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THE FUTURE OF AFFIRMATIVE ACTION: THE LEGAL IMPERATIVE NATIONALLY AND THE OHIO EXPERIENCE

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I. INTRODUCTION

Over the past generation, the policy strategy referred to as affirmative action has retained its status as one of the most controversial issues confronting our society. The intensity of the debate continues to rage. Advocates of affirmative action argue for the maintenance and expansion of these types of programs. They suggest that affirmative action provides needed compensation for the victims of past injustices, is an effective method of addressing social and economic inequalities, and is the best approach to achieving non-discrimination. These proponents point to lingering differences between the races in regard to employment earnings, and poverty as providing the justification for claims that only by taking into account one's race can disparities be eliminated.[4] Opponents of affirmative action contend that this policy is counterproductive, divisive, and ineffective. They stress that affirmative action is discriminatory, fails to reward merit, denigrates individuals as a result of stereotying, and leads to enduring racism.[5] The future of affirmative action has significant implications for the public and private sectors. Its status will define or redefine policies in regard to job recruitment, promotion, and retention or termination; awarding of governmental contracts; training programs; educational opportunities and matriculation.

The basic premise of this analysis is that the debate about the moral and ethical legitimacy of affirmative action may soon be made irrelevant by the impending legal imperative of affirmative action. Affirmative action policies require legal legitimacy before they can be considered as viable programmatic options. The legal environment of affirmative action has been uncertain since the inception of this idea. However, a series of recent court cases adjudicated throughout our nation suggest an inexorable resolution of the legal debate. In addition, the United States Supreme

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[4]See BARBARA BERGMAN, IN DEFENSE OF AFFFIRMATIVE ACTION (1966); Deborah Ballam, Affirmative Action: Purveyor of Preferential Treatment or Guarantor of Equal Opportunity, 18 BERKELEY J. EMP. & LAB. L. 1 (1997).

[5]See Roger Clegg, Beyond Quotas: A Color-Blind Vision for Affirmative Action, Policy Review, May/June 1998; PAUL SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE (1993).

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Court seems to have developed a cohesive and compelling majority perspective in regard to this issue. This legal definition of the issue will have a significant impact on the saliency of affirmative action. It is the objective of this article to provide a legal analysis of affirmative action. The ultimate goal is to suggest the types of programs that are permissible within the context of these constitutional and statutory mandates.

This presentation of the legal future of affirmative action will be divided into five sections. The material above serves as a general introduction to the issues. The second section will review the origins and evolution of affirmative action. This section will also attempt to provide a definition of this complex concept. The third will provide a detailed analysis of *Regents of the University of California v. Bakke.*[6] *Bakke* represents the Supreme Court's first attempt to resolve the legal complexities of affirmative action. The Court's holdings in *Bakke* have shaped the debate for over 20 years. The fourth segment of this chapter will review current affirmative action case law. Close attention will be paid to emerging legal distinctions essential to an accurate application of affirmative action principles in the future. Within this section, close attention will be paid to current controversies such as California Proposition 209 - the state constitutional amendment which outlaws the use of affirmative action, *Hopwood v. State of Texas*,[7] nonminority students who challenged a law school's affirmative action admissions program, and *Taxman v. Board of Education of the Township of Piscataway*,[8] a teacher's challenge to a school board's affirmative action plan of retaining minority teachers over nonminority teachers in regard to layoff decisions. The last section will explain the Ohio Experience with affirmative action.

II. THE EMERGENCE OF AFFIRMATIVE ACTION: THE "BENIGN DISCRIMINATION" MOVEMENT

The passage of the Civil Rights Act of 1964 marks the inception of the affirmative action debate. As John David Skrentny notes in his book *The Ironies of Affirmative Action*: "Race problems and race inequality look very different when discrimination laws *are* on the books than when they *are not* on the books. Simple racist exclusion was such an obvious problem that it consumed the energy of the civil rights groups and the attention of the sympathetic public."[9] With the attainment of legal equality which provided equality of opportunity the question for civil rights groups became whether this accomplishment was sufficient. The dilemma for civil rights advocates was whether to rejoice in the hard fought victory for color blind laws or to pursue new goals. For many the optimism which followed the passage of the Civil Rights Act "quickly dissipated."[10] Social realities illustrated that equality of opportunity did not insure equal living conditions, adequate health care, high

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[6]Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978).

[7]Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996).

[8]Taxman v. Board of Education of the Township of Piscataway, 91 F.3d 1547 (3d Cir. 1997).

[9]JOHN DAVID SKRENTNY, THE IRONIES OF AFFIRMATIVE ACTION 69 (1966).

[10]Edward Erler, *The Future of Civil Rights: Affirmative Action Redivivus*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 26 (1997).

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incomes, meaningful employment, and a good education for minority citizens. These disparities were as apparent as before.

It is within this context that the concept of "affirmative action" first emerged. Reflecting the nature of the times this term is very complex and has numerous meanings. As civil rights evolved so did the concept of affirmative action. Originally, the term was utilized to express aggressive nondiscrimination or a strong commitment to equality of opportunity for all regardless of race or ethnicity. It meant "public policies that afforded individuals opportunity without discrimination."[11] President Kennedy was the first public official to use this term in the context of racial discrimination when he signed Executive Order No. 10,925 in 1961. This order advocated equality of opportunity while directing public contractors to adopt nondiscriminatory employment practices. The Executive Order stated:

> The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to insure that applicants are employed, and that employees are treated during employment, without regard to their race, color, or national origin.[12]

Following the issuance of this order "some two hundred fifty federal contractors" adopted voluntary affirmative action compliance programs which modified their existing employment practices.[13]

As cynicism and dissatisfaction grew despite the attainment of legal equality, affirmative action took on a new meaning. Affirmative action would represent any measures "beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination. . . ."[14] This approach promotes special or preferential consideration of defined or targeted groups that have been the victims of discrimination. The goal of this type of affirmative action represents a significant shift from equality of opportunity to equality of outcome.[15] "Affirmative action programs can range from aggressive recruiting and remedial training programs, to setting goals and guidelines, to set asides and quotas specifying an exact number or percentage of admissions or jobs for blacks, women, and other minorities."[16]

While there is significant public support for the color-blind principle of equal opportunity, public acceptance of affirmative action targeted toward "special consideration" or "equality of outcome" has never been high.[17] Even civil rights leaders such as Martin Luther King, Jr. were ambivalent about the future of

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[11] Anthony Platt, *The Rise and Fall of Affirmative Action*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 67 (1997).

[12] Clegg, *supra* note 5, at 13.

[13] Ballam, *supra* note 4, at 9-10.

[14] Platt, *supra* note 11, at 72.

[15] *See* PAUL JOHNSON ET AL, AMERICAN GOVERNMENT 151 (3d ed. 1994).

[16] 2 DAVID O'BRIEN, CONSTITUTIONAL LAW AND POLITICS 1315 (3d ed. 1997).

[17] SKRENTNY, *supra* note 9, at 4-5.

affirmative action. As social unrest and dissatisfaction increased governmental leaders searched for viable alternatives. Ironically, shortly after the passage of the Civil Rights Act, our nation experienced the worst urban rioting in history.[18] Expert commissions appointed by the President to study urban unrest recommended the promotion of quota systems and affirmative action as a solution. President Johnson relying on these types of suggestions set a new agenda as exemplified in his often quoted speech at Howard University:

> (F)reedom is not enough. You do not wipe away the scars of centuries by saying: 'Now you are free to go where you want and do as you desire, and choose the leaders you please…' This is the next and the more profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equality but human ability, not just equality as a right and a theory but equality as a fact and equality as a result…. To this end equal opportunity is essential, but not enough, not enough.[19]

Inspired by this oratory and agenda, administrative agencies assumed a prominent role in the promulgation of the new affirmative action programs. Numerous examples of bureaucratic pronouncements and regulations aimed at promoting the next stage of civil rights exist. Edward Erler observes how the Equal Employment Opportunity Commission assiduously wrote "guidelines, not indeed to achieve equality of opportunity but equality of result" while in the hands of the Office of Federal Contract Compliance "affirmative action became a thinly disguised code for racial quotas and goals".[20] David O'Brien notes how the Department of Labor in 1967 "adopted a policy of preferential hiring for minorities and women and the Department of Health, Education and Welfare (HEW) assumed responsibility for affirmative action in education."[21] By the 1970s O'Brien states that the (HEW) issued guidelines and threatened to withhold funds "from colleges and universities that failed to meet its hiring and admissions goals for blacks, women, and other minorities."[22] Unlike previous civil rights programs the new affirmative action agenda evolved in a piecemeal fashion. As developed by these low visibility agencies, affirmative action moved civil rights policy from one dedicated to being color-blind to one advocating significant color conscious decision making.

Federal administrative agencies produced numerous affirmative action regulations and standards and imposed them upon the public and private sectors. However, little guidance was provided to those who were expected to comply. In response to these vague and often contradictory mandates thousands of affirmative action plans and programs were established throughout the United States. The vagaries of affirmative action were being addressed in areas such as education admissions policy; minority contracting; workplace training; and workplace

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[18] *Id*. at 71-76.

[19] Erler, *supra* note 10, at 26-27.

[20] *Id*. at 29-30.

[21] O'BRIEN, *supra* note 16, at 1316.

[22] *Id*.

decisions related to hiring, firing, and promotion. The product of these actions was a vast array of policy approaches many of which provoked controversy and concern.

As the social implications of these new affirmative action programs became apparent, the public and Congress (including many members who voted for and worked for the passage of the Civil Rights Act) began to question their legitimacy. How could students with higher grade point averages and standardized test scores be denied admission into undergraduate colleges and professional schools while students with lower scores were admitted? How could employees with more seniority be laid off while those with less seniority were retained? How could government reject the lowest and best bidder in favor of a more expensive and less experienced competitor? Why is a poor Vietnamese-American less deserving of special consideration than an affluent African-American? These difficult questions lead many to challenge the legal, moral, and ethical assumptions of affirmative action.

Consistent with the objective of this article, the analysis to follow will focus on the legal challenges to affirmative action. Legal critics of affirmative action programs believe that the Fourteenth Amendment and the Civil Rights Act prohibit any consideration of race, ethnicity, and religion in an effort to promote a color-blind society. Proponents of affirmative action did not contemplate the social disruption created by these programs and maintained that any discrimination that occurred was unintended. The belief was that actions not motivated by discriminatory intent could be characterized as "benign discrimination" which does not violate the spirit of the Fourteenth Amendment or the Civil Rights Act. In response to these claims, opponents argued that discrimination against individuals whether they are white, male, Jewish, Japanese, or Irish is equally reprehensible and equally a violation of equal protection of the law. There can not be any "good vs. bad discrimination;" it is all bad.

Historical analyses of the Fourteenth Amendment suggest that its language and legislative history intended it to establish a color-blind society.[23] Did the Civil Rights Act modify this interpretation? A review of the legislative history and language of the Civil Rights Act leads to the conclusion that it too was intended to eradicate all discrimination based upon racial, ethnic, or religious considerations.[24] Numerous articles and books have been written documenting that the Civil Rights Act and its titles explicitly advocated a color-blind perspective. John David Skrentny writes that efforts to ensure a color-blind interpretation of the Act exist throughout the Congressional debate and are "well covered elsewhere."[25] He then quotes Senator Hubert Humphrey, the Senate floor leader for the Civil Rights Act, who in response to a question about the motives of the employment section of the Act responded:

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[23]*See, e.g.*, DOUGLAS KMIEC FOREWARD: THE ABOLITION OF PUBLIC RACIAL PREFERENCE-AN INVITATION TO PRIVATE RACIAL SENSITIVITY (1997).

[24]*See* ANDREW KULL, THE COLOR BLIND CONSTITUTION (1992); ROBERT LOEVY, TO END ALL SEGREGATION: THE POLITICS OF THE PASSAGE OF THE CIVIL RIGHTS ACT OF 1964 (1990); CHARLES & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985).

[25]SKRENTNY, *supra* note 9, at 121.

> Contrary to the allegations of some of the opponents of this title there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial "quota" or to achieve a certain racial balance. That bugaboo has been brought up a dozen times; but it is nonexistent. In fact the opposite is true, Title VII prohibits discrimination. In effect, it says that race, religion and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications not race or religion.[26]

Edward Erler points to the statements of Senator Joseph Clark, the floor manager for Title VII as being even more explicit than Humphrey's.[27] Senator Clark stated:

> Any deliberate attempt to maintain a given balance would almost certainly run afoul of Title VII because it would involve the failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What Title VII seeks to accomplish is equal treatment for all.[28]

While stressing that the Civil Rights Act "bars discrimination against or preferential treatment in favor of 'any individual or group'. . ." Eugene Volokh cites the statements of Representative Emmanuel Celler, the House of Representatives floor manager for the Civil Rights Act, who states a "court could not order that any preference be given to any particular race, religion, or other group but would be limited to ordering an end to discrimination."[29] Finally, Skrentny quotes the language of the Civil Rights Act itself to demonstrate that it does not condone "racial proportions in employment" and it in fact "prohibits such a concern":

> Nothing contained in this title shall be interpreted to require any employer . . . to grant preferential treatment to any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community . . . or in the available workforce in any community.[30]

III. *REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE*: THE SUPREME COURT ENTERS THE AFFIRMATIVE ACTION DEBATE

The debate over the legality of affirmative action continued throughout the 1960s and 1970s devoid of a political resolution. Citizens turned to the courts as the appropriate forum to resolve the legal dispute and to provide a clear and uniform direction. Issues such as affirmative action are difficult for the Supreme Court

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[26] *Id.*

[27] Erler, *supra* note 10, at 26.

[28] *Id.*

[29] Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide,* 44 UCLA L. REV. 1345 (1997).

[30] SKRENTNY, *supra* note 9, at 121.

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because they are embroiled in political controversy, pose significant legal and moral dilemmas, and are cases of first impression. By the late 1970s, the Court could no longer avoid the issue.

In 1973 and 1974, Allan Bakke, a white male applied to the University of California-Davis Medical School.[31] Both times he was denied admission.[32] Bakke discovered that the Medical School operated two separate admissions programs.[33] A special admissions program reserved 16 of the 100 entering slots for disadvantaged members of certain minority races.[34] A comparison of Bakke's qualifications with students matriculated through the special admissions program revealed significant disparities.[35] Bakke's grade point average was 3.46 compared to the average of the 1973 special admittees of 2.88, and 2.62 for the 1974 special admittees.[36] A comparison of standardized MCAT scores revealed similar differences: Bakke's percentiles were 96% for the verbal versus 46% for the 1973 admittees and 24% for the 1974 admittees , 94% for the quantitative versus 24% for the 1973 admittees and 30% for the 1974 admittees, 97% for science versus 35% and 37%, and for general information 72% versus 33% and 18%.[37]

Believing that he had been discriminated against because of his race Bakke sued the Regents of the University of California in a state trial court.[38] Among his legal causes of action he alleged a violation of his constitutional rights pursuant to the Equal Protection Clause of the Fourteenth Amendment and his statutory rights under Title VI of the Civil Rights Act.[39] The state trial court held that the medical school's special admissions program constituted a racial quota which did violate Bakke's constitutional and civil rights.[40] On appeal, the Supreme Court of California affirmed the trial courts holdings.[41] The Regents of the University of California then appealed to the United States Supreme Court.[42]

The decision of the Supreme Court was awaited with great anticipation because it marked the first time the Court addressed the legalities of affirmative action. Its holding would determine the boundaries of acceptable applications of this strategy, if any, and would impact numerous programs and individuals in our society. The Court announced its sharply divided decision on June 28, 1978. All of the major issues were decided by a tenuous 5-4 vote. The holding contained three distinct

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[31]Regents of the Univ. of California v. Bakke, 438 U.S. 265, 276 (1978).

[32]*Id.* at 276, 277.

[33]*Id.* at 277.

[34]*Id.* at 275.

[35]*Id.* at 278.

[36]*Bakke*, 438 U.S. at 277-78.

[37]*Id.*

[38]*Id.*

[39]*Id.* at 278.

[40]*Id.* at 279.

[41]*Bakke*, 438 U.S. at 280.

[42]*Id.*

opinions, with none of the opinions garnering majority support in regard to the major issues. Substantively, five members of the Court agreed; that the Medical Schools admission program was illegal, Bakke must be admitted, but that race could be considered as one element to be weighed fairly against others in the selection process.[43]

To comprehend the practical and legal implication of the *Bakke* decision it is essential to understand the three factions which formed. The Brennan, White, Marshall, and Blackmun group, concluded that the Regents of California's admissions process was constitutional because the Fourteenth Amendment is not "colorblind" and Title VI doesn't prohibit preferential treatment.[44] Chief Justice Burger, Stevens, Stewart, and Rehnquist relying solely on Title VI argued that the admissions program was illegal because it violated the colorblind standard of the statute and therefore it wasn't necessary to even consider the alleged constitutional violation.[45] Justice Powell issued his own opinion, but his holdings were the most influential because he constituted the deciding fifth vote in regard to the outcomes of all the significant issues. Powell aligned with Chief Justice Burger's faction and held that Bakke must be admitted and the Medical School's admissions program was illegal (Powell contending it violated the Constitution as well as Title VI).[46] However, Powell aligned with the Brennan group when holding that race could be a factor in an admissions process.[47]

For these reasons it is important to understand the logic of Powell's holding which has been relied upon by many public and private institutions as providing the bottom line guidance required for acceptable race conscious affirmative action programs. Powell's opinion has been referred to as the "cornerstone of affirmative action".[48] It must be reemphasized however, that although there were majority *holdings* in *Regents of California v. Bakke*, there was not a majority *opinion* for any of the significant issues. In other words, from a legal perspective the justices could not agree as to the underlying legal justifications for their decisions.

Justice Powell announced the judgment of the Court holding that *Bakke* must be admitted, and although the Medical School's special admissions program was unlawful, race could be considered in an admissions program.[49] In reaching these judgments Powell developed important distinctions and reached significant conclusions. While addressing the constitutional issue raised in this case he found that the constitution is explicit in its language when it states "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[50] Based upon this language Powell reasons:

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[43]*Id.* at 271.

[44]*Id.* at 325, 326.

[45]*Id.* at 408.

[46]*Bakke*, 438 U.S. at 320.

[47]*Id.* at 289.

[48]Lackland Bloom, Jr., Hopwood, Bakke *and the Future of the Diversity Justification*, 29 TEXAS TECH L. REV. 1, 8 (1998).

[49]*Bakke*, 438 U.S. at 289, 320, 325-26, 408.

[50]U.S. CONST. amend. XIV, § 1.

> It is settled beyond question that the rights created by the first section of the Fourteenth Amendment are, by its terms guaranteed to the individual. The rights established are personal rights. The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not afforded the same protection then it is not equal. . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. . . . It is far too late to argue that the guarantees of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others.[51]

Although, Powell believes the Constitution is intended to treat all equally, he does not interpret this perspective to be an absolute bar to all racial classifications.[52] However, for a program which considers race to pass constitutional scrutiny he believes the state must have a substantial interest that is legitimately served by this classification.[53] For Powell, this must of course exist within the context of preserving individual equal protection. In applying this standard to the facts of this case, Powell argues that the "fatal flaw" in the Regents of California's admission program is its "disregard of individual rights as guaranteed by the Fourteenth Amendment."[54] A public program based upon these standards can never pass constitutional muster when it summarily rejects any group of people based solely upon their race or ethnicity.[55] This logic leads to the inevitable conclusion that all quotas are illegal.

Powell accepts the argument offered by the Regents of California that a "diverse student body" may be a constitutionally permissible goal for an institution of higher learning.[56] But he cautions that this goal can only be embraced to the extent that it does not violate individual rights.[57] Powell warns:

> 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. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded.[58]

Based upon this reasoning the problem with the Medical School's admission program is that it focused exclusively on racial and ethnic diversity insulating the

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[51]*Bakke*, 438 U.S. at 289-91.

[52]*Id.* at 289-90.

[53]*Id.* at 320.

[54]*Id*.

[55]*Id.*

[56]*Bakke*, 438 U.S. at 311-12.

[57]*Id.*

[58]*Id*. at 314

applicants from comparison with all other candidates for admission.[59] Powell suggests that programs which take diversity into account will only survive constitutional scrutiny if "race or ethnic background is simply one element - to be weighed fairly against other elements- in the selection process."[60] Applicants cannot be excluded from the admissions process based upon their race or not belonging to a particular race.[61] This reasoning does not afford preferential treatment a large role, although unlike Chief Burger's group it doesn't completely dismiss it either.

In contrast to the Powell opinion, the Brennan faction argued that the affirmative action program of the Medical School was constitutional.[62] Government may use race conscious programs as long as they do not "demean or insult any racial group, but . . . remedy disadvantages cast on minorities by past racial prejudice . . . ."[63] The constitutional basis for their holding is the conclusion that the Fourteenth Amendment is not "colorblind."[64] The most intriguing articulation of this argument was provided by Thurgood Marshall who reasoned:

> [h]ad the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember however, that the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter. . . . It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America.[65]

In addition, the Brennan group suggests that the purpose of Title VI is to make sure that federal finances were not used to support racial discrimination and it was not intended as a ban on all race conscious efforts.[66] As further support for this perspective the opinion documents the promulgation of affirmative action regulations by federal agencies.

Marshall's interpretation of the Constitution seems fraught with contradictions. Clearly, the Court erred in 1898 when they imposed the "separate but equal" doctrine. However, to then argue that because a tragic mistake was made (most probably motivated by political considerations), that we must perpetuate a race based interpretation of the Constitution is hard to justify legally. Marshall also must believe that the proper reading of the Fourteenth Amendment is that it is colorblind or he would not be able to argue logically if not for Plessy we wouldn't be faced with our current dilemma. It is also important to remember that it was Marshall, who on

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[59]*Id.*

[60]*Id*. at 318

[61]*Bakke*, 438 U.S. at 318.

[62]*Id.*

[63]*Id*. at 325

[64]*Id.*

[65]*Id.* at 401.

[66]*Bakke*, 438 U.S. at 336.

behalf of the NAACP argued in *Brown v. Board of Education*[67] that the Constitution does not recognize race distinctions. The ultimate problem with the rejection of the "colorblind" perspective is that it justifies a perpetuation of a political imperative over the legal imperative.

In regard to the Brennan group's reading of Title VI, it is not contradictory to argue that even if a clear purpose of that section was to insure funds were not being distributed in a discriminatory manner which required race consciousness this objective doesn't sanction affirmative action. Ensuring that all individuals receive their fair share of a benefit program regardless of race is very different than instituting an affirmative action program that denies individuals an opportunity to be considered solely because of their race. Last, as the Burger faction argues the Brennan group's legislative history ignores explicit statements embracing the "colorblind" rationale.

The opinion of Chief Justice Burger's group is by far the shortest, most succinct, and least encompassing. In essence they maintain that the plain language of Title VI, as supported by its extensive legislative history, is dispositive of this issue.[68] Therefore, it is unnecessary to even consider constitutional arguments. The following passages capture the essence of their opinion:

> In the words of the House Report, Title VI stands for the "general principle that no person . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance." This same broad view of Title VI…was echoed throughout the congressional debate and was stressed by every one of the major spokesman for the Act . . . . The language of the section is perfectly clear; the words that follow "exclude from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds . . . the proponents of the legislation gave repeated assurance that the Act would be "colorblind" in its application. . . . The meaning of the Title VI ban on exclusion is crystal clear; Race cannot be the basis of excluding anyone from participation in a federally funded program.[69]

Many insights can be drawn from the *Bakke* decision. From a legal perspective, if this holding is the "cornerstone" of affirmative action, the status of this policy is fragile at best. Owing to the fact that it was a 5-4 decision, and devoid of a majority opinion, it is surprising that it has managed to endure for over twenty years. Its staying power is probably the result of many things: the lack of a new consensus, the avoidance of further potential controversy, and judicial respect for the doctrine of stare decisis. Based upon the *Bakke* decision it is difficult for public and private institutions to develop programs that address issues of race or ethnicity. The holding provides little direction and the often quoted guiding principle it does posit—"race is but one element to be weighted fairly against other elements" is vague and represents the opinion of Justice Powell alone.[70] Finally, the constitutionality of affirmative

[67]347 U.S. 483 (1954).

[68]*Bakke*, 438 U.S. at 407.

[69]*Id*. at 418

[70]*Id.* at 318.

action is still to be determined as the majority of the court did not address this issue. Powell in concert with Chief Justice Burger's group were able to come to a legal conclusion based solely on Title VI considerations.

Throughout the 1970s and 1980s, the Burger Court remained sharply divided when addressing affirmative action programs. Recently, the Rehnquist Court has seemed to adopt a significant change in perspective in regard to affirmative action and the utilization of race classifications in general.

IV. CURRENT NATIONAL DEVELOPMENTS ON AFFIRMATIVE ACTION

The Supreme Court in recent years has re-examined and redefined affirmative action in a number of important contexts. Among some of the more important holdings of the Court are: the adoption of a more rigorous level of scrutiny -"strict scrutiny" - which all race conscious programs must now survive in order to satisfy constitutional dictates, the rejection of claims of societal discrimination as a justification for racial classifications, and the elimination of its deferential standard toward congressional affirmative action programs.[71] These developments have seemed to inspire the lower federal courts and state courts to make even more fundamental challenges to affirmative action. Many of the holdings of these courts appear even more restrictive than what is required by the Supreme Court. Spurred by these actions, state legislatures - most notably California and Proposition 209 - have acted to eliminate all race and ethnic classifications from the public domain through state constitutional amendments requiring a "colorblind" application of the law. These legal dynamics have led many analysts to question the future of affirmative action.[72]

A. Recent Supreme Court Interpretations

This review of current developments in regard to affirmative action programs starts with an analysis of recent Supreme Court decisions. These decisions assume primacy because they are the most authoritative source of constitutional principle. Supreme Court holdings in regard to the Constitution are binding on all federal and state courts. It is important to understand the Court's perspective before juxtaposing the actions of other judicial bodies. Two of the most significant race classification cases decided by the Court are the *City of Richmond v. J.A. Croson*[73] and *Adarand Constructors Inc. v. Pena.*[74]

J.A. Croson Company was a Virginia plumbing contractor which had bid on a city contract to install toilets in the jail. Richmond had enacted an ordinance which required nonminority building contractors to subcontract 30 percent of all city

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[71]*See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) and City of Richmond v. J.A. Croson Co. 488 U.S. 469 (1989).

[72]*See* Paula Alexander Becker, *Affirmative Action and Reverse Discrimination: Does Taxman v. Board of Education of the Township of Piscataway Define the Outer Limits of Lawful Voluntary Race-Conscious Affirmative Action*, 8 SETON HALL CONST. L.J. 13, 15, (1997).

[73]City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989).

[74]Adarand Constructors Inc. v. Pena, 515 U.S. 200 (1995).

awarded projects to minority owned business enterprises (MBE).[75] Croson was awarded the contract as the only bidder despite failing to attract any MBEs.[76] Croson was finally able to subcontract to an MBE but at a price $7,000 higher than it had estimated.[77] Richmond refused to adjust the contract price and instead reopened bidding.[78] Croson sued Richmond alleging that the ordinance violated his constitutional rights.[79]

The Croson case produced a number of important developments. The Richmond MBE standard was patterned after a federal program that the Burger Court upheld, by a 6-3 vote, in the 1980 case of *Fullilove v. Klutznick*.[80] When the Rehnquist Court held by a vote of 6-3 that the Richmond program was unconstitutional this was viewed by many as representing a significant shift in jurisprudence.[81] A review of the opinion and the number of justices supporting the judgment does suggest a change in judicial philosophy. O'Connor writing for the majority attacked the presumptions of the Richmond program:

> As this court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual." The rights established are personal rights. The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their personal right to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decision making.[82]

In contrast to prior decisions, a clear majority also rejected the idea that claims of "societal discrimination" or "past discrimination" would survive constitutional scrutiny. The Court held that these concepts are deficient because they provide "no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.[83] It has no logical stopping point."[84] In other words these types of claims do not point to a specific alleged legal harm which makes it impossible to determine when a remedy is achieved.

This case is noteworthy because for the first time the majority of the Court embraced the strict scrutiny standard for all Equal Protection Clause violations,

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[75]*Croson*, 488 U.S. at 479.

[76]*Id.* at 482.

[77]*Id.* at 483.

[78]*Id.*

[79]*Id.*

[80]448 U.S. 448 (1980).

[81]*Id.* at 486.

[82]*Croson*, 488 U.S. at 493.

[83]*Id.* at 498.

[84]*Id.*

including benign racial preferences. In adopting the strict scrutiny test the court argues that this approach will:

> "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also insures that the means chosen "fit" this compelling goal so closely that there is little or no possibility the motive for the classification was illegitimate racial prejudice or stereotype. Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote inferiority and lead to a politics of racial hostility.[85]

This more exacting scrutiny standard clearly reflects a judicial desire to reserve race based classifications for the most deserving purposes such as to rectify specific instances of discrimination. Broad remedial programs designed to address general claims of discrimination clearly will not be considered constitutional. The Court's disdain for preferential programs is further highlighted by dicta which suggests that Richmond should have first considered race neutral policies such as providing financing for the development of small firms to increase minority business participation.

While this case challenges many of the central holdings previously maintained by *Fullilove*, it was not considered a repudiation of similar programs enacted by Congress. The Supreme Court has applied a less rigorous standard of scrutiny - intermediate - in the *Fullilove* case in deference to federal legislative efforts. In fact, the Rehnquist court in *Croson*, in response to claims by Richmond that its determinations deserved deference similar to those afforded to Congress, explained that only Congress was specifically authorized under section five of the Fourteenth Amendment to enforce its dictates.[86]

The deference afforded to congressional programs by the Supreme Court lasted for only another five years. In its decision in *Adarand v. Pena*[87] the Court explicitly overruled *Fullilove* and a subsequent case that relied on its logic - *Metro Broadcasting v. FCC* (upheld the Federal Communication Commission's policy of preferring minority applicants for radio and television licenses). Adarand Constructors Inc. was a Colorado based company which specialized in the construction of highway guardrails.[88] The nonminority company had submitted the lowest bid to serve as a subcontractor for Mountain Gravel which was the recipient of a Department of Transportation construction contract.[89] Despite this bid, Mountain Gravel subcontracted with Gonzales Construction Co. - an Hispanic-American company - because under the terms of the contract they received additional compensation from the federal government for hiring subcontractors certified as "socially and economically disadvantaged individuals."[90] This provision

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[85] *Id*. at 493.

[86] *Id*. at 491, 504.

[87] Adarand Constructors, Inc. v. Pena, 515 U.S. 210 (1995).

[88] *Id.* at 205.

[89] *Id.*

[90] *Id.*

was included pursuant to requirements of the Small Business Act and the Surface Transportation and Uniform Relocation Assistance Act.[91]

Adarand filed suit claiming these federal incentives violated his equal protection rights as provided by the Fifth Amendment which applies to federal actions.[92] Justice O'Connor writing for the majority agreed and added that "all racial classifications imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny."[93] O'Connor, in imposing a uniform standard on all governmental actions, rationalized this holding by stating:

> Metro Broadcasting's untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between the principle and "its later misapplication", the principle must prevail.[94]

This holding resulted in the application of the heightened standard of strict scrutiny to all governmental actions without exception. As a result of this development the major legal issues left to be resolved in the affirmative action debate evolve from the application of the two prongs of the strict scrutiny test. Specifically the questions become: What constitutes a "compelling interest"? Can non-remedial objectives such as promoting diversity ever constitute a compelling interest? And what is a "narrowly tailored program"? The answer to these questions will shape the future of preferential programs in regard to their scope, content, and number.

The broad application of the equal protection clause from the workplace setting, to educational admissions, to issues of voting and political representation has yielded some uniform standards. The Court has held that claims of discrimination can provide a compelling interest only if the program is predicated upon specifically identified discrimination versus claims of society wide or past discrimination. Critics of this approach believe this standard makes it impossible to devise a viable race based program that will survive the inquiry.

Justice O'Connor in response to this charge argued in *Adarand* that she wished to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact".[95] Within this context, she cited the 1987 case of *United States v. Paradise*[96] in which the Court found a history of forty years of discrimination that resulted in a workforce where none of Alabama's 232 state troopers with a rank of corporal or higher were black. Based upon this information the Court agreed that a narrowly tailored race based remedy was justified. Ironically, O'Connor cast a dissenting vote in this case arguing that, although there was a compelling interest, the remedy -that 50% of all promotions go to blacks-was not narrowly tailored.[97] This finding raises the question

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[91]*Id.*

[92]*Adarand Constructors*, 515 U.S. at 205, 210.

[93]*Id*. at 227.

[94]*Id*. at 235.

[95]*Id*. at 237.

[96]480 U.S. 149 (1987).

[97]*Id.* at 197.

of what does a narrowly tailored program to address a compelling interest look like? Clearly, the Court disdains quotas while it has recommended race neutral remedies. The exact composition of narrowly tailored programs still remains to be determined. The Supreme Courts imposition of strict scrutiny, the difficulty of providing a compelling interest in race based programs, and the need for narrowly tailored programs suggest that it will be difficult for a number of programs to satisfy constitutional analysis.

B. Taxman v. Board of Education of the Township of Piscataway

Changing directives provided by the Supreme Court have inspired the lower courts to address affirmative action issues in a more speculative manner. *Taxman v. Board of Education of the Township of Piscataway*,[98] is an example of an important case decided by a lower court that has significant implications for the affirmative action debate. This case specifically considers the legality of a nonremedial justification — racial diversity for racial preferences. It also illustrates the political dynamics of the issue.

In May of 1989, the Board of Education of the Township of Piscataway decided to reduce the teaching staff in their Business Department at the high school by one.[99] The two least senior members of the department had an identical tenure record of nine years.[100] In light of this fact, the Board turned to its affirmative action plan and consistent with its stated policies, considered the race of the teachers to assist in the termination decision.[101] Based upon this consideration, they decided to lay off Sharon Taxman, who was white, and retain Debra Williams who was black.[102] The Board conceded that their affirmative action plan did not have a remedial purpose-there was not any prior discrimination that they were attempting to remedy.[103] In fact, the employment statistics revealed that the percentage of black employees in the teaching category exceeded the percentage of blacks in the available work force.[104] The Board instead indicated that the sole purpose of the affirmative action policy was to promote "racial diversity."[105]

Sharon Taxman filed suit against the Piscataway Board of Education alleging reverse discrimination in violation of Title VII of the Civil Rights Act.[106] The trial court, upon the facts of the case and its interpretation of the law, granted a summary judgment to Taxman.[107] The Board of Education appealed this decision to the United

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[98]Taxman v. Bd. of Educ. of the Township of Piscataway, 91 F.3d 1547, 1550 (3rd Cir. 1997).

[99]*Id.* at 1551.

[100]*Id.*

[101]*Id.*

[102]*Id.*

[103]*Taxman*, 91 F.3d at 1551.

[104]*Id.* at 1551-52.

[105]*Id.*

[106]*Id.* at 1552.

[107]*Id.*

States Court of Appeals for the Third Circuit.[108] The Court of Appeals was confronted with having to determine whether a nonremedial purpose such as racial diversity can be the basis for a compelling state interest. The Third Circuit provided a broad application in affirming the holding of the trial court and stated:

> Given the clear antidiscrimination mandate of Title VII a non-remedial affirmative action plan, even one with a laudable purpose cannot pass muster. Although we applaud the goal of racial diversity, we cannot agree that Title VII permits an employer to advance that goal through nonremedial discriminatory measures.[109]

This holding instead of just dismissing the idea of "racial diversity" indicates that the only justifiable state interest in the area of public race programs is to remedy past discrimination. This conclusion extends the logic of the Supreme Court further than necessary. Piscataway appealed this decision to the Supreme Court which agreed to hear the case.[110]

At this point, the politics swirling around the *Taxman v. Board of Education* case became intriguing. The Justice Department of the Bush Administration aligned with Taxman and argued that a desire to promote racial diversity could not justify racial discrimination and racial preference. When the Clinton Administration assumed power, his Solicitor General, Walter Dellinger, voiced support for the Piscataway School Board's policy. However, in dramatic development, the Clinton Administration changed its position and Solicitor General Dellinger actually filed a brief with the Supreme Court in support of Sharon Taxman. As concern mounted about the possible outcome of this case, black civil rights groups, including the NAACP, financed a surprise out-of-court settlement with Taxman estimated at over $400,000. Commenting on this development, the National Law Journal claimed that it is "rare for any case to be settled once the Supreme Court has agreed to hear the dispute, and virtually unheard of for third parties to direct the settlement."[111] These maneuverings suggest that the civil rights community sensed that the Supreme Court was on the verge of announcing a precedent setting ruling which would have severely limited the application of affirmative action. The political strategy seems to be delay and hope that the prevailing legal perspective will change.

The legal status which has resulted from all this maneuvering is that the states in the Third Circuit are bound by the *Taxman* holding while the rest of the nation is still free to develop their own interpretation of Title VII and subsequent Supreme Court rulings. In other words, the constitutionality of race programs can vary from state to state. This case also demonstrates how the lower courts are influencing the legal agenda.

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[108]Taxman, 91 F.3d at 1552.

[109]*Id*. at 1550.

[110]Piscataway Tp. Bd. of Educ. v. Taxman, 521 U.S. 1117 (1997).

[111]NATIONAL LAW JOURNAL (Nov. 22, 1997).

C. Hopwood v. Texas

Hopwood v. State of Texas,[112] decided by the United States Court of Appeals for the Fifth Circuit in 1996, is an important case because it provides an evaluation of the evolution of affirmative action law since the *Bakke* decision in 1978. The facts of this case were similar to those of *Bakke*. The *Hopwood* case involves a legal challenge to the admissions program of the University of Texas School of Law by nonminority applicants.[113] Specifically, the law school upon, receiving an application for admission, calculated the Texas Index (TI) which was a composite of undergraduate grade point average (GPA) and standardized law school admission test scores (LSAT).[114] Based upon their composite, applicants were assigned to one of three categories: presumptive admit, presumptive deny, and a discretionary zone.[115] This procedure was however, applied to African-Americans and Mexican-Americans in a different and more preferential manner. As the Fifth Circuit Court of Appeals noted:

> In March 1992, for example the presumptive TI admission score for resident whites and non-preferred minorities was 199. Mexican-Americans and blacks needed a TI of only 189 to be presumptively admitted. The difference in the presumptive deny ranges is even more striking. The presumptive denial score for "nonminorities" was 192; the same score for blacks and Mexican-Americans was 179.[116]

Based upon these standards, a minority candidate with a TI of 190 would be presumptively admitted while the same 190 score if achieved by a nonminority would place them in the presumptive deny category. Aside from different admissions standards the law school established a segregated evaluation process, consisting of different committees with different admissions personnel, and segregated waiting lists.

Cheryl Hopwood, a white applicant, applied for admission to the Law School in 1992.[117] Despite a GPA of 3.8 and a LSAT of 39, resulting in a TI of 199, she was denied admission.[118] Hopwood and three other white applicants also denied admission, noting the separate admissions procedures, sued the law school alleging that the school's affirmative action program violated their rights as protected by the Equal Protection Clause of the Fourteenth Amendment.[119] In reviewing this action, the Court of Appeals reconstructs *Bakke*. The majority opinion of the Fifth Circuit does not just extend *Bakke*, it actually invalidates some of its major assumptions. In

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[112]78 F.3d 932 (5th Cir. 1996).

[113]*Id.* at 938.

[114]*Id.* at 935-36.

[115]*Id.* at 935.

[116]*Hopwood*, 78 F.3d at 936.

[117]*Id.* at 938.

[118]*Id.*

[119]*Id.*

framing the constitutional issues addressed by this case, the court recites a number of familiar principles:

> The central purpose of the Equal Protection Clause "is to prevent the State from purposefully discriminating between individuals on the basis of race". It seeks ultimately to render the issue of race irrelevant in governmental decisionmaking. . . . In order to preserve these principles, the Supreme Court recently required that any governmental action that expressly distinguishes between persons on the basis of race be held to the most exacting scrutiny . . . Under strict scrutiny analysis we ask two questions: 1) Does the racial classification serve a compelling government interest and 2) is it narrowly tailored to the achievement of that goal?[120]

According to the court, the two most significant justifications that the law school offered to legitimize these racial classifications was the need for diversity in regard to a student body and overcoming the effects of past discrimination. To determine whether these reasons satisfy the rigors of a "compelling government interest" the Court of Appeals re-evaluated *Bakke* in light of recent developments. The Fifth Circuit acknowledged that Justice Powell's opinion in *Bakke* provided the original justification for recognizing "diversity" as a compelling state interest in education. To the astonishment of many legal observers, the Fifth Circuit Court of Appeals, while reviewing the origins of the diversity rationale decided to reject entirely the legitimacy of Powell's opinion:

> We argue with the plaintiffs 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. Justice Powell's argument in Bakke has never represented the view of the majority of the court . . . . Moreover, subsequent Supreme Court decisions regarding education state, that non-remedial state interests will never justify racial classifications.[121]

These assertions shocked many in the legal community because the Powell opinion has been widely relied upon by many lawyers as an essential guide for the development of affirmative action programs.[122]

The court in regard to the issue of recognizing past discrimination as a basis for a compelling government objective suggested that this standard could only be derived from the actions of the law school not the education system in general. Based upon these premises the Fifth Circuit Court of Appeals held that the University of Texas School of Law's admissions program was unconstitutional. The conclusion of the court in this case is not as significant as the process utilized to reach the court's decision. The court of appeals could have just as easily concluded that this program was unconstitutional by applying the logic of *Bakke*. Clearly, by the standards of that case, the law school had instituted an impermissible quota which rejected individuals on the basis of their race and was therefore not narrowly tailored. Rather

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[120] *Id*. at 940.

[121] *Hopwood*, 78 F.3d at 944.

[122] *See* Bloom, Jr., *supra* note 48.

than embracing the reasoning, the Fifth Circuit rejected *Bakke* and suggested an alternative method of constitutional inquiry. This approach was particularly profound because it is generally understood that only the Supreme Court can overturn or redefine its binding precedent. The practical effect of *Hopwood* is to challenge the constitutionality of numerous admissions programs throughout the nation. Many colleges and universities have "relied upon the Powell opinion in *Bakke* as the blueprint for designing and operating a constitutionally acceptable affirmative action admissions process . . .[123] Some Texas universities have already "adopted expanded admission criteria that are aimed at achieving diversity through race-neutral facts such as the socioeconomic history of applicants and the level of education of applicant's parents."[124]

D. California Proposition 209

The single most important development in regard to affirmative action programs was the passage of Proposition 209 in California. This development could signal the end of most preferential programs based upon race and ethnic background regardless of future Supreme Court holdings. Proposition 209 was a state initiative to amend the California Constitution, which stated that the "state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, and national origin in the operation of public employment, public education, or public contracting.[125]

This initiative provoked an intense and emotional campaign debate. On November 5, 1996, this amendment was approved by a vote of 54.3% to 45.7%. White males favored the Proposition by 66% to 34%; and white females favored it 56% to 44%. African-Americans voted against the Proposition 73% to 27%; Hispanics opposed it by 70% to 30%; and Asians by 56% to 44%.[126] The day after the election, several groups in opposition to Proposition 209 filed a complaint with the district court seeking a permanent injunction which would bar California from implementing the amendment. The legal basis of this complaint was that Proposition 209 denied racial minorities and women the equal protection of the law guaranteed by the Fourteenth Amendment. Consequently, it was void because it conflicted with Title VI and VII of the Civil Rights Act of 1964. The district court granted the injunction, but on appeal to the United States Court of Appeals for the Ninth Circuit, the injunction was vacated. The Ninth Circuit while reviewing the legal arguments in opposition to Proposition 209, expressed their contempt for these equal protection challenges:

> As a matter of "conventional" equal protection analysis, there is simply no doubt that Proposition 209 is constitutional . . . . The ultimate goal of the equal protection clause is "to do away with all government imposed discrimination based on race." Proposition 209 amends the California

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[123]*Id*. at 3.

[124]Victor Wright, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admission Program*, 34 HOUS. L. REV. 871, 905 (1997).

[125]*See* Volokh, *supra* note 29.

[126]ERLER, *supra* note 10, at 15.

> Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.[127]

The Ninth Circuit filled its holding with language which rejected equal protection and Civil Rights challenges to Proposition 209. For example, the Court emphasized that individuals do not possess a constitutional right to preferential treatment based upon race or gender, and impediments to "preferential treatment do not deny equal protection."[128] In another statement filled with sarcasm, the court reminded us that the "Fourteenth Amendment, lest we lose sight of the forest for the trees does not require what it barely permits."[129] This resounding defense of the constitutionality of Proposition 209 emphasizes the importance of understanding its policy implications. This amendment will likely remain in effect for many years.

Eugene Volokh's extensive review of the practical implications of this initiative stresses that it applies only to the public sector (state and local governments, agencies, and instrumentalities) and that private sector actions are not affected. Therefore, all public sector preferential programs regarding employment, contracting, recruiting, and education are illegal:

> It doesn't matter whether a prohibited criterion is the only factor, or one of many factors. It doesn't matter whether the program refers to "quotas" or "plus factors" . . . . It doesn't matter whether its an admissions program, training program, or mentoring program. Any government program that treats people different based on the prohibited criteria is forbidden.[130]

Illustrating the distinction between public and private sector programs, Volokh noted that a race based scholarship is permissible at a private college but prohibited if established by a public college.[131] While this example suggested that private preferential programs may endure it must be remembered that many of them were specifically instituted in response to public mandates. It must also be emphasized that Proposition 209 does not prohibit programs which are implemented in response to identified past discrimination. Actions that remediate constitutional violations of anti-discrimination law are permissible.

The California amendment also does not invalidate any program which provides assistance or preferential treatment to individuals based upon non-suspect criteria such as income, educational opportunities, and single parent household. Over twenty states and numerous local governments are currently considering the adoption of legislation similar to Proposition 209.[132]

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[127]Coalition for Economic Equality v. Wilson, 122 F.3d 692, 701-02 (9th Cir. 1997).

[128]*Id*. at 708.

[129]*Id*. at 709.

[130]*See* Volokh, *supra* note 29, at 1345.

[131]*Id.* at 1345.

[132]Congressional Quarterly Guide to Current American Government 1 (Spring 1998).

V. THE OHIO EXPERIENCE

The last section of this analysis will review the evolution of affirmative action principles in Ohio. The evolving principles surrounding affirmative action have left governmental institutions and state actors with little guidance for developing programs to promote social inclusion within the context of existing and anticipated legal parameters. The complexity of formulating Constitutional remedial programs is dramatically evidenced by the history of race-conscious programs in Ohio and their recent demise under strict scrutiny analysis. The power of the state to enforce state-wide remedial legislation has been crippled, and the authority of state actors, to enforce remedial programs has been threatened. The Ohio experience provides a warning that many existing affirmative action plans will not survive judicial scrutiny, and, that appointed and elected officials cannot be protected by qualified immunity if they have not conducted a predicate study prior to the initiation of affirmative action programs. Recent developments construing affirmative action plans in Ohio illustrate the factors that cannot be relied on to support an affirmative action plan, but provide little guidance for promoting social inclusion within the diminishing legal parameters.

State participation, active or passive, in racially discriminatory practices, was not foreign to the State of Ohio at the conception of the Civil Rights Act. In 1967, the United States District Court for the Southern District of Ohio held that the State of Ohio was a "joint participant" in discriminatory practices of contractors and craft unions in violation of the Fourteenth Amendment because it had *no* measures to ensure against the discriminatory practices of its contractors.[133] The court enjoined the State of Ohio from awarding construction contracts until it obtained assurances from the contractors that equal job opportunities would be made available.[134]

In a progressive attempt to eradicate discrimination in the awarding of state contracts, Ohio began enacting policies and legislation to promote social inclusion of minority business enterprises in the awarding of state contracts. In 1972, Ohio Governor John J. Gilligan cited *Ethridge* in an Executive Order that required all state agencies to "eliminate discriminatory barriers to employment and remedy all effects of present and past discriminatory patterns and practices including those relating to public works contracts."[135] In 1976, the Ohio Department of Transportation (ODOT) issued bid-specifications for a road construction contract that included a mandatory set-aside of two percent for minority business subcontractors, which was commended by a state court for its compliance with Federal Highway Administration regulations for minority participation.[136]

In 1977, the Ohio General Assembly passed an appropriations measure requiring state agencies to adopt affirmative action programs and to invite minority business enterprises and small businesses to participate in certain projects for which

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[133]Ethridge v. Rhodes, 268 F. Supp. 83, 88 (S.D. Ohio 1967).

[134]*Id*. at 88-90.

[135]Exec. Order of September 27, 1972.

[136]Connors v. Ohio Dept. of Transportation, No. 77-CV-03-1173 (Franklin Cty. Common Pleas, Aug. 4, 1981).

competitive bidding requirements were waived.[137] This measure survived constitutional review by a state court, however, the measure was not upheld until after it had expired by its own terms. [138]

In spite of Ohio's affirmative efforts to end discrimination in the awarding of state contracts, as well as receiving approval by the judiciary for its efforts, the *Jackson* court found that discrimination remained in the awarding of public contracts by the State of Ohio.[139]

> This court finds from the evidence submitted that there exists in the awarding of state contracts a discrimination against the minority groups specified in [the Act]. The court finds that there is a *compelling need to correct this discrimination*.[140]

Ohio's efforts to institute policies, set-asides and waivers to encourage minority participation in the state contracts were clearly ineffective in eliminating discrimination, as evidenced by the state court's finding of discrimination in 1979.[141] Against this backdrop, the General Assembly enacted a statute in 1980 which provided that a prime contractor on a state contract must "award subcontracts totaling no less than five percent of the total value of the contract to (MBE's) . . . and that the total value of both the materials purchased from (MBE's) . . . and of the subcontracts awarded . . . will equal at least seven percent of the total value of the contract. . . ." [142] The statutory provision additionally included a waiver provision for majority bidders who could demonstrate inability to secure minority participation in the subcontracting.[143]

The Sixth Circuit Court of Appeals, following the dictates of the Supreme Court's decision in *Fullilove*[144] upheld the constitutionality of this statute in 1983. Although strict scrutiny review had not yet been mandated by the Supreme Court, the Sixth Circuit specifically held that: "the compelling nature of the governmental interest in halting racial discrimination by the state itself is clear."[145]

The Sixth Circuit, finding a compelling government interest, noted that the Ohio General Assembly considered the following indicia of racial discrimination within the state's bailiwicks in enacting the statute: (1) the 1967 and 1979 judicial determinations that the state had been a "joint participant" in the exclusion of minority businesses from work on public construction projects; (2) a task force

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[137]Ohio Legislative Service Commission Summary of Enactments, 112th General Assembly 4-7 (Nov. 1977).

[138]Ohio Bldg. Chapter, AGC v. Jackson, No. 79-CV-01-247 (Franklin Cty. Common Pleas., Sept. 28, 1979).

[139]*Jackson*, slip op. at 5.

[140]*Id*. at 5 (emphasis added).

[141]*Jackson*, slip op. at 5.

[142]OHIO REVISED CODE ANN. § 123.151 (c)(2)(b) (West 1980).

[143]OHIO REVISED CODE ANN. § 1232.151(C)(3) (West 1980).

[144]Ohio Contractors Ass'n. v Keip, 713 F.2d 167 (6th Cir. 1983).

[145]*Id*. at 170.

report covering the years 1975-1977 that showed that although minority businesses constituted 7% of all Ohio businesses they received less than 0.5% of state purchase contracts; (3) a Department of Administrative Services study showing that from 1959-1975, the state awarded only 0.24% of its general construction contracts to minority businesses; and (4) an Ohio Legislative Budget Office report showing minority participation in ODOT contracts to be 0.13% in 1975, 0.3% in 1976, and 0.18% in 1977.[146]

When the Supreme Court of the United States implemented strict scrutiny in its 1989 *Croson* decision, it analyzed relevant statistical data necessary to evidence a discrimination by the governmental entity seeking to enforce remedial affirmative action.[147] Justice O'Connor's analysis approvingly made an example of *Keip*, which, as she noted, upheld a minority set-aside based on "the percentage of minority businesses in the State compared to [the] percentage of state purchasing contracts awarded to minority firms upholding [the] set-aside."[148]

The State of Ohio amended its statutory set-aside program set forth in Ohio Revised Code section 123.151, providing that: "the total value of subcontracts awarded and materials and services purchased from minority businesses shall be at least ten percent of the total value of the contract, wherever possible and whenever the contractor awards subcontracts or purchases materials or services."[149] In 1993, subsequent to the Supreme Court's strict scrutiny ruling in *Croson*, the General Assembly directed community college districts to comply with this set-aside provision.[150]

A flood of litigation arose in Ohio challenging the constitutionality of the statutory set-aside provisions, as well as the policies of state agencies enforcing state law. The result has led not only to the invalidation of Ohio's set-aside programs, but the unavailability of qualified immunity as a defense for state actors enforcing such programs.[151] Moreover, these decisions have left the debate open as to what factors, if any, would validate race-conscious measures in awarding public contracts.

State and Federal courts were called upon to scrutinize the constitutionality of the Ohio statutory set-asides, and the policies enforced by state agencies and arms of the state in three separate but concurrent actions. The first action was brought in state court by a Lebanese business owner challenging the State's refusal to certify his company for set-aside contracts under state statute.[152] The second action was also brought in federal court by an unsuccessful bidder against a community college challenging the college's MBE and FBE policies, as well as the state statutes that the

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[146] *Id*. at 171.

[147] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 488 (1989).

[148] *Id*. at 502.

[149] OHIO REV. CODE ANN. § 123.151 (C)(2)(a) (West 1990).

[150] OHIO REV. CODE ANN. § 3354.161 (West 1999).

[151] F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 584, 590 (N.D. Ohio 1998).

[152] Ritchey Produce Company, Inc. v. Ohio, No. 97APE04-567, 1997 WL 629965 at *2 (Ohio App. 10th Dist., Oct. 7, 1997).

policies enforced.[153] Finally, a third action was brought in federal court challenging the state statute and the Department of Administrative Services' enforcement of the set-aside provision in connection with a public construction project.[154]

In *Ritchey*, the state trial and appellate courts pronounced the first major blow to the Ohio statutory set-aside framework. The business owner in *Ritchey* had been denied recertification as a qualified MBE on the basis that the business owner, who was of Lebanese descent, was not "oriental" and not a member of any of the other minority groups listed in section 122.71 (E)(1) of the Revised Code.[155] The appellate court held that the statutory provision defining minorities was unconstitutional as applied to the Lebanese business owner, because he was denied MBE certification solely on account of his race.[156] While all three justices on the panel held that the business owner was wrongfully excluded from participation in the MBE set-aside program, one justice opined that the business owner fit the definition of "oriental" and that it was unnecessary to reach the constitutional issue.[157]

Of great consequence to the future of race-conscious remedial programs in the State of Ohio was the *Ritchey* court's statement that: "While remedying past discrimination may be a compelling interest, *we find it hard to envision a situation in which a race-based classification is narrowly tailored*."[158] The court did, however, propose that: "the goal of the MBE program ideally should be maximizing the opportunity for all Ohio citizens who are economically or socially disadvantaged."[159] Yet, if the judiciary cannot envision a race-based classification that is narrowly tailored, it is foreseeable that even an MBE program that considers economic and social disadvantage would not survive strict scrutiny.

Identifying those MBE's who can demonstrate the effects of discrimination by showing that they have suffered social or economic disadvantage would tend to more closely tailor the remedy to the identified discrimination. However, if a minority business enterprise that does not fit within the definition of "minority" to qualify for participation in an MBE program could establish social and economic disadvantage, that minority business would be denied participation in the MBE program solely on the basis of race and the program would be underinclusive. Alternately, the program could be deemed overinclusive if a minority business enterprise can show social and economic disadvantage, but there is no evidence that the governmental entity discriminated against that particular racial group. Moreover, the compelling interest standard requires governmental entities to demonstrate a strong basis in evidence that it participated in the discrimination of minorities. It could be argued that any remedial program benefiting minority business enterprises that have relocated to the

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[153]F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998).

[154]Associated General Contractors of Ohio, Inc. v. Drabik, No. C2-98-943 1998 WL 812241 (S.D. Ohio, Oct. 26, 1998).

[155]*Ritchey Produce*, 1997 WL 629965, at *1.

[156]*Id.* at *3.

[157]*Id.*

[158]*Id.* at *5.

[159]*Id*.

relevant market is not narrowly tailored because it does not remedy the identified discrimination against local businesses, regardless of the racial classification the minority business enterprise may be grouped. Taking the court's analysis to the extreme, the only race-conscious program that could survive constitutional scrutiny would be one that benefits only those minorities specifically identified as having been discriminated against by the governmental entity *and* who have been economically and socially disadvantaged because of the identified discrimination.

In 1998, two federal district courts within the State of Ohio were called upon to examine the constitutional viability of the "set-aside" provisions of the Ohio Revised Code, as well as the policy of a community college district that enforced the statutorily mandated "set-aside".[160] At the time these cases were pending, there had not yet been a state Supreme Court decision rendering the state statute unconstitutional. The *Ritchey* case was pending review by the Supreme Court of Ohio, and the Sixth Circuit had previously upheld the statutory set-asides in *Keip* in 1983. While the Sixth Circuit in *Keip* did not implement the strict scrutiny standard, there was indication in the *Keip* decision that the State of Ohio had identified a "compelling interest" as there were judicial findings of past discrimination by the State in the awarding of state contracts. Additionally, a legislature is presumed to know the status of the law when enacting legislation, which was confined to strict scrutiny analysis at the time the State of Ohio enacted the statutory provision, requiring community college districts to enforce the statutory set-asides.

The U.S. District Court for the Northern District of Ohio addressed the following claims brought by an unsuccessful, non-minority bidder for a construction project by the Cuyahoga Community College (a "community college district" as defined by state statute): (1) that the MBE and FBE policies of the College violated the Plaintiff's equal protection rights; (2) that the state statute mandating the MBE and FBE policies violated the Plaintiff's equal protection rights; and (3) that the state statutes were unconstitutional *per se*.[161] The plaintiff brought the action against the College and its trustees individually; the State of Ohio was not a party to the action.[162]

While the action was pending in the Northern District, the Federal District Court for the Southern District of Ohio was reviewing a direct challenge to the constitutionality of the state set-aside provision pertaining to a contract to be let by the State Department of Administrative Services.[163] The plaintiffs in *Drabik* sought injunctive and declaratory relief against the State officials and the State to prohibit the enforcement of the set-aside statute in the letting of state construction projects.[164]

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[160] *See* Associated General Contractors of Ohio, Inc. v. Drabik, No. C2-98-943, 1998 WL 812241 (S.D. Ohio Oct. 26, 1998), and F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998).

[161] F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998).

[162] *Id.*

[163] Associated General Contractors of Ohio, Inc. v. Drabik, No. C2-98-943 1998 WL 812241 (S.D. Ohio, Oct. 26, 1998).

[164] *Id.* at *2.

On October 21, 1998, the Northern District of Ohio entered its ruling upon the challenge to the policies and the underlying statutory mandates of the Cuyahoga Community College.[165] The court refrained from ruling upon the constitutionality of the state statute, as the state was not a party, as well as the plaintiff's challenge to the College's FBE policy because the plaintiff's bid had not been rejected on the basis of its failure to comply with the FBE policy.[166] However, the validity of the state statute was necessarily reviewed by the court because the college was an arm of the state, enforcing state law.[167] The court held that the college's MBE policy, which mirrored the statutorily mandated set-aside provision, was unconstitutional as to both prongs of the strict scrutiny standard.[168] Moreover, and most threatening to state officials throughout the state of Ohio, the court held that the individual defendants were not entitled to qualified immunity for their participation in enforcing the College's set-aside program and State law.[169]

The Northern District noted several factors from which it concluded that the College did not have a compelling interest in enforcing remedial programs.[170] The court discounted reliance on the evidence relied on by the State in enacting state-wide set-asides.[171] First, the court held that finding of discrimination by the state in the '60's and '70's and the statistical disparity studies of the '70's were too remote to demonstrate the required need for remedial action.[172] Secondly, the court held that neither the college nor the state demonstrated past discrimination by either governmental entity "within the area from which [the College] is likely to acquire contractors."[173] Disparity studies presented by the college were found insufficient because "they [did] not show MBE's qualified and willing to undertake [the College] construction contracts but instead rely solely on disparity between all MBE's and the distribution of contract dollars . . . ."[174]

The Northern District further held that the college's set-aside program was not narrowly tailored, finding that: (1) there was no evidence that the college or the state considered any race-neutral alternatives; (2) there was no time limit on the MBE set-aside program that has been in place since 1982; and (3) there was no requirement in the policy that an MBE demonstrate that it has been the victim of past discrimination or that it was otherwise was economically disadvantaged.[175]

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[165] *F. Buddie Contracting*, 31 F. Supp. 2d at 583.

[166] *Id*. at 584.

[167] *Id*. at 574.

[168] *Id*. at 583-84.

[169] *Id*. at 584.

[170] *F. Buddie Contracting*, 31 F. Supp. at 583.

[171] *Id*.

[172] *Id*. at 576.

[173] *Id.* at 583.

[174] *Id*.

[175] *F. Buddie Contracting*, 31 F. Supp. at 580-81.

Only one week after the Northern District entered its decision, the Southern District of Ohio ruled that the State's MBE set-aside statute was unconstitutional and permanently enjoined the defendant state officials from enforcing the state statute.[176] The court held that there was insufficient evidence of past discrimination or a remedial purpose by the State to support the set-aside program because: (1) current statistics only demonstrated the percentage of contracts actually awarded to MBE's under the set-aside; (2) evidence of past discrimination and statistical disparities found in the 1970s were too remote; (3) there was no time limit on the set-aside program; (4) there was not a stated remedial purpose contained in the statute; and (5) the availability of waivers for non-minority firms was solely discriminatory.[177]

In both federal cases, the defendants argued the constitutional validity of the state statutes, pointing out the statistical studies relied upon by the General Assembly when initially enacting the set-aside program in 1980, as well as judicial findings of past discrimination by the State as a joint participant with private industry. Both courts found that the studies were outdated, and that the finding of discrimination in the 60's and 70's did not substantiate the appropriate nexus to the remedial actions of the State in the 90's.

The federal decisions ruling upon MBE programs in Ohio will substantially affect the future of remedial, race-conscious programs. Developing a remedial program that will survive constitutional review is now uncharted territory in the State of Ohio with little more than a theoretical framework to guide government entities and state officials. Perhaps the greatest hurdle facing the state as a whole, and public officials in the State of Ohio, is the Northern District's pronouncement that state actors, enforcing state law, will be denied qualified immunity if the requisite studies do not support enforcement of race-conscious programs within the bailiwicks of the arm of the state.[178]

In *F. Buddie Contracting*, the court held that the individual defendants violated a "clearly established right" and were therefore not entitled to qualified immunity for enforcing an MBE program mandated by state law which had not yet been invalidated by the State Supreme Court.[179] While the court readily found a violation of a clearly established right, it grappled with the underlying question of whether discrimination by a state could justify the use of a set-aside by an arm of the state. Specifically, the Court stated:

> Although it is well-established that the past discrimination which establishes the compelling interest in affirmative action must have been by a governmental entity seeking to employ the affirmative action plan, it is not entirely clear to this Court that this means that a history of discrimination in the area of public construction contracts by the State of Ohio might not be considered sufficient to justify the use of a set-aside

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[176]Associated General Contractors of Ohio, Inc. v. Drabik, No. C2-98-943, 1998 WL 812241, *1, 5 (S.D. Ohio Oct. 26, 1998).

[177]*Id.* at *4-5.

[178] *F. Buddie Contracting*, 31 F. Supp. 2d at 582.

[179]*Id*. at 584

> program by an arm of the State, the College, without a showing of discrimination by that particularlized entity.[180]

The factor that is "not entirely clear" is reconciling the decision that the state actors violated a clearly established right, when the court itself was uncertain whether discrimination by the state could justify the use of remedial measures by an arm of the state.

Prior to the court's decision in *F. Buddie Contracting*, the law provided no guidance with respect to which "governmental entity" was relevant in determining the existence of past discrimination to establish a compelling interest. As a result, the college trustees relied on Ohio law, which prior to the Northern District's decision was never declared unconstitutional by the State Supreme Court.[181] Yet, the college trustees were found to have violated a clearly established constitutional right by enforcing existing statutory mandates.[182] Therefore, the College trustees were denied qualified immunity, which shields government officials from liability if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

In *Croson*, the Supreme Court reviewed the ordinances of one municipality, which did not involve state mandate.[183] The Supreme Court has not pronounced that a state has no power to remedy past discrimination throughout its jurisdiction. Since the college is an arm of the state, and the trustees followed the dictates of existing state law, they should not have been held individually liable pursuant to *Harlow*.[184] However, federal precedent in the State of Ohio denies qualified immunity for state actors and rejects state-wide remedial programs on the grounds that: "Allowing an arm of the State which has not been found to have discriminated in the past to remedy a history of discrimination by the State itself would be tantamount to requiring it to remedy broad societal discrimination, which would be an exercise in the tail wagging the dog."[185]

Interestingly, the court arrived at this opinion on the grounds that an arm of the state should not "be required to remedy the discriminatory practices of other departments of the state . . ." and that "an MBE could not sue [the College] for discriminatory contracting customs of the Ohio Department of Transportation."[186] However, in a matter involving constitutional magnitude, this logic is wanting of constitutional analysis to justify infringing upon a state's right to remedy discrimination within its own bailiwicks. The state can only act through its arms, whether to discriminate, or to remedy discrimination. The Court's logic suggests that the state could not mandate the state entities to enforce remedial legislation to remedy the effects of past discrimination by the state. This suggestion narrows the

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[180] *Id*. at 580.

[181] *Id.* at 582.

[182] *Id*. at 583-84.

[183] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[184] Harlow v. Fitzgerald, 457 U.S. 800 (1982).

[185] *F. Buddie Contracting*, 31 F. Supp. 2d at 580.

[186] *Id*.

possibilities for governmental entities to remedy past discrimination by leading to the logical extreme that a state must identify which of its departments, or arms, have specifically discriminated in the past or refrain from enacting remedial measures to address the effects of discrimination by the state.

The Ohio experience evidences that structuring a race-conscious affirmative action program within the context of legal constraints will be a nearly insurmountable task. A strong basis in evidence necessary to validate such a program would have to approach identification of those minority enterprises actually discriminated against by the governmental entity and lingering social and economic disadvantage suffered by the enterprise resulting from the discrimination. However, establishing that the particular governmental entity discriminated against particular minority enterprises would be nearly impossible since set-aside statutes have been enforced for over a decade.[187] Any predicate study would therefore conclude that the governmental entity has not participated in recent discriminatory practices. The tenure of set-aside programs and the resultant inability to identify recent discrimination by the governmental entity eliminates the possibility of developing any affirmative action program that would survive strict scrutiny. Such a result would lead to a return to the status quo that existed prior to the initiation of that entity's affirmative action programs. The difficulty in developing an affirmative action program to comply with the Supreme Court dictates was reflected in the State Appellate Court's statement that: "we find it hard to envision a situation in which a race-based classification is narrowly tailored."[188]

The Northern District questioned the validity of disparity studies showing the smaller size of MBE's to evidence the affects of discrimination.[189] Specifically, the court noted that while discrimination may cause MBE's to remain relatively small, evidence of size disparity and "reverse causation" is "more than likely the result of *societal discrimination* which may have delayed the development of MBE firms thereby rendering the *unqualified* for bigger jobs and skewing statistics to show disparity between large and small firms as disparity between minority and non-minority firms."[190] The Southern District of Ohio commended an executive order promulgated by Governor Voinovich that encourages the elimination of race-based criteria in assisting economically disadvantaged business.[191]

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[187]*See* OHIO REVISED CODE ANN. § 123.151(C)(2)(b) (West 1980) and F. Buddie Contracting Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571, 579-80 (citing Middleton v. City of Flint, Michigan, 92 F.3d 396 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997) (Past judicial findings of discrimination do not justify race-conscious programs because subsequent efforts to rectify discrimination have been largely successful. A nine year race-conscious program was too long as racial disparities had already evolved into near parity)).

[188]Ritchey Produce Co. v. Ohio. No. 97APE04-567, 1997 WL 629965, at *2 (Ohio App. 10th Dist. Oct. 7, 1997).

[189]F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998).

[190]*Id*. at 582-83 (emphasis added).

[191]Associated General Contractors of Ohio v. Drabik, No. CS-98-943, 1998 WL 812241 at *5 (S.D. Ohio, Oct. 30, 1998).

The cumulative effect of the courts' opinions in the State of Ohio is potentially devastating to the future of race-based affirmative action programs. Entities or arms of the state will have difficulty demonstrating discrimination through disparity studies for two significant reasons: (1) MBE participation in state construction contracts has been evident over the recent years because of the State mandated set-aside programs in existence since 1982; and (2) studies demonstrating statistical disparities in size, social and economic disadvantage may be deemed to be the result of "*societal discrimination*" thereby diminishing the likelihood of showing a strong basis in evidence of a compelling interest to remedy the effects of discrimination.[192]

The judicial decisions within the state of Ohio have substantially narrowed the range of permissible programs designed to remedy past discrimination in several respects: (1) governmental entities may be required to show unsuccessful results of race-neutral alternatives; (2) an arm of the state may not be required to enforce state mandated affirmative action plans; (3) enforcing a remedial program without the "requisite," but undefined, disparity studies, will result in personal liability for state actors; and (4) a program that does not link the effects of discrimination to those who actually were discriminated against by the state entity will not be narrowly tailored.[193]

The most prudent method to address and promote social inclusion would be to consider and develop race-neutral alternatives. In the area of contracting, governmental entities could target social and economic disadvantages, rather than race itself to promote MBE participation. Methods to be adopted could include waiving bonding requirements, offering financial and/or training and simplifying bidding procedures for those firms found to be socially and economically disadvantaged. Governmental entities may also consider providing incentives to contractors who utilize firms, or hire individuals, from the geographic area.

Social inclusion may still be promoted through indirect means, such as funding programs that provide work training to underprivileged individuals. Educational institutions could provide incentives through financial aid or otherwise to applicants from urban schools or to applicants whose parents have not received post-secondary education. Targeting social and economic disadvantage at its core would assist the development of opportunities for those who continue to suffer the lingering effects of discrimination.

Direct race-conscious policy strategies to promote social inclusion should be formulated with caution, and with many underlying factors taken into consideration to maximize the potential validity under strict scrutiny. Any remedial action taken by a governmental entity must be formulated based upon a showing of discrimination by the entity within the limited geographic area in which the governmental unit exists. For example, arms of the state should not rely on state statutes mandating affirmative action programs, but instead examine the existence and effects of discrimination within the market in which the governmental entity specifically operates. Moreover, minority firms should be required to demonstrate social and economic disadvantage. Qualifying racial classifications should be limited to those

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[192]*See* F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998) and Associated General Contractors of Ohio v. Drabik, No. CS-98-943, 1998 WL 812241 (S.D. Ohio, Oct. 30, 1998).

[193]*Id.*

groups who have been identified, by statistics or direct evidence, as subject to discrimination by the governmental entity.

Determining the existence, or continuing effects of discrimination within the governmental entity's bailiwicks requires extensive statistical analysis of the relevant market. The more narrow the statistical comparisons, the more likely they are to support a strong basis in evidence for the need for remedial programs. For example, it would be prudent to compare the percentage of willing, and qualified, minority business enterprises within the specific industries and types of services contracted for by the governmental entity. This may require separate statistical comparisons for each type of contract let by the government to each identifiable racial classification. Such statistical analysis should be conducted on a regular and continuing basis to ensure the continued validity of the evidence demonstrating a need for remedial action. In addition, any race-conscious program should have meaningful waiver provisions and be of limited duration.

The strict scrutiny analysis as applied to affirmative action programs requires the development of new policies, and perhaps new avenues, to promote social inclusion. Shifting the focus from race to social and economic disadvantage may provide a foundation for providing opportunities to those who are underrepresented due to the effects of societal discrimination.

VI. CONCLUSION

At the dawn of affirmative action, race-conscious programs were deemed not only constitutional, but required to ensure equal opportunity in fact, not just in theory. Recent developments in the law suggest that affirmative action has reached the eve of its constitutional viability.[194]

Affirmative action began with executive orders for government actors to require that contractors take affirmative action to ensure employment opportunities without regard to race.[195] To enforce such mandates, the Office of Federal Contract Compliance issued several regulations requiring contractors to implement plans to obtain the "goal" of minority utilization on a percentage basis. Minority set-asides were mandated, enforced and upheld. Contractors contesting affirmative action programs and set-asides were deemed to have "voluntarily" accepted the terms of the contract; courts consistently held that such objection to affirmative action requirements was in the nature of a contract dispute rather than an equal protection concern. Judicial, legislative and administrative mandates *required* government officials to comply with set-asides and other race-conscious "goals;" all of which were upheld throughout the country. The Supreme Court explicitly approved a federal set-aside program in the 1980 *Fullilove* decision.[196] Permissible goals included remedying societal discrimination, increasing minority participation, and achieving racial diversity.

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[194] *See* F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio 1998) and Associated General Contractors of Ohio v. Drabik, No. CS-98-943, 1998 WL 81224 (S.D. Ohio, Oct. 30, 1998).

[195] Exec. Order of September 27, 1972, (I believe there are additional ones cited in earlier portions of the article)

[196] Fullilove v. Klutznick, 448 U.S. 448 (1980).

While it cannot be disputed that the effects of societal discrimination continue, the social, political, economic and judicial frameworks have so evolved as to drastically alter the viability of affirmative action within the existing context of equal protection jurisprudence. Over time, overt discrimination has diminished, but in turn, the nexus between remedial action and discrimination has become more difficult to define within constitutional parameters. It was perhaps politically easier for the judiciary to approve of affirmative action when continuing acts and effects of discrimination were conspicuously pervasive. Remedying societal discrimination or encouraging racial diversity remain laudable, but legally insufficient. As it became more difficult to link remedy to specific harm, the opponents of affirmative action became increasingly successful in harnessing the "color-blind" Constitution, which had previously been interpreted to permit consideration of race as a factor in providing opportunities to individuals who had historically been denied equal opportunity in fact due to racial bias.

Non-minorities have been increasingly successful in their challenges to race-conscious remedial programs on the basis that programs that require minority inclusion without sufficient supportive studies have unconstitutionally excluded them on the basis of race.[197] Ironically, a member of a suspect class asserting "unlawful discrimination" has been judicially required to prove "invidious discrimination", i.e. discrimination due to stereotypes and prejudices associated with racial classifications. Even in the cases in which members of suspect classes allege a discriminatory impact of race neutral decision-making, they are required to demonstrate significant statistical disparities between the inclusion of non-minorities and minorities. Query today whether a member of a minority group who can demonstrate 90% exclusion of minorities in employment or government contracts could succeed in a discrimination claim against a government employer or prime contractor who cannot statistically demonstrate a compelling interest to sustain a 10% minority set-aside under current affirmative action parameters.

Throughout the evolving jurisprudence concerning race-conscious remedial programs, state actors have struggled to abide by the law of the day with little guidance as to their duties under the law. When affirmative action was mandated, state actors were not instructed as to how to accomplish the goal of social inclusion. Over time, the judiciary upheld federal mandates, voluntary affirmative action programs, and minority set-asides. State actors following the law, could rely on the "good faith" reliance on the law, and their efforts to promote diversity and inclusion were applauded. As it became increasingly difficult to link remedy with discrimination, and as the judiciary heightened scrutiny of race-conscious programs, remedial programs soon met their demise. Now that affirmative action has suffered critical defeats, state actors are left with little, if any, guidance of how to promote social inclusion within the context of current legal parameters.

The Ohio experience dramatically illustrates the evolution, and near demise, of affirmative action as well as the potential for personal liability for those state actors implementing statutorily required minority programs. Strict scrutiny analysis, as applied by the federal district courts of Ohio, requires a direct statistical link between

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[197]*See* F. Buddie Contracting, Ltd. v. Cuyahoga Community College, 31 F. Supp. 2d 571 (N.D. Ohio, Oct. 21, 1998) and Associated General Contractors of Ohio v. Drabik, No. CS-98-943, 1998 WL 81224 (S.D. Ohio, Oct. 30, 1998). (and every other case after Adarand cited in the article)

identifiable discrimination by the governmental entity and the individuals affected by the discrimination, as well as an exacting burden of establishing that any race-conscious program is narrowly tailored. The power of the state to enforce race-conscious remedial programs has been threatened, if not discounted absent exacting statistical analysis. The statistical disparity sought by the judiciary may be impossible to demonstrate in light of the fact that arms of the state have enforced statutory set-asides in the last two decades that ensure minority participation.

State actors are warned by recent imperatives throughout the nation and within the state of Ohio that enforcing race-conscious programs may be found to violate clearly established law, even if the state actors rely on state statute. The potential for individual liability for enforcing race-conscious measures may potentially eradicate affirmative action. At the least, any efforts to achieve social inclusion within the context of existing legal parameters should first include implementation of race-neutral alternatives. Any effort to include racial classification as a factor in decision-making must be supported by strong statistical studies.

Current legal parameters provide little guidance to state actors as to what their powers and duties encompass under the law. If nothing else, the evolution of the law of affirmative action and equal protection establishes one truism: "[t]he law is not the same at morning as at night."[198] New policies and directives must be established in order to continue the promotion of social inclusion given the jurisprudential shift toward eradication of once required affirmative action.

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[198] GEORGE HERBERT, JACULA PRUDENTUM (1651).

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