-based classifications. In order to withstand constitutional scrutiny, the reasons underlying the implementation of race-based affirmative action programs must be compelling and clearly legitimate.<sup>36</sup> In addition, the remedial measures imposed by the race-based affirmative action program must be narrowly tailored to address the discriminatory conduct.<sup>37</sup> Although the current group of Supreme Court justices has yet to address the degree of historic discrimination that must be established before race-based affirmative action programs may be incorporated into the admissions procedures of law schools,<sup>38</sup> the Supreme Court has upheld a race-based

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used to challenge a violation of the Fourteenth Amendment to challenges brought under the Fifth Amendment. *Id.*

<sup>32</sup> *Id.* at 2114.

<sup>33</sup> *Id.* at 2118 (Scalia, J., concurring in part and concurring in judgment).

<sup>34</sup> *Id.* at 2117 (citing *Fullilove v. Klutznick*, 448 U.S. 448 (1980)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> The Supreme Court may have an opportunity to consider this issue in the event that the court grants the writ of certiorari expected to be filed by the University of Texas at Austin to appeal the Fifth Circuit decision in *Hopwood*



affirmative action program initiated to redress over four decades of "pervasive, systematic, and obstinate" discriminatory hiring practices.<sup>39</sup> Implicit in this analysis is the ultimate conclusion that the remedial benefits of constitutionally permissible race-based affirmative action programs will be narrow in scope, limited in number, and have no appreciable impact on improving the social, economic and political condition of racial and ethnic minorities.

The curious aspect underlying the principle of consistency is that it requires the court to apply the strict scrutiny analysis to race-based classifications affecting Blacks and whites in order to insure that the constitutional guarantee of equal protection is administered to everyone in an identical fashion. However, the principle does not account for the less restrictive intermediate scrutiny analysis afforded to gender-based classifications.

## 2. *Gender-based Affirmative Action Programs*

Several white women interviewed in the study were interested in the continuation of affirmative action programs as a means of correcting the gender inequality currently in existence at the subject law school.

One thing that I think will happen is the Good Old Boy network that was alluded to will come back even stronger, because at least where I'm from and what I'm used to, ninety-nine percent of all the attorneys in [my hometown] were white guys, whose dads were attorneys, whose

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v. Texas, 78 F.3d 932 (5th Cir. 1996). On March 21, 1996, in a televised interview with Edie Magnus of CBS This Morning, Dr. Robert Berdahl, President of the University stated that UT will appeal the Fifth Circuit's decision to the Supreme Court.

<sup>39</sup> *Adarand*, 115 S. Ct. at 2117 (citing *United States v. Paradise*, 480 U.S. 149, 167 (1987) (plurality opinion)). In *Paradise*, the Supreme Court held that race-based hiring and promotion quotas imposed on the Alabama Department of Public Safety to force the hiring and promotion of Black troopers and support personnel did not violate the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court noted that the lower courts in the case conclusively determined that "[d]iscrimination at the entry level necessarily precluded Blacks from competing for promotions, and resulted in a departmental hierarchy dominated exclusively by nonminorities." 480 U.S. at 168. The discriminatory hiring practices identified in *Paradise* had been utilized by the State of Alabama for over thirty-seven years before this action was initiated by the NAACP.

grandfathers were attorneys, whose great-grandfathers were attorneys, so when little Johnny gets about fifteen, Johnny works as a clerk in the law office, little Johnny takes the perfect major to get the perfect resume, has the perfect experience, bam, they start looking at nothing but paper credentials. I think there's a guy here whose father is a lawyer in my hometown, you can tell he's been groomed from day one and I think that's what's going to happen. Because unfortunately you don't have a lot of women who can say well my mother was a lawyer, and my mother's mother was a lawyer. African-Americans see the same way, I can't think right off the bat of any Black lawyers in [my hometown], and that's a big town and that's really sad. You're not going to see the people like you going well, my Dad's an attorney and my aunt was an attorney and I'm following the tradition. Only people who have that tradition are white men. If you get away from anything other than paper credentials you won't see both minority and women. . . .

However, some of the white women interviewed in this study were noticeably indifferent to the impact that social and legal challenges to affirmative action programs would have on their lives.<sup>40</sup> One significant reason for this indifference may be explained by the Supreme Court's less exacting constitutional standard of review for gender-based preferences. Unlike racial classifications, the Supreme Court applies an intermediate level of scrutiny when reviewing equal protection challenges to gender-based classifications.<sup>41</sup> This lesser standard of review leads to the curious result that gender-based preferences may withstand Equal Protection challenges, but race-based programs will generally fail.

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<sup>40</sup> Another reason for the indifferent response by white women to the possible elimination of affirmative action programs may be the considerable academic accomplishments of the white women applying to law school. See EPSTEIN, *supra* note 15, at 56:

However, the problem raised by preference for women is unlike the problem of other minority group preferences because women applicants have generally been better qualified than men. A 1972 survey of eight elite and "semi-elite" law schools revealed that over 53 percent of the women, compared with only 38 percent of the men, graduated in the top 10 percent of their undergraduate institutions. The average law school admission test (LSAT) score did not vary significantly by sex.

<sup>41</sup> *Craig v. Boren*, 429 U.S. 190, 197 (1976) (affirming that gender classifications are subject to intermediate level scrutiny).

To withstand constitutional challenge, gender-based classifications must "serve important government objectives and must be substantially related to achievement of those objectives."<sup>42</sup> This intermediate standard, although substantial, can be sustained where the gender-based classification "intentionally and directly assists members of the sex that is disproportionately burdened."<sup>43</sup> As noted by Justice O'Connor in *Mississippi University for Women v. Hogan*,<sup>44</sup> a classification is impermissible if its underlying purpose is to foster archaic and stereotypical notions.<sup>45</sup> In *Hogan*,<sup>46</sup> the Court struck down a statute excluding men from a state-supported professional nursing school upon concluding that an admission restriction favoring women was unnecessary in the already female-dominated nursing profession.<sup>47</sup> The Court noted that a statute violates the Equal Protection Clause "if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior . . . ."<sup>48</sup>

Courts have taken the view that laws should not overly burden women by trying to protect them. In *Associated General Contractors, Inc. v. City and County of San Francisco*, the Ninth Circuit noted that "[a] thin line divides governmental actions that help correct the effects of invidious discrimination from those that reinforce the harmful notion that the women need help because they can't make it on their own."<sup>49</sup> It is a difficult task, however, to locate that line.

The weakness in the principle of consistency announced by the *Adarand*<sup>50</sup> decision becomes apparent in cases like *Associated General Contractors* where the Court of Appeals for the Ninth Circuit invalidated the race-based component of an ordinance that established an affirmative action plan for women and minorities, but sustained the gender-based

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<sup>42</sup> *Id.* See also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (reiterating the application of the intermediate level scrutiny test to gender-based classifications).

<sup>43</sup> *Mississippi Univ. for Women*, 458 U.S. at 728.

<sup>44</sup> *Id.* at 718.

<sup>45</sup> *Id.* at 729.

<sup>46</sup> *Id.* at 733.

<sup>47</sup> *Id.* at 728-33.

<sup>48</sup> *Id.* at 725.

<sup>49</sup> 813 F.2d 922, 940 (9th Cir. 1987) (holding that a provision of a city ordinance that gave preference to minority-owned businesses violated the Equal Protection Clause, but provisions that gave preference to female-owned businesses were facially valid under an equal protection analysis).

<sup>50</sup> *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111 (1995).

component of the ordinance.<sup>51</sup> As noted by Justices Stevens and Ginsberg in their dissenting opinion in *Adarand*:

If this remains the law, then today's lecture about 'consistency' will produce the anomalous result that the government can more easily enact affirmative action programs to remedy discrimination against women than it can enact affirmative action programs to remedy discrimination against African-Americans — even though the primary purpose of the Equal Protection Clause<sup>52</sup> was to end discrimination against the former slaves. . . . When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.<sup>53</sup>

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<sup>51</sup> *Associated General Contractors*, 813 F.2d at 941.

<sup>52</sup> For an examination of racism and sexism in the historic development of constitutional equal protection rights for women and Blacks under the Fourteenth Amendment, see generally Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994). It is important to note that affirmative action legislation was not originally applicable to women. As originally drafted, Title VII of the Civil Rights Acts prohibited discrimination on the basis of race, color, religion, or national origin. After heated debate, the final version signed into law included a prohibition against gender discrimination as well. Thereafter on September 24, 1965, President Johnson issued Executive Order No. 11,246, 3 C.F.R. 339 (1964-65), which prohibited the federal government and its contractors from engaging in employment discrimination because of "race, creed, color, or national origin" and required them to take affirmative steps to insure the equitable treatment of all workers. Two years later, Johnson issued Executive Order No. 11,375, 3 C.F.R. 684 (1966-70), which amended Executive Order No. 11,246 by including sex as a protected classification. Executive Order No. 11,375 provides, in pertinent part: "It is the policy of the United States Government to provide equal opportunity in federal employment and in employment by federal contractors on the basis of merit and without discrimination because of race, color, religion, sex or national origin." RACIAL PREFERENCE AND RACIAL JUSTICE app. F (Russell Nieli ed., 1990).

For a good discussion of this issue, see CLAYTON & CROSBY, *supra* note 6, at 13; Alice Kemler-Harris, *Feminism and Affirmative Action*, in DEBATING AFFIRMATIVE ACTION 70-71 (Nicolaus Mills ed., 1994).

<sup>53</sup> *Adarand*, 115 S. Ct. at 2122 (Stevens, J., dissenting). See also *Ensley Branch NAACP v. City of Birmingham*, 31 F.3d 1548, 1579 (1994) ("While it may seem odd that it is now easier to uphold affirmative action programs for women than for racial minorities, Supreme Court precedent compels that result.").

The judiciary's quest for consistency has placed men and women on an equal constitutional footing. The Supreme Court's consistency approach does not, however, extend to the constitutional treatment of white women and Blacks. Until such time as the Supreme Court reconciles this paradoxical situation, this issue will continue to be a source of social, economic, and political conflict between white women and Blacks.<sup>54</sup>

*D. Elimination of Affirmative Action Programs in Law Schools*

The most ardent disapproval of affirmative action programs was expressed by the two white women<sup>55</sup> who refused to participate in the academic support programs. One student noted that she does not think "people who don't have the ability should take the place of someone who does have the ability." She indicated that in the absence of affirmative action goals at the subject law school, the composition of the law school student body would be very different. Although she refused to identify those students who, in her opinion, lacked the requisite capabilities, she stated that "I can pick out a few who wouldn't be here." The other white student made an effort to reconcile her ambivalent feelings about this issue:

I can tell you what the cases say. But I think that affirmative action is a bad answer to a worse problem. I think that the ramifications of affirmative action I mean, you know, one of the reasons we have it is because of misconceptions about a race or about a sex or whatever, these people are barred because of past historical or whatever but now we're just changing the stigma. We're just changing evils now. We think, maybe we're just keeping the same stigma. A woman couldn't do it if she was to do it on her own merit. A Black person couldn't do it if they did it on their own merit. I think a lot of white males and maybe even some, I don't know what everyone, maybe that's what the world

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<sup>54</sup> For a discussion of racial tensions among study participants, see *infra* notes 55-56 and accompanying text.

<sup>55</sup> It has been suggested that there are psychological reasons for the growing attacks on affirmative action programs. CLAYTON & CROSBY, *supra* note 6, at 24 (noting that "... the vehemence with which some white women . . . and people of color . . . argue against programs designed to help the victims of discrimination may in part derive from a defensive addiction to the myth of meritocracy: any success they have achieved, they may want or need to believe, is due to their own efforts and raw talent. . . . Either way, it is hard to escape the implications of self-interest.").

perceives it as that we have to give them equal opportunities inclination because they can't do it on their own. I don't know that we're helping the situation any, but then again, what if we didn't have affirmative action? What would motivate people to overcome their own stereotyping and their own prejudices? Why would they suddenly bring a woman into law school if they know such and such man who's been the head of this firm and he has a son who wants to go to law school and I can go and play golf with him and why would they accept a woman? They would be perfectly fine with only men. And then why would whites suddenly let in Blacks, for so long they have believed were not as qualified. So really it has to be and then, to even the playing ground because it hasn't been even for so long but then I think we are making some sad tradeoffs also. That's my perception. I don't know if that is right or wrong. I don't think it's out the door because many thinking people, hopefully, will realize that we have to keep something intact because we're only thirty years since the revolution really. Why would thirty years overcome hundreds of years of past discrimination . . . But I don't know that it is the complete be and end all, perfect resolution that we really need.

The aforementioned white female students also argued that academic support programs do not belong in law school, and should fall under the anti-affirmative action ax:

If you have been accepted to law school well really then isn't that all that was needed. Once you're here you may be the last one student in class but you need to be able to pass your classes and if you can't then why were you accepted. And then you think that maybe we need to be getting people through law school and this is horrible of me to say that I don't think the law is to be getting people through law school. The law is to be making lawyers and if they can do it in class then they'll do it and they'll do it in the world but if you're, but how else did you get into law school. You should have been qualified to get here before you got here to some degree. Now how affirmative action works in with that, that doesn't mean you're not qualified simply because you, you know, I may have been a poor [rural] student who didn't do the best grades at [a small, local college] or wherever and then we say, well we're going to let that person in anyway but we expect that they should keep up with everyone else in class. And maybe that requires working harder but that's your job isn't it. If you want to go to law school, we all had to work hard. Maybe I have something, maybe I wasn't in the retention program, maybe there was something in my background that

really impedes my learning ability, you know, something. Maybe I've been out of school for whatever years. Maybe I didn't do well. I know students who didn't do well in undergrad who got on probation . . . and who are not in the academic program and they didn't do as well as I did. How are they choosing these people, that's what I want to know. How did we get selected. . . but I bet you could ask any of them to identify themselves for a learning program they thought they were identifying themselves for someone who could be good in law school. You know, and so I wonder what is their role here. But if you are going to have them, if someone does disagree with me and says, yes, I think we need something for students who can't do well then it needs to be voluntary and it needs to be, everyone should be given the option. . . . Isn't that really the, that's the goal and you haven't stigmatized anyone. You haven't said to anyone, "We as an institution that has been here for years know that you might not do well." You have people coming to law school saying I'm challenged more than anyone else because it is so hard. This class must be harder for me than it is for anyone else in class. They had such a good answer in class, I could never have thought of that. I mean, why, and you feel immediately that you could not do well. If you need to make it voluntary across the board and then people will drop out if they don't need it. And if they need it, they stay in. Well wasn't that the goal.

One of the white women, who has become very good friends with several of the minority students in the academic support program, expressed some ambivalence about permitting affirmative action to have an impact on the admissions process:

Well, I look at this from two sides because I don't know how big a role that plays here at the law school, but I know that not everybody comes from the same opportunities and it isn't fair to keep somebody out because they don't have the chance to prove themselves first just enough to get in. But I know from just talking about LSAT [Law School Aptitude Test] scores and GPA's that the girl that I was closest to in undergrad, she didn't make it in and she was white and I know that her scores were higher than some of my Black friends that I talked to and it hurts me that she didn't get in and we don't get to study together and I never see her anymore but I understand that it's necessary because not everybody has had the opportunities to prove themselves first. So as far as that goes I wish she could have gotten in. I feel like she got knocked out but I know that the people who did get in are just as worthy as she is. Maybe they didn't have the same chance

but I guess I'm just torn because I understand, I see both sides but it still hurts a little bit because I know she would have done really well too. So I can't say that I'm, I guess I'm straddling the fence but I can't help it because I see it from both sides. I know it is necessary but it hurts me that it does knock other people out too.

The concerns of the Black women participants regarding the possible elimination of race-based affirmative action programs were expressed by a third-year student who noted that:

Well, there is the CLEO program fighting for its life. And as soon as I heard the decision<sup>56</sup> come down, the big one this summer I was like, well. I immediately thought about CLEO and we discussed it out at work because, you know, the retention programs and all they are basically geared toward women and people who are disadvantaged according to the Supreme Court these days that is discrimination and it will probably be out the door pretty soon.

With the exception of Justice Powell's plurality opinion in *Bakke*,<sup>57</sup> the constitutional legitimacy of using race-based preferences in higher education recruitment and retention efforts has never been fully addressed by the Supreme Court. However, it is interesting to note that in two separate actions, white women have sought to eliminate race-based affirmative action programs from the law school admission process.

In *Henson v. University of Arkansas*,<sup>58</sup> a white, female applicant raised an equal protection challenge to the law school's minority preference admission system. In *Henson*, which is a pre-*Bakke* decision, the University of Arkansas School of Law established a special admission category for minority students who were not admitted under two other categories that focused on prediction indexes and state residency considerations.<sup>59</sup> The standard for admission of minority students under the special category was based on a subjective determination of whether

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<sup>56</sup> *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-17 (1995) (holding that all racial classifications are to be analyzed under a strict scrutiny standard, and that a racial classification will only pass constitutional muster if it is a specific measure advancing compelling government interests).

<sup>57</sup> 438 U.S. 265 (1978) (plurality opinion).

<sup>58</sup> 519 F.2d 576 (8th Cir. 1975).

<sup>59</sup> *Id.* at 577.



they had a "reasonable likelihood" of success in law school.<sup>60</sup> The plaintiff raised an equal protection challenge to the use of the special minority admission category. The Eighth Circuit affirmed the district court's dismissal of the action after an evidentiary hearing on the merits of the case.<sup>61</sup> The court never addressed the equal protection argument because it determined that the plaintiff was not injured by the law school's minority preference admission system because she could not establish "that it was the application of those policies to her that kept her out of Law School, and that but for those policies she would have been admitted . . . ."<sup>62</sup>

In the more famous case of *Hopwood v. Texas*,<sup>63</sup> an unsuccessful white female law school applicant, together with several unsuccessful white male applicants, raised equal protection challenges to the University of Texas School of Law's affirmative action program.<sup>64</sup> In *Hopwood*, the School of Law established special admissions criteria for minority students in an effort to remedy past discrimination in Texas' public higher education system and increase the number of minority students enrolled in law school.<sup>65</sup> Specifically, the plaintiffs challenged several components of the law school's 1992 admissions program. One component of the program differentiated between the scores for presumptive admits and denials based on minority and nonminority status.<sup>66</sup> Another component of the program permitted a minority subcommittee of the Admissions Committee to review applications from minorities that fell within a discretionary zone.<sup>67</sup> Although the School of Law did not establish quotas, the school acknowledged admissions targets or aspirations of ten percent Mexican-American students and five percent Black students, subject to the quality of the applicant pool.<sup>68</sup> The School of Law indicated that "[t]hese numbers reflect an effort to achieve an

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 576.

<sup>62</sup> *Id.* at 578.

<sup>63</sup> 861 F. Supp. 551 (W.D. Tex. 1994), *rev'd and remanded*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996). This author is currently developing an article that will thoroughly examine the significance of the *Hopwood* decisions, and their impact on race-based admissions and retention criteria in legal education.

<sup>64</sup> *Id.* at 553.

<sup>65</sup> *Id.* at 556-62.

<sup>66</sup> *Id.* at 560.

<sup>67</sup> *Id.* at 561-62.

<sup>68</sup> *Id.* at 563.

entering class with levels of minority enrollment generally consistent with the percentages of Black and Mexican American college graduates.”<sup>69</sup> The plaintiffs also challenged the constitutionality of these admissions targets.

Relying on the Supreme Court’s decisions in *City of Richmond v. J.A. Croson Co.*,<sup>70</sup> and *Bakke*,<sup>71</sup> the trial court in *Hopwood* determined that the School of Law’s affirmative action programs utilized race-based classifications which triggered the application of the strict judicial scrutiny test under the Equal Protection Clause of the Fourteenth Amendment.<sup>72</sup> The court noted:

The most compelling justification for application of strict scrutiny in this context is to provide assurance that individual rights are afforded the full protection they merit under the Constitution. Only by applying strict scrutiny can a court honestly weigh the validity and necessity of efforts to remedy past wrongs against the rights of otherwise qualified nonminorities affected by the efforts. Although the use of racial classifications is disfavored, there are instances when such classifications serving proper purposes should be upheld. Only through diligent judicial examination can a court determine if a classification is consistent with constitutional guarantees and not related to “illegitimate notions of racial inferiority or simple racial politics.”<sup>73</sup>

The court’s application of the strict scrutiny test is a two-pronged analysis. The state must establish that there is a “‘compelling governmental interest’” served by the program, and that the program is “‘narrowly tailored to the achievement of that interest.’”<sup>74</sup> The School of Law introduced its Statement of Policy on Affirmative Action to provide the compelling interest required under the test.<sup>75</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> 488 U.S. 469, 493 (1989).

<sup>71</sup> 438 U.S. 265, 291 (1978) (plurality opinion).

<sup>72</sup> *Hopwood*, 861 F. Supp. at 568.

<sup>73</sup> *Id.* at 569 (quoting *Croson*, 488 U.S. at 493).

<sup>74</sup> *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986)).

<sup>75</sup> *Id.* at 569-70. The School of Law’s Statement of Policy on Affirmative

Action reads:

To achieve the School of Law’s mission of providing a first class legal education to future leaders of the bench and bar of the state by offering real opportunities for admission of the two largest minority groups in Texas, Mexican Americans and African Americans; To achieve the

The court concluded: "Although [the policy statements] are important and laudable goals,<sup>76</sup> the law school's efforts, to be consistent with the Equal Protection Clause, must be limited to seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices."<sup>77</sup> As a result, the court held that the law school's interest in "obtaining the educational benefits that flow from a racially and ethnically diverse student body,"<sup>78</sup> coupled with its remedial efforts to overcome past discrimination in the University of Texas system and the Texas educational system as a whole was a compelling enough governmental interest.<sup>79</sup>

Notwithstanding the compelling governmental interest underlying the law school's affirmative action program,<sup>80</sup> the court concluded that the program violated the Equal Protection Clause because it was not narrowly

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diversity of background and experience in its student population essential to prepare students for the real world functioning of the law in our diverse nation; To assist in redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas; To achieve compliance with the 1983 consent decree entered with the Office of Civil Rights of the Department of Education imposing specific requirements for increased efforts to recruit African American and Mexican American students; To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralist diversity in the law school's student population.

*Id.* at 570.

<sup>76</sup> It is interesting to note that District Judge Sparks' decision in *Hopwood* seems to be compelled by law, not personal conviction. He notes that "[n]otwithstanding the personal views of this judge, it appears the goal of increasing the number of minority members in the legal profession and judiciary of Texas is not a legally sufficient reason to justify racial preferences under fourteenth amendment analysis." *Id.* at 570 n.56.

<sup>77</sup> *Id.* at 570. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (plurality opinion) ("Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."); *Podbersky v. Kirwan*, 956 F.2d 52, 57 (4th Cir. 1991) ("The Supreme Court has declared that in some situations the State may enact a race-exclusionary remedy in an attempt to eliminate the effects of past discrimination.").

<sup>78</sup> *Hopwood*, 861 F. Supp. at 570.

<sup>79</sup> *Id.* at 570-73.

<sup>80</sup> *Id.* at 573.

tailored enough to achieve the law school's goals.<sup>81</sup> The court concluded that "[t]he constitutional infirmity of the 1992 law school admissions procedure, therefore, is not that it gives preferential treatment on the basis of race but the test fails to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant's own race."<sup>82</sup>

In a recent decision,<sup>83</sup> the U.S. Court of Appeals for the Fifth Circuit rejected the District Court's conclusion that the School of Law's admissions policies were justified by compelling governmental interests. The Fifth Circuit held that the goal of achieving diversity through race-based affirmative action initiatives was constitutionally impermissible.<sup>84</sup> As a result of this holding, the court found that it was not necessary to address the second prong of the strict scrutiny test to determine whether the remedial measures in the law school's affirmative action plan were narrowly tailored to achieve a compelling state interest.<sup>85</sup> The appellate court noted 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."<sup>86</sup> In addition to concluding that race-based classifications serve to stigmatize their recipients, the Fifth Circuit asserted that

the use of race in admissions for diversity in higher education contradicts, rather than furthers, the aims of equal protection. Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.<sup>87</sup>

In so doing, the court explicitly rejected the proposition advanced by Justice Powell in his plurality opinion in *Bakke* that the use of racial justifications to achieve a diverse student body "is a constitutionally permissible goal for an institution of higher education."<sup>88</sup> In rejecting

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<sup>81</sup> *Id.* at 573-79.

<sup>82</sup> *Id.* at 578.

<sup>83</sup> *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *cert. denied*, 116 S. Ct. 2581 (1996).

<sup>84</sup> *Id.* at 944-48.

<sup>85</sup> *Id.* at 955.

<sup>86</sup> *Id.* at 944.

<sup>87</sup> *Id.* at 945.

<sup>88</sup> *Id.* at 943 (citing *Bakke*, 438 U.S. at 311). The Fifth Circuit notes that

every justification proffered by the School of Law, the Fifth Circuit held that

the University of Texas School of Law may not use race as a factor in deciding which applicants to admit in order to achieve a diverse student body, to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school.<sup>89</sup>

In light of *Adarand*,<sup>90</sup> the *Hopwood* decisions, and the Supreme Court's quest for a consistent application of the Equal Protection Clause, it is doubtful that race-based affirmative action programs will continue to influence the composition of law school student populations. The continued impact of gender-based affirmative action programs is, however, a mystery. If consistency is the ultimate goal of the Supreme Court, then it must reexamine its formalistic approach to the issues of race and gender. It is clearly inconsistent for the Court to apply a more relaxed standard of review to gender-based classifications than to race-based classifications. This is especially troublesome when the need for remedial measures to counter the pervasive impact of racism has not been eliminated. In the absence of judicial leadership regarding this issue, the composition of graduate and professional schools will not be representative of the racial and ethnic population of this country.

#### *E. Affirmative Action as a Tool of Diversity*

In addition to being questioned about their opinions on affirmative action, the students were asked to discuss their concerns about the continued existence of academic support programs if affirmative action initiatives are eliminated.<sup>91</sup> It was not unexpected that the students

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"[n]o case since *Bakke* has accepted diversity as a compelling state interest under strict scrutiny analysis." *Id.* at 944.

<sup>89</sup> *Id.* at 962.

<sup>90</sup> *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2112-13 (1995). *See supra* notes 17-39 and accompanying text.

<sup>91</sup> In addition to judicial setbacks, affirmative action programs are also being reevaluated in the political and legislative arenas. Californians are currently debating the merits of the California Civil Rights Initiative ("CCRI") which is a legislative initiative designed to "forbid the use of ethnicity or gender 'as a criterion for either discriminating against, or granting preferential treatment to,

divided along racial lines when discussing this issue. Several students believe that the elimination of affirmative action will give educational institutions free license to eliminate all programs that are designed to increase diversity in the legal profession:

[I]t makes me think about survival of the fittest. If you're weak then you're gone and I don't know. I think coming into an environment like this I was real nervous and real intimidated and the program that I'm in makes me feel like I belong a little bit more and am a little more comfortable and I think, you know, if you got the power you don't need things like that. And I'm afraid that is how it will be. That will just be something that's just not important any more.

. . . I think it gives people a way out and I think if it's not recognized on a federal level, then everybody may not take it as seriously, you know, and give it as much credibility as it needs to have, and diversifying the legal profession or the medical profession or higher education, in general, I think that that's going to be an outlet for people who don't think that it's important. I think a lot of people that can't see beyond themselves to helping somebody else, and I guess you have to go within yourself to find out if that's important for you, but I think that it's going to be a way to say, well, Congress says we are going to have to do it, so we are not going to do it, and it's just puke on you, and we'll go somewhere else. I think they don't look to the importance of what the programs are really doing. Like what we are getting out of these programs doesn't cross racial lines and doesn't cross gender lines except it's going to help you succeed and be a good lawyer, doctor or whatever. I think they are missing the point of the programs and worrying about who is in the programs. So I think that's going to hurt us and as a result there is going to be less of us, and less of me and less of you, I don't think it's going to have a good effect.

It was interesting to note that some of the white women, who were reluctant to acknowledge the impact of affirmative action programs in

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any individual or group.' " Joe Klein, *The End of Affirmative Action*, NEWSWEEK, Feb. 13, 1995, at 36-37 (discussing CCRI and its impact on California and the national political arena). See also Peter Annin, *Battleground Chicago Report From the Front: How Racial Preferences Really Work — Or Don't*, NEWSWEEK, Apr. 3, 1995, at 26-33; Howard Fineman, *Rage & Race*, NEWSWEEK, Apr. 3, 1995, at 23-25.

their lives, agreed that the programs should continue in order to effectuate racial diversity.<sup>92</sup>

Now that they are really chipping away at affirmative action, the thing that concerns me is that, things are not equal out there and I think a lot of us would agree. But I hear people say all the time, well women are treated equally as a woman, it's nice that you have been treated equally, but look around you, the minorities are not treated equally and my concern was with the decline of affirmative action that other people, maybe a lot of white males and a lot of other people too will think that everything is equal now and we really don't need it at all, and it can really help everyone. I'm just afraid that it's going to hurt a lot a people.

*F. Tension Between Black and White Women Regarding Their Views on Affirmative Action*

A recurring theme underlying the comments of the white female participants<sup>93</sup> in this study is apathy toward the preservation of affirmative action initiatives incorporated either formally or informally into law school admissions and academic support programs. The reticence of the white women interviewed to support the continued implementation of

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<sup>92</sup> In response to a question regarding the complexion of the student body at UT after the Fifth Circuit's decision in *Hopwood*, Dr. Robert Berdahl, President, University of Texas at Austin, noted that:

Well, I think if this ruling stands, universities like the University of Texas that have selective admissions policies will have much smaller representation from minority students. I think one thing that's important for us to remember in all of this is that the students who were admitted — the minority students who were admitted are highly qualified students. These are not students who . . . don't belong in this university. We have very high standards for admission for all of our students, and we're talking about very marginal differences between those of — of minority applicants and those of majority applicants so that we simply have a pro — had a process whereby in order to achieve diversity in the student population, in order to provide opportunities to minority students, we did take — in those small number of cases where their scores were slightly lower than the majority students, we did take race into account to achieve that end.

Comments from televised interview of Dr. Berdahl, Cheryl Hopwood, and her attorney, Ted Olson by Edie Magnus, CBS This Morning, March 21, 1996.

<sup>93</sup> See *supra* notes 3-5 and accompanying text.

affirmative action programs parallels the struggle between race and gender that manifested itself during the Reconstruction Era suffrage movement.

The participants in this study raised some of the same concerns expressed by the women in the *Declaration of Sentiments* issued by the participants of the Seneca Falls Conference in 1848, which is discussed in the introduction to this symposium edition.<sup>94</sup> These are the same concerns and issues that women, regardless of race, continue to grapple with almost 150 years later. As expressed by the participants in this study, tension exists between women over the allocation of social, economic, and political resources generated by affirmative action gains.<sup>95</sup> In 1848, the resource at issue was suffrage, which brought its

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<sup>94</sup> Carolyn S. Bratt, *Introduction*, 84 K.Y. L.J. 715 (1995-96). For example, in ANGELA Y. DAVIS, *WOMEN, RACE & CLASS* (1981), Davis notes the contradictions inherent in the 1848 Seneca Falls Convention:

The inestimable importance of the Seneca Falls Declaration was its role as the *articulated consciousness of women's rights* at midcentury. It was the theoretical culmination of years of unsure, often silent, challenges aimed at a political, social, domestic and religious condition which was contradictory, frustrating and downright oppressive for women of the bourgeoisie and the rising middle classes. However, as a rigorous consummation of the consciousness of white middle-class women's dilemma, the Declaration all but ignored the predicament of white working-class women, as it ignored the condition of [b]lack women in the South and North alike. In other words, the Seneca Falls Declaration proposed an analysis of the female condition which disregarded the circumstances of women outside the social class of the document's framers.

*Id.* at 53-54.

<sup>95</sup> See generally Elizabeth Debold et al., *From Betrayal to Power*, 1 DUKE J. GENDER L. & POL'Y 53 (1994) (discussing the tension between parties desiring suffrage based on race and on gender).

Within the last hundred-plus years, white women have repeatedly opted to exercise their race privilege in order to gain an advantage in the competitive public world. The fledgling coalition of white and African-American women fighting for suffrage was violently torn apart when it became clear that Congress was seriously considering granting suffrage to men of color and not to women at all. White women argued that they, because of their race, should be granted the right to vote before men or women of color. This betrayal, white women's shame, leaves a bitter taste in the mouths of African-American women even today. Most women of color have justifiably internalized a deep



holder the promise of both political and economic freedom. In 1996, one of the resources that causes contention between white women and minorities is affirmative action. The privileges associated with affirmative action programs similarly provide its beneficiaries with the promise of political and economic freedom.

Many would argue that affirmative action programs helped white women obtain those promised levels of political and economic freedom. However, Blacks and other minority groups have not been as fortunate. As a result, the struggle to preserve this remedial initiative continues in earnest. However, the fight has lost a necessary ally because white women, at least to the extent evidenced by the students in this study, are reluctant to either acknowledge the benefits of affirmative action programs or advocate for their continuation. Most of the Black women in this study readily assume that their presence in law school was the explicit or implicit result of some type of affirmative action initiative. Contrary to popular belief, however, this acknowledgement empowers the women interviewed:

Coming in, just the people from the outside, some people say the only reason . . . you got in [the subject law school] is because of affirmative action and sometimes that gives you a complex, then you say in my situation, I'll just work harder and prove that that's not the only reason why I'm here.

. . . I think I did have some kind of sick little thing I wanted to prove that I was just as smart as everyone else. I think I did have that. So that's why I really prepared for class, I wanted to answer all the questions correctly and I think I impressed a few [faculty members].

. . . I'm trying to prove that I deserve to be here just as much as the guy that is sitting next to me. And that is probably why I feel like I have to answer these questions [asked by professors in class] if I know them.

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suspicion and mistrust of white people. Women of color were not heard or considered an integral part of the last phase of the women's movement. Tired of educating white women about their racist assumptions, many women of color have given up on the possibility of speaking across race. White women can begin to educate themselves about the privilege they assume.

*Id.* at 61.

That's one of the reasons that I'm here. . . . Because I just don't think that we'll get that chance to prove ourselves if affirmative action is eliminated that we have now. And I just worry about future generations. I worry about my sister coming after me. How is it going to be for her. It's something I think about pretty much daily.

The white female students were not as eager to acknowledge the role affirmative action may have played in their admission to law school:

It bothers me that it is necessary. I would like to think that we're all here because of what's in here [head] not because we're female or we're Black, you know.

I don't like to think so but I'm a woman and I'm in law school. This is a [public] school and generally been, you know, a male dominated field . . . I'm a woman and it could just as easily got me into school and that's not a good thought. And I have been told that by someone who didn't get into law school and his parents were very angry. They're from back home and he didn't get into law school and they were angry that I had gotten into law school . . . . And they thought that it was because I was a woman. And I've actually been told that. Now whether that is true or not . . . I'm as qualified as well as any other person here . . . [s]o maybe if there was no affirmative action I still would have made the cut and you know, I don't know. I don't know how that works really. I don't know if they go through and choose so many women and so many men then that clearly would be not allowed. But if they go for the sake of diversity, wanted to bring in these women and oh, she's a poor woman, that's even better. And she's from [a small, rural area], . . . she's going to fit lots of our areas.

Well, I like to think that I got into law school based on my brain not on the fact that I was an old woman and I guess maybe when I walked in that room for that academic support program thing it made me feel as if I was chosen, as if maybe that I might have gotten into law school not based on my ability. That would have made me very angry. I don't want to get anything because I'm a woman or because I'm filling a slot with a certain number of females over the age of forty. I don't know how I really feel about affirmative action. I can see the benefit of it but I do think people's ability ought to be the primary measuring point not whether they are Black, white, yellow or orange or female or male.

If the past is prologue for the future, history teaches us that the struggle to preserve affirmative action programs will be as divisive to the intersection of race and gender<sup>96</sup> as it was in the 1800s when the fight for suffrage caused a fissure between Black and white women in the suffrage movement.

During the Reconstruction Era, Blacks and white women, most of whom were former abolitionists, shared a common goal — universal suffrage.<sup>97</sup> Notwithstanding the participation of Black women in the suffrage movement, they were noticeably absent from the 300 Seneca Falls conventioners.<sup>98</sup> Yet it was a Black man, Frederick Douglass, who

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<sup>96</sup> Many commentators have contributed to the contemporary dialogue regarding the role of Black women in the feminist movement. See BELL HOOKS, *KILLING RAGE* (1995) (discussing the role of Blacks and people of color in the feminist movement):

It is usually materially privileged white women who identify as feminists, and who have gained greater social equality and power with white men in the existing social structure, who resist most vehemently the revolutionary feminist insistence that an anti-racist agenda must be at the core of our movement if there is ever to be solidarity between women and effective coalitions that cross racial boundaries and unite us in common struggle. These are the women who are determined to leave the issue of race behind.

*Id.* at 101; Michele Wallace, *A Black Feminist's Search for Sisterhood*, in *ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE* 5-12 (Gloria T. Hull et al. eds., 1982); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152-60; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); see Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-ISMS)*, 1991 DUKE L.J. 397.

<sup>97</sup> For extensive analyses of suffrage, see generally DAVIS, *supra* note 94; ELEANOR FLEXNER, *CENTURY OF STRUGGLE* (1975); PAULA GIDDINGS, *WHERE AND WHEN I ENTER* (1984); BELL HOOKS, *AIN'T I A WOMAN* (1981); ELIZABETH C. STANTON ET AL., *HISTORY OF WOMAN SUFFRAGE* (1887).

<sup>98</sup> See DAVIS, *supra* note 94, at 57 (discussing the absence of Black women among the audience in attendance at the convention: "While at least one [b]lack man was present . . . there was not a single [b]lack woman in attendance. Nor did the convention's documents make even a passing reference to [b]lack women. In light of the organizers' abolitionist involvement, it would seem puzzling that slave women were entirely disregarded."); FLEXNER, *supra* note 97, at 75 (noting that the Seneca Falls conventioners included an audience of 300, and that even

seconded the resolution introduced by Elizabeth Cady Stanton advocating voting rights for women.<sup>99</sup> Although Douglass supported enfranchisement of women, he never wavered in his belief that enfranchisement of Black men was of paramount importance. Douglass' urgent advocacy for enfranchisement of Black men was due in large part to the physical jeopardy faced by Blacks during this period, as well as the need to eliminate the vestiges of slavery by permitting Blacks to develop economic and political power.<sup>100</sup>

In 1869, at a meeting of the American Equal Rights Association ("AERA"), Douglass spoke about the need for Black men to obtain the vote:

When women, because they are women, are hunted down through the cities of New York and New Orleans, when they are dragged from their

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though no men were invited, 40 men participated in the Convention).

<sup>99</sup> See ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE* 40-41 (1978) ("Although the convention passed all other motions unanimously, it was seriously divided over the suffrage. Frederick Douglass, who, himself disfranchised, appreciated the importance of membership in the political community, was Stanton's staunchest supporter at Seneca Falls. The woman suffrage resolution barely passed."); see also STANTON ET AL., *supra* note 97, at 73 ("Mrs. Stanton and Frederick Douglass seeing that the power to choose rulers and make laws, was the right by which all others could be secured, persistently advocated the resolution, and at last carried it by a small majority.").

<sup>100</sup> Frederick Douglass prioritized Black male suffrage over suffrage for women because of the political, economic, and physical oppression experienced by Black men during the Reconstruction Era:

Douglass argued to consolidate and secure the new "free" status of Southern Blacks: "Slavery is not abolished until the black man has the ballot." This was the basis for his insistence that the *strategic* priority, at the particular historical moment, over the effort to achieve the vote for women. Frederick Douglass viewed the franchise as an indispensable weapon which could complete the unfinished process of liquidating slavery. When he argued that woman suffrage was momentarily less urgent than the extension of the ballot to [b]lack men, he was definitely not defending [b]lack male superiority. Although Douglass was by no means entirely free of the influence of male-supremacist ideology and while the polemical formulations of his arguments often leave something to be desired, the essence of his theory that [b]lack suffrage was a strategic priority was not in the least anti-women.

DAVIS, *supra* note 94, at 77-78 (quoting Frederick Douglass, Speech at Seneca Falls Convention (July 19, 1848)).

houses and hung upon lamp posts; when their children are torn from their arms, and their brains dashed upon the pavement; when they are objects of insult and outrage at every turn; when they are in danger of having their homes burnt down over their heads; when their children are not allowed to enter schools; then they will have an urgency to obtain the ballot equal to our own.<sup>101</sup>

The strategic importance Douglass placed on suffrage for Black men was not universally supported by Black women. Distinguished abolitionist, Sojourner Truth,<sup>102</sup> openly voiced her concerns that once empowered, Black men would exercise the same tyranny over Black women that white men had exercised for years.<sup>103</sup> Truth's views were countered by Black poet and educator, Frances Ellen Harper,<sup>104</sup> who believed that white racism, from men and women, was fundamentally more destructive to the goals of Black women than sexism from Black men.<sup>105</sup> Harper said that "[t]he white women all go for sex, letting race occupy a minor position."<sup>106</sup> However, she believed that "[b]eing black means that every

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<sup>101</sup> GIDDINGS, *supra* note 97, at 67. When asked about the applicability of his statement to the rights of Black women, "'Yes, yes, yes,' replied Douglass. 'It is true for the [b]lack woman but not because she is a woman but because she is [b]lack!'" *Id.*

<sup>102</sup> BLACK WOMEN IN NINETEENTH-CENTURY AMERICAN LIFE 234-42 (Bert J. Loewenberg & Ruth Bogin eds., 1976).

<sup>103</sup> GIDDINGS, *supra* note 97, at 65.

<sup>104</sup> Frances Ellen Harper was a noted author, educator, and participant in the Underground Railroad. She wrote several poems about her experiences including *The Slave Mother* and *Ethiopia*. Giddings notes that from Harper's point of view:

[T]he greatest obstacle to the progress of black women was not [b]lack men but [w]hite racism, including the racism of her [w]hite "sisters." At a 1869 convention, Harper expressed her support for the Fifteenth Amendment. By that year she had reason to believe that if the bill was defeated, [b]lack women would be less, not more, secure.

*Id.* at 66.

<sup>105</sup> *Id.* Giddings wrote:

As an officer of the AERA, Harper may have suspected that the [w]hite feminists' sudden (and expedient) concern for [b]lack women was less than genuine. . . . Black women like Harper may have had their complaints against [b]lack men, but they must have looked down on [w]hite women using them as fodder to further their own selfish ends.

*Id.*

<sup>106</sup> *Id.* at 68.

white, including every working-class white woman, can discriminate against you."<sup>107</sup> Harper's views proved to be prophetic. With the passage of the Fourteenth Amendment,<sup>108</sup> white women became increasingly concerned that Black men would be elevated in status<sup>109</sup> and power over them.<sup>110</sup> As the fissure between Blacks and white women

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<sup>107</sup> *Id.*

<sup>108</sup> U.S. CONST. amend. XIV.

<sup>109</sup> Elizabeth Cady Stanton and others who believed that because, in their eyes, emancipation had rendered [b]lack people "equal" to white women, the vote would render [b]lack men superior, were absolutely opposed to [b]lack male suffrage. Yet there were those who understood that the abolition of slavery had not abolished the economic oppression of [b]lack people, who therefore had a special and urgent need for political power.

DAVIS, *supra* note 94, at 72-73; *see also* DUBOIS, *supra* note 99:

The abolitionists advocates of black suffrage made their case in a variety of ways, some of which coincided with arguments for woman suffrage, others of which emphasized the difference between the two demands. On the one hand, they argued that black men should be enfranchised because the suffrage was a right of all citizens and a source of self-respect and social power. Douglass described the psychological impact of disfranchisement on black men with great eloquence and in terms that could have been taken to apply equally to women. By disfranchising black people, he explained, "you declare before the world that we are unfit to exercise the elective franchise, and by this means lead us to undervalue ourselves, and to feel that we have no possibilities like other men." More frequently, however, supporters of black suffrage insisted on the special historical significance and unique strategic position of the ex-slaves. Southern blacks were a pro-northern force in the heart of the Confederacy and this linked their enfranchisement to the preservation of the Union's victory and the protection of the Republican party's power. Black suffrage, its supporters argued, was the only secure basis for Reconstruction. Feminists could make no such claims of partisan benefit or political expediency for woman suffrage.

*Id.* at 56-57.

<sup>110</sup> *See* DUBOIS, *supra* note 99, at 174-75. DuBois discusses the tension between racism and sexism that manifested itself during the suffrage movement:

The position Stanton and Anthony took against the Fifteenth Amendment reveals much about their political development after the Civil War and especially after their 1867 break with abolitionists. Their objections to the amendment were simultaneously feminist and racist. On the one hand, their commitment to an independent women's

over suffrage grew,<sup>111</sup> Elizabeth Cady Stanton and Susan B. Anthony became more adamant in their quest for women's suffrage. In their feminist newspaper, *The Revolution*, they wrote:

While the dominant party have with one hand lifted up TWO MILLION BLACK MEN and crowned them with the honor and dignity of citizenship," wrote Anthony, "with the other they have dethroned FIFTEEN MILLION WHITE WOMEN — their own mothers and

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movement was intensifying the feminism that underlay their demand for woman suffrage. Although they acknowledged the similarities between the inferior position women held with respect to men and the status of other oppressed groups, they believed that women's grievances were part of a distinct system of sexual inequality, which had its own roots and required its own solutions. This led them to repudiate the Fifteenth Amendment, not only because women were omitted from its provisions, but because they believed that its ratification would intensify sexual inequality. They argued that the doctrine of universal manhood suffrage it embodied gave constitutional authority to men's claims that they were women's social and political superiors. On the other hand, this feminism was increasingly racist and elitist. The women among whom it was growing were white and middle-class and believed themselves the social and cultural superiors of the freedmen. The anti-Republican suffragists chose to encourage these women to feel that the Fifteenth Amendment meant a loss of status for them, and to try to transform their outraged elitism into an increased demand for their enfranchisement. New England suffragists also had racist arguments for women suffrage in their rhetorical arsenal, but the political decision to maintain abolitionists allies and to court Republican support kept them from using these weapons. By contrast, the *Revolution's* militant anti-Republicanism permitted and even encouraged Stanton and Anthony to approach woman suffrage by way of attacks on the freedmen.

*Id.* at 174-75.

<sup>111</sup> Although Stanton and Anthony were allied with Douglass in their campaigns to end slavery and obtain universal suffrage, Douglass' views on the issue of Black male suffrage were substantially different:

The former slave population was still locked in a struggle to defend their lives — and in Douglass' eyes, only the ballot could ensure their victory. By contrast, the white middle-class women, whose interests were represented by Elizabeth Cady Stanton and Susan B. Anthony, could not claim that their lives were in physical jeopardy. They were not, like [b]lack men and women in the South, engaged in an actual war for liberation.

DAVIS, *supra* note 94, at 79.

sisters, their own wives and daughters — and cast them under the heel of the lowest orders of manhood.<sup>112</sup>

One year before the passage of the Fifteenth Amendment<sup>113</sup> giving Black men voting rights, the universal suffrage organization, AERA, founded by Douglass, Stanton, and Anthony, split over this issue.<sup>114</sup> Thereafter, the political movement for suffrage remained segregated. During the period following the passage of the Fifteenth Amendment, until women received voting rights in 1920 pursuant to the Nineteenth Amendment,<sup>115</sup> racial tensions continued to divide women suffragists.<sup>116</sup>

The racial mistrust and divisiveness that manifested itself during that period continues to cause dissension between Black and white women.<sup>117</sup> The students participating in this study discussed the tension that

<sup>112</sup> GIDDINGS, *supra* note 97, at 66. See also DUBOIS, *supra* note 99, at 162-96, for a discussion of the role played by the Revolution in the feminist's repudiation of the Fifteenth Amendment.

<sup>113</sup> The Fifteenth Amendment provides, in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

<sup>114</sup> GIDDINGS, *supra* note 97, at 67.

<sup>115</sup> The Nineteenth Amendment provides, in pertinent part: "The right of citizens of the United States to vote shall not be denied on account of sex." U.S. CONST. amend. XIX, § 1.

<sup>116</sup> At this time, black women suffragists struggled for their enfranchisement in black women's organizations, or in segregated chapters of white women's organizations; they marched for their enfranchisement in segregated suffrage parades. However, many powerful forces in the country were convinced that extending the franchise to black women posed considerable risks. White women in the women's movement were concerned that requesting extension of the franchise to black women would damage their chances of gaining the vote for themselves.

Judy Scales-Trent, *Black Women and the Constitution: Finding Our Place, Asserting Our Rights*, 24 HARV. C.R.-C.L. L. REV. 9, 31-32 (1989).

<sup>117</sup> In Pamela J. Smith, *We Are Not Sisters: African-American Women and the Freedom to Associate and Disassociate*, 66 TULANE L. REV. 1467 (1992), the author discusses the alienation Black women experience when discussing the issue of racism and sexism with white women, thus encouraging Black women to disassociate from white women:

Racism may be the strongest reason for African-American women to disassociate from white women. Whether the racism practiced is benign



continues to exist between white and Black women regarding issues of race and gender. The following exchange occurred in response to concerns raised by a Black student that her fellow white students seem to purposefully ignore racial incidents that occur at the subject law school:

White Woman: I think you have a complaint when you said that a lot of the white people didn't notice. I think this isn't an excuse, I think they need to be made aware that, I think that white people who have always been around white people don't know. They just don't clue in, it doesn't hit them that that would be offensive. Because if you don't have Black friends or you haven't been around Black people, sometimes I guess you can't empathize but that's no excuse. They need to be aware and say, "Hey, this is an offensive thing."

White Woman: I understand what you're saying. I'm thinking too, though. I understand they haven't been around Black people but I think part of it too is subconsciously that's how they see Black people so to them it's like, okay. What's abnormal about this? We see it on the news every day. It's just normal to them.

Black Woman: You two are white women and in a way, I guess I'm sometimes I'm more frustrated because I figure you're a woman so somewhat of what I'm going through you should relate to simply because you're going to get it.<sup>118</sup> You're not getting it because of race

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or subconscious, it exists. African-American women cannot force or attempt to sway white women who may harbor racist feelings and attitudes. White women must first recognize any racial animosity that may be within themselves, and then try to confront these feelings. Until they do, African-American women must disassociate to concentrate on their unique problems and concerns.

*Id.* at 1480.

<sup>118</sup> bell hooks writes that, without invalidating feminism, tension continues to exist between Black and white women. She notes:

To black women the issue is not whether white women are more or less racist than white men, but that they are racist. If women committed to feminist revolution, be they black or white, are to achieve any understanding of the "charged connections" between white women and black women, we must first be willing to examine woman's relationship to society, to race, and to American culture as it is and not as we would ideally have it be.

HOOKS, *supra* note 97, at 124.

but because of gender. And sometimes I'm like, as a woman, not you particularly, but why do you have such trouble perceiving my frustrations when you're getting some yourself? Do you see what I'm saying? Because I'm getting it as a woman and as a Black person so I guess I'm frustrated in that sense too. As a white woman you should know somewhat of what I'm going through . . . I don't believe [white women understand]. I mean, I really don't believe they do.

#### CONCLUSION

It is clear that the women who participated in this study have experienced the stigmatizing effects of racism and sexism throughout their law school experience. The findings generated by this study suggest that the stigmatization of these women is not a by-product of the academic support or affirmative programs, but a systemic component of legal education that was merely exacerbated by another bade of inferiority — participation in the academic support program. Contrary to expectations, however, the women did not sit idly by and wait for the courts or the law school administration or even contemporary society to eliminate the negative perceptions that are so prevalent in their law school experience. A significant number of the study's participants achieved a high level of academic success that enabled them to carve out their own niche within the law school environment. By attaining the same academic honors and merit based career opportunities coveted by their male counterparts, the women made the stigma irrelevant in some cases, or if not irrelevant, at least worth the price of success. After the initial interviews were completed, a clear indication that the stigma associated with the academic support program at the subject law school was diminished is apparent from the requests by middle class white male students to participate in the program. The findings of this investigation clearly suggest that fear of stigmatizing should not outweigh the benefits associated with implementation of academic support programs in law school.

Although it is clear that legal education must respond to the diverse needs of contemporary society by establishing programs that encourage the admittance and retention of women and minorities in law school, a question regarding the constitutional validity of race and gender based affirmative action measures remains unresolved. Ultimately, the constitutional validity of affirmative action programs will be decided by the Supreme Court. Until then, institutions will continue to maintain programs that attempt to allocate resources among diverse and competing groups, notwithstanding the atmosphere of uncertainty and strife

surrounding affirmative action. The fact that the study's participants were divided along racial lines when discussing this issue presents a troubling indicator that this issue will continue to sustain a divisive barrier between women.