AFFIRMATIVE ACTION: AN IDEA WHOSE TIME HAS GONE[1]

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.[2]
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> 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 accorded the same protection, then it is not equal.[3]

Affirmative action[4] is a program that has generated a tremendous amount of controversy and debate since its inception.[5] Perhaps nowhere

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[1] This Comment presents one side of the race-based affirmative action debate. For contrary arguments, see generally Barbara Bader Aldave, *Affirmative Action: Reminiscences, Reflections, and Ruminations*, 23 S.U. L. REV. 121 (1996); Note, *An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education*, 109 HARV. L. REV. 1357 (1996); David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921 (1996); Laura C. Scanlan, Note, Hopwood v. Texas: *A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. REV. 1580 (1996).

[2] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The notion of equality was secured by the inclusion of the Equal Protection Clause in the Fourteenth Amendment. *See* WILLIAM D. GUTHRIE LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 107-08 (1898).

> By the Fourteenth Amendment, the principle of equality before the law, a principle so vital and fundamental in American institutions, ceased to be a mere theory or sentiment, or an implied condition, and became incorporated into the organic law as the fundamental right of every individual . . . . The provision, if properly construed, assures to every person within the jurisdiction of any State, whether he be rich or poor, humble or haughty, citizen or alien, the protection of equal laws, applicable to all alike and impartially administered without favor or discrimination.

Id. at 110.

[3] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 289 (1978).

[4] *See* BLACK'S LAW DICTIONARY 59 (6th ed. 1990) (citing NLRB. v. Fansteel Metallurgical Corp., 306 U.S. 240, 258 (1939); NLRB. v. Leviton Mfg. Co., 111 F.2d 619, 625 (1940)) "Affirmative action" is defined as

> [e]mployment programs required by federal statutes and regulations designed to remedy discriminatory practices in hiring minority group mem-

is this tension felt more severely than in the context of admissions policies at colleges and universities across the country. Each year, many of these institutions admit minority[6] students who are less qualified than their nonminority counterparts.[7] The repercussions of this reverse-

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bers; *i.e.* positive steps designed to eliminate existing and continuing discrimination, to remedy lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination; commonly based on population percentages of minority groups in a particular area. Factors considered are race, color, sex, creed and age.

Id.

[5] "Few constitutional questions in recent history have stirred as much debate" as affirmative action. DeFunis v. Odegaard, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting). Recent polls reflect this controversy. For example, this question was posed to over 2,000 people in a NBC News/*Wall Street Journal* Poll: "Dealing with affirmative action . . . how important is this in deciding who you will vote for as president?" Forty-four percent of those polled indicated that this issue was extremely important as a voting issue. *See* ROPER CENTER FOR PUBLIC OPINION, NBC News/*Wall Street Journal* Poll, June 27, 1996, *available in* WESTLAW, POLL Database. In response to the question: "[d]o you think white men should be covered . . . under federal affirmative action laws?," approximately 55% of those polled responded in the affirmative. *See id.* Approximately 63% of African Americans and 62% of Hispanics agreed that white men should be covered under these policies. *See* ROPER CENTER FOR PUBLIC OPINION, NBC News/*Wall Street Journal* Poll, September 28, 1995, *available in* WESTLAW, POLL Database. In another survey, 54% of people polled agreed that federal affirmative action programs should be provided for low-income people rather than for people of a specific race or sex. *See id.*

[6] For purposes of this Comment, the terms "minority" and "nonminority" are used merely to distinguish between what would generally be considered "whites" and "nonwhites." For example, a Hispanic would be considered a "minority," while an Italian American would not. The author recognizes the inexactness of these distinctions, and any offense as a result of their use is unintended.

[7] *See* Patricia Alex, *N.J. Offers Haven for Affirmative Action*, BERGEN RECORD, July 22, 1995, at A1. One program that some commentators have criticized is the Minority Student Program (MSP) at Rutgers University Law School-Newark, which, in some years, is comprised of 90% minority students. *See id.* However, Dean Roger I. Abrams claims the percentage of nonminorities included in the MSP is often much higher. *See* Interview with Roger I. Abrams, Dean of Rutgers University Law School-Newark, in Newark, N.J. (July, 1997) [hereinafter "Abrams Interview"]. While nonminority students are eligible for the MSP, they must first demonstrate that they "grew up as members of low-income families with a history of poverty or . . . can demonstrate that for other reasons they are educationally disadvantaged." *See* RUTGERS NEWARK, THE STATE UNIVERSITY OF NEW JERSEY, LAW SCHOOL ADMISSIONS BULLETIN (1994-96) at 20.

The average GPA for students entering through the MSP is 3.0, and the average LSAT score is 149, which falls in the 47th percentile. *See* Alex, *supra*, at A6. By contrast, students who are admitted through the regular admissions program have an average GPA of 3.4 and an average LSAT score of 161, which is in the 89th percentile. *See id.* MSP students are also eligible for a first-year tutorial program, a two-week summer orientation program, a summer internship program, and a federal judicial internship program. *See* Janice S. Robinson, *Unlocking the Doors to Legal Education: Rutgers-Newark Law School's Minority Student Program*, N.J. LAW., Nov.—Dec. 1992, at 17-19. Similar programs are not available to students admitted through the regular admissions process. *See* Alex, *supra*, at A6. Nonetheless, Abrams, a vigorous supporter of the MSP,

discrimination have led to feelings of resentment, racial polarization, and the reinforcement of negative stereotypes.[8] It is both ironic and disheart-

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states that affirmative action is necessary, useful, and will continue at his school. *See* Abrams Interview, *supra*.

Roger Abrams has also stated that "[the] legality of [the MSP] was upheld by the Third Circuit." *See* Robert Schwanberg, *Courts Turn Colorblind on Affirmative Action*, STAR-LEDGER, Aug. 18, 1996, at 42. It appears, however, that the rejected nonminority student who challenged the constitutionality of the MSP lacked standing as his qualifications were too low. *See* Doherty v. Rutgers Sch. of Law-Newark, 651 F.2d 893, 902 (3d Cir. 1981).

In contrast, Seton Hall University School of Law has no formal affirmative action program. *See* Interview with Ronald J. Riccio, Dean of Seton Hall University School of Law, in Newark, N.J. (Sept. 30, 1996) [hereinafter "Riccio Interview"] (on file with the *Seton Hall Law Review*). Seton Hall does maintain a Committee on Legal Education program (CLEO), but does not keep statistics regarding the racial composition of the program. *See id.* A CLEO program is one in which minority students receive conditional acceptance upon successful completion of summer classes at the law school. *See* Hopwood v. Texas, 861 F. Supp. 551, 557 n.10 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996). Although requested by the author, Seton Hall does not ordinarily keep statistics concerning minority application rates, acceptance rates, median grade point averages, or LSAT scores. *See* Riccio Interview, *supra*.

At the University of Virginia, the disparity of SAT scores between minority students and nonminorities in 1988 was 240 points. *See* DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 3 (1991). At the University of California at Berkeley, African Americans and Hispanics are "up to twenty times (or 2000%) more likely to be accepted for admission than Asian American applicants who have the same academic qualifications." *Id.* Without affirmative action programs, college acceptance rates for African American applicants would drop from 70% to 52%. *See* Gene Koretz, *Less Diversity At B-Schools? Minority Admissions May Be At Risk*, BUS. WK., Apr. 29, 1996, at 26. The same numbers for Hispanics would fall 18 points, from 78% to 60%. *See id.*

At the University of Michigan School of Law, only 4.8% of white applicants with a GPA of 3.0 to 3.24 and a LSAT score between 156 and 166 were accepted. *See* George Cantor, *Would Policies at U. of Mich. Make The Perfect Test Case on Affirmative Action?*, DET. NEWS, July 13, 1996, at 12. Among African Americans with the same qualifications, the acceptance rate was 85%. *See id.*

[8] *See* Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment). "Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences." *Id.*; *see also* Hayes Johnson, *Racism Still Smolders on Campus*, USA TODAY, May 10, 1988, at D1 (discussing how a black student's dormitory room door was set on fire and the words "nigger" and "KKK" were written on the door; affirmative action was cited as a possible cause); Carl Mollins, *A White Male Backlash: Critics Attack Affirmative Action as Reverse Discrimination*, MACLEAN'S, Mar. 20, 1995, at 23 (discussing flyers delivered to 15 black students at Berkeley's law school reading "[r]ejoice you crybaby niggers—it's affirmative action month. When I see you in class it bugs the hell out of me because you're taking the seat of someone qualified."); Judy Peet, *Bias, Apathy Grow Among Students*, STAR-LEDGER, Nov. 19, 1990, at 1 (discussing students at Rutgers University, Montclair State University, William Patterson College, and Princeton University holding various demon-

ening that the after-effects of affirmative action perpetuate the very same problems that these programs were enacted to counter.[9]

Unfortunately, the negative social ills that accompany affirmative action are not the only flaws inherent in these programs. Some statistical studies show that affirmative action programs have been abysmal in attaining the premier goal of such plans, namely, the recruitment and advancement of minority students.[10] In fact, several colleges show a decrease in the amount of minority students admitted from 1984 to 1990.[11] Additionally, recent studies show the graduation rate among African American[12] college students to be only fifty-nine percent, compared with eighty-four percent for whites and eighty-eight percent for Asians.[13] Unfortunately, fear of being labeled a racist prohibits many opponents of affirmative action from openly criticizing these programs.[14] As such, the existence of affirmative action is fostered by political-correctness and liberalism rather than results-based analysis.[15]

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strations protesting different types of harassment); Andrea Stone & John Larrabee, *Racism Taints Universities' Hallowed Halls: As Diversity Increases, So Do Tensions*, USA TODAY, Nov. 9, 1992, at A6 (citing to various racial incidents at George Washington University, State University of New York at Oneonta, University of North Carolina, and others); *See generally* D'SOUZA, *supra* note 7, at 3-4.

[9] *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 527 (1989) (Scalia, J., concurring) (citing ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975)).

> '[A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.'

Id.

"A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end it may produce that result despite its contrary intentions." *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting).

[10] *See* Podberesky v. Kirwan, 38 F.3d 147, 154 n.3 (4th Cir. 1994); *see also* Susan Tifft, *The Search For Minorities: Despite Increased Wooing, Few Go On To College*, TIME, Aug. 21, 1989, at 64.

[11] *See Podberesky*, 38 F.3d at 154 n.3.

[12] For purposes of this Comment, the term "African American" denotes blacks, regardless of their national origin. For a discussion of the distinction as it applies to *Hopwood*, see *infra* note 160.

[13] *See* Gary S. Becker, *End Affirmative Action As We Know It*, BUS. WK., Aug. 21, 1995, at 16.

[14] *See generally* Michael A. Fletcher, *Losing Its Preference: Affirmative Action Fades as Issue*, WASH. POST, Sept. 18, 1996, at A12; Abigail Thernstrom, *Affirmative Action Backfires at Harvard Law Review*, WALL ST. J., Nov. 18, 1992, at A17.

[15] One example of the nonsensical nature of certain affirmative action programs involved plans aimed at increasing membership on a school's law review. *See* Edward S. Boylan, *Candor on Affirmative Action Can Prevent a Turn to Extremes*, THE RECORD,

This Comment examines the current status of affirmative action, particularly in light of the Fifth Circuit's holding in *Hopwood v. Texas*.[16] Part I focuses on past Supreme Court rulings concerning affirmative action, specifically those of *Regents of the University of California v. Bakke*,[17] *City of Richmond v. J.A. Croson Co.*,[18] *Metro Broadcasting, Inc. v. F.C.C.*,[19] and *Adarand Constructors, Inc. v. Pena*.[20] Part II provides an analysis of the facts and decision in *Hopwood*. Part III discusses the problems inherent in affirmative action, and provides statistical studies concerning the failure of affirmative action programs in attaining positive results for minorities. Part IV concludes by suggesting alternatives to affirmative action that ideally will result in substantial gains in educational opportunities for minorities, while also reducing or eliminating the negative social consequences and reverse-discrimination that inevitably accompany these programs.

July 19, 1995, at N7; Lisa Anderson, *Law Review Masks Diversity in a New Admission System*, N.Y. TIMES, July 7, 1995, at A1.

Ordinarily, students are selected anonymously for law review through two processes. *See* Thernstrom, *supra* note 14, at A17. The first is by academic achievement, whereby students with the top scholastic averages receive invitations, and the second is through a writing competition. *See id.*

An anonymous acceptance system, similar to that described by Thernstrom above, eliminates bias, and acceptance is gained through merit and hard work. Various law schools, however, have instituted affirmative action programs designed to artificially increase minority representation on law review. At the University of Pennsylvania School of Law, for example, in order to include a "requisite number of minorities, an applicant is deemed eligible for consideration if he/she does not score in the lowest ten percent on an essay test and in the lowest forty percent on an editing test." *Boylan*, supra, at N7. Harvard Law Review has an affirmative action program whereby minority students selected for editorial slots do not have to compete in grade or writing competitions. *See* Thernstrom, *supra* note 14, at 17. The Harvard plan was called "a disaster" when two African American editors were unilaterally chosen to edit an article written by an African American Harvard professor. *See id.* Ultimately, the decision to circumvent the usual selection procedure led to the appointment of an outside investigator, and several law review members were forced to retain counsel. *See id.*

In addition, the Columbia Law Review had "set aside up to five extra places on its enlarged staff of 40. In selecting those students, preference [was] given to gay, handicapped, and poor applicants, as well as women and members of minority groups." Daniel Seligman, *Accountants' Preferences in Sex, Sandinistas on Welfare, The Unknown Liberal, and Other Matters*, FORTUNE, June 5, 1989, at 339. Although the stated purpose of the Columbia affirmative action plan was to remedy past discrimination against the listed groups, the editor-in-chief of the law review, and a major proponent of the program, admitted he had no "conclusive evidence of past discrimination." *Id.*

[16] 78 F.3d 932 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996)

[17] 438 U.S. 265 (1978).

[18] 488 U.S. 469 (1989).

[19] 497 U.S. 547 (1990).

[20] 115 S. Ct. 2097 (1995).

I. SUPREME COURT CASES

The issue of affirmative action has reached the Supreme Court in a variety of contexts; most frequently those of education and employment.[21] Most often a nonminority alleges that an affirmative action program is in violation of the Equal Protection Clause of the Fourteenth Amendment.[22] Numerous other cases have been brought under Title VII of the Civil Rights Act of 1964.[23] The scrutiny that the Court applies to affirmative action plans has ranged from intermediate[24] to strict.[25] Over the past decade, the Court's judicial scrutiny of these programs has narrowed consid-

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[21] *See generally* Adarand Constructor, Inc. v. Pena, 115 S. Ct. 2097 (1995) (federal highway contracts); United States v. Fordice, 505 U.S. 717 (1992) (dismantling of dual university system); Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990) (broadcast licenses); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (city construction contracts); United States v. Paradise, 480 U.S. 149 (1987) (police promotion procedures); International Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986) (firefighter promotion procedures); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (preferential layoff policy); Fullilove v. Klutznick, 448 U.S. 448 (1980) (local public works contracts); United Steelworkers of America v. Weber, 443 U.S. 193 (1979) (minority training program); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (medical school admissions policy); *see also infra* notes 111-132 and accompanying text (discussion of *Adarand*); *infra* notes 104-110 and accompanying text (discussion of *Metro Broadcasting*); *infra* notes 85-103 and accompanying text (discussion of *Croson*); *infra* notes 45-84 and accompanying text (discussion of *Bakke*).

[22] *See supra* note 2.

[23] Title VII of the Civil Rights Act of 1964 provides, in relevant part:

> Discrimination Because of Race, Color, Religion, Sex, or National Origin
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> (a) It shall be an unlawful employment practice for an employer-
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2 (1992).

[24] *See* Craig v. Boren, 429 U.S. 190, 197 (1976). A classification must be substantially related to an important governmental interest to satisfy intermediate judicial scrutiny. *See id.*

[25] *See* THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 845 (Kermit L. Hall ed., 1992). Under strict scrutiny, "a challenged governmental action must be 'closely' related to a 'compelling' governmental interest." *Id.* The strict scrutiny test "ensures that the means chosen 'fit' [the] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." *Croson*, 488 U.S. at 493.

erably. *DeFunis v. Odegaard*,[26] *Bakke*, and *Hopwood* deal with affirmative action in the educational context. *Adarand* and *Croson* concern affirmative action programs aimed at government contracts.

A. DeFunis v. Odegaard

In *DeFunis*, the Supreme Court declined to hear the issue of affirmative action in the context of law school admissions.[27] Marco DeFunis, Jr. applied to the University of Washington Law School in 1971.[28] He was denied admission, and thereafter sought an injunction claiming that the law school's affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment.[29] The trial court issued the injunction ordering DeFunis admitted to the school.[30] The Washington Supreme Court reversed, holding that the admissions policy utilized by the law school was constitutional.[31] Justice Douglas, as Circuit Justice, granted a stay pending the final disposition of the case.[32] As a result of the stay, DeFunis continued his studies at the law school. By the time the case reached the Supreme Court, DeFunis was in the first semester of his third year.[33] The law school stated that he would be able to continue his legal studies and graduate.[34] As such, the Court held that the issue of whether the admissions policy was constitutional was moot, because the controversy between the two parties had "ceased to be 'definite and concrete.'"[35]

Justice Douglas dissented and offered an analysis of the admissions process.[36] The dissent explained that the school utilized a dual-

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[26] 416 U.S. 312 (1974).

[27] *See generally id.*

[28] *See id.* at 314.

[29] *See id.* DeFunis claimed the "procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race." *Id.* DeFunis did not represent a class of plaintiffs, but brought the suit alone against the members of the Board of Regents of the University of Washington, as well as various officers and faculty members. *See id.*

[30] *See id.* at 314-15.

[31] *See DeFunis*, 416 U.S. at 315.

[32] *See id.*

[33] *See id.*

[34] *See id.* The Law School first stated that DeFunis would be required to ask the faculty's permission to continue in the school after he completed the semester in which he was enrolled. *See id.* On responding to the petition for certiorari, however, the school stated DeFunis would graduate "regardless of the outcome of this appeal." See *id.* at 315 n.2.

[35] *Id.* at 317 (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)). The Court also found that the question presented by the case was "capable of repetition, yet evading review." *Id.* at 318-19. (citations omitted).

[36] *See generally DeFunis*, 416 U.S. at 320-48 (Douglas, J., dissenting).

admissions program that classified applicants based on race.[37] Applicants to the law school, according to the dissent, indicated whether their ethnic origin was either "black, Chicano, American Indian, or Filipino."[38] Justice Douglas explained that the applications of nonminority students were in jeopardy of being summarily rejected by the admissions chairman, whereas minority applications were not.[39] The dissent also found that African American students were separately reviewed by a first-year African American student and a professor who served on the school's Committee on Legal Education program.[40] The dissent noted that the law school computed an index called the "Predicted First Year Average."[41] Based on this index, the dissent analyzed the disparity between DeFunis's qualifications and that of minority applicants.[42] The dissent indicated that although DeFunis maintained an index score of 76.23 and was denied, all but one of the admitted minority students had lower index scores.[43] Justice Douglas argued that the Court should subject the affirmative action policy to strict judicial scrutiny and hold that "[t]he consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination."[44]

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[37] *See id.* at 320-23 (Douglas, J., dissenting).

[38] *See id.* at 320 (Douglas, J., dissenting); *see also infra* notes 285-289 and accompanying text (discussing the inexactness of the selection process).

[39] *See DeFunis*, 416 U.S. at 323 (Douglas, J., dissenting).

[40] *See id.* at 323 (Douglas, J., dissenting). Although minority applications were considered competitively with one another, they were not compared to the regular applications. *See id.* The law school stated that an individual's ethnicity or race was considered "as one factor in our general attempt to convert formal credentials into realistic predictions [of success]." *Id.* at 324 n.5 (citation omitted).

[41] *See id.* at 321 (Douglas J., dissenting). This average is computed by calculating the sum of the applicants grade point average, law school admissions test score, and writing test score. *See id.* n.1.

[42] *See id.* at 324 (Douglas, J., dissenting).

[43] *See id.* at 324-25 (Douglas, J., dissenting). Thirty-seven minority applicants gained admission under this procedure. *See id.* at 324. "Of these, 36 had averages below DeFunis' 76.23, and 30 had Averages below 74.5, and thus would ordinarily have been summarily rejected by the Chairman." *Id.* Additionally, 48 nonminority applicants were admitted whose averages were lower than DeFunis's. *See id.* Twenty-three of these applicants were veterans, and the other 25 had attractive credentials despite their low scores. *See id.*

[44] *DeFunis*, 416 U.S. at 333 (Douglas, J., dissenting) (citations omitted). Justice Douglas determined the law school had admitted less qualified minority students in place of better qualified nonminority ones, to achieve a "reasonable representation." *See id.* at 326. Justice Douglas illustrated, however, that an admissions committee would find a better student in a "black applicant who pulled himself out of the ghetto into a junior college [and demonstrated] motivation, perseverance, and ability . . . than the son of a rich alumnus who achieved better grades at Harvard." *Id.* at 331. The distinction, according to Justice Douglas, was that an applicant who demonstrated potential should be given

B. *Regents of the University of California v. Bakke*

In *Regents of the University of California v. Bakke*,[45] one of the most infamous cases in United States Supreme Court history, the Court provided a fractured analysis of affirmative action in the "reverse-discrimination" context. Allan Bakke, a white male, applied to the Davis Medical School at the University of California in both 1973 and 1974.[46] Although there were four available slots that had not been filled, Bakke's 1973 application was denied as it "had come late in the year."[47] Although Bakke then filed his 1974 application early and received a "benchmark" score of 549 out of 600, he was again rejected.[48] Some applicants whose grade point average (GPA), Medical College Admissions Test (MCAT) scores, and corresponding benchmark scores were significantly lower than Bakke's, however, were admitted to the medical school through the use of a special admissions program.[49]

The medical school utilized a dual-admissions policy, and applicants who indicated that they were "economically or educationally disadvantaged" or were members of a "minority group" were considered by a "special admissions committee."[50] All other applicants were evaluated by the regular admissions committee.[51] Applicants in the regular admissions category were subject to immediate rejection if their GPA was 2.5 or less,[52] while special admissions applicants did not have to meet this standard.[53] Applicants in the special admissions program were not com-

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preference, regardless of whether that potential is linked to race or ethnicity. *See id.* at 332.

[45] 438 U.S. 265 (1978).

[46] *See id.* at 276.

[47] *Id.* Bakke was never considered for the four additional slots as those were reserved for the special admissions program. *See id.*

[48] *See id.* at 277. The benchmark score was computed by adding scores from interviewers' summaries, Medical College Admissions Test scores, grade point average, science course grade point average, extracurricular activities, letters of recommendation, and biographical data. *See id.* at 274. In his 1973 application, Bakke received a "strong benchmark score of 468 out of 500." *Id.* at 276.

[49] *See id.* at 277; *see also* Appendix A.

[50] *Bakke*, 438 U.S. at 274-75. The school never adopted a formal definition of the term "disadvantaged." *See id.* In 1973, applicants were asked if they considered themselves to be "economically and/or educationally disadvantaged." *Id.* at 274. In 1974, applicants to the medical school were asked whether they wished to be considered as a member of a "minority group," which included "Blacks, Chicanos, Asians, and American Indians." *Id.* (citation omitted) (internal quotation marks omitted); *see also infra* notes 285-289 and accompanying text (discussing the inexactness of the selection process) Applications that indicated "yes" to either question were forwarded to the special admissions committee. *See Bakke*, 438 U.S. at 274.

[51] *See Bakke*, 438 U.S. at 273.

[52] *See id.*

[53] *See id.* at 275.

pared against the regular admissions applicants, and sixteen seats had been "prescribed" for these special admissions students.[54] Although 245 white students applied as "disadvantaged" through the special admissions program, not one was accepted.[55]

After his 1974 application was rejected, Bakke sued the medical school claiming that they applied an unconstitutional quota system.[56] Bakke alleged violations of Title VI of the Civil Rights Act of 1964,[57] the Equal Protection Clause of the Fourteenth Amendment,[58] and Article I, § 21 of the California Constitution.[59]

The trial court held the dual-admissions policy unconstitutional, and the California Supreme Court affirmed.[60] The United States Supreme Court heard the case in 1978.[61] Justice Powell, providing the crucial "swing vote," opined that, although the special quota program utilized by the medical school was unconstitutional, an individual's race or ethnic background could be used as a "plus" in admissions decisions.[62] Having

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[54] *See id.*

[55] *See id.* n.5. "Indeed, in 1974, at least, the special committee explicitly considered only 'disadvantaged' special applicants who were members of one of the designated minority groups." *Id.* at 276.

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

[57] *See id.* at 278. Section 601 of Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (1992).

[58] *See supra* note 2.

[59] *See Bakke*, 438 U.S. at 278. Article I, § 21 of the California Constitution provides that "[n]o special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." CAL. CONST. art. I, § 21.

[60] *See Bakke*, 438 U.S. at 270.

[61] *See id.* at 265.

[62] *See id.* at 317, 320.

> In such an admissions program, race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important.

Id. at 317.

labeled the program unconstitutional, Justice Powell directed that Bakke be admitted to the Medical School.[63]

Justice Stevens, along with Chief Justice Burger and Justices Stewart and Rehnquist, concurred in the judgment and argued that the special admissions program was violative of Title VI of the Civil Rights Act of 1964.[64] Justices Brennan, White, Marshall, and Blackmun concurred with Justice Powell in finding that colleges and universities could continue to use race as a factor in fashioning an admissions policy.[65]

Justice Powell applied strict judicial scrutiny to the school's admissions policy, finding that "racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination."[66] Although the medical school argued that discrimination against the "white majority" was permissible if the underlying purpose for the discrimination is "benign," Justice Powell disagreed and stated that the notion of equal protection applied to all persons.[67] Justice Powell acknowledged that the term "white majority" is, in and of itself, a misnomer.[68] The Justice commented that the white majority is made up of many different minorities, many of whom have experienced discrimination.[69] Next, the Justice explored some of the problems inherent in programs that utilize racial preferences.[70] Justice Powell opined that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection."[71] The Justice also considered the unfairness of forcing innocent parties to "redress[] grievances not of their making."[72]

In considering possible compelling government interests in support of the medical school's admissions policy, Justice Powell found that diversity could be a permissible interest.[73] Justice Powell indicated that

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[63] *See id.* at 320.

[64] *See id. generally* at 408-21 (Stevens, J., concurring). For a discussion of the Civil Rights Act of 1964, see *supra* note 57.

[65] *See generally Bakke*, 438 U.S. at 324-80 (Brennan, J., concurring).

[66] *See id.* at 291.

[67] *See id.* at 294-95.

[68] *See id.* at 295.

[69] *See id.; see also infra* notes 285-289 and accompanying text (discussing the inexactness of the selection process).

[70] *See Bakke*, 438 U.S. at 298.

[71] *Id.*; *see infra* note 277-279 and accompanying text (discussing the stigma resulting from the use of affirmative action programs).

[72] *Bakke*, 438 U.S. at 298.

[73] *See id.* at 311-12. Commentators, however, have hotly contested the acceptance of the diversity rationale as a compelling government interest. *Compare* Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839 (1996) (criticizing diversity as a sufficient rationale) *with* Note, *An Evidentiary Framework for Diversity as a Compelling Interest in*

remedying the present effects of past discrimination would constitute a compelling interest if judicial or legislative bodies were to first make findings of constitutional or statutory violations.[74] The Justice stressed the benefits that can be attained from learning in a diverse scholastic atmosphere and held that the school's interest in diversity was compelling.[75] Justice Powell determined, however, that the use of a fixed quota system was not sufficiently narrowly tailored towards the achievement of that goal.[76] Justice Powell referred to the program in place at Harvard, in which all applicants are compared with one another, and race or ethnicity may be used as a "plus" that may "tip the balance" in the minority applicant's favor.[77]

Justice Powell criticized the special admissions program used by the Davis Medical School, stating that no matter how qualified a nonminority applicant was, such an applicant would be unable to compete for the set-aside number of special admissions seats.[78] The Justice then concluded that Bakke was entitled to admittance to the medical school because they would have admitted him had they not employed an unlawful dual-admissions policy.[79]

Justices Brennan, White, Marshall, and Blackmun were of the opinion that Title VI allowed for discrimination against whites when "minority students [are] disadvantaged by the effects of past discrimination."[80] Justice Brennan, writing for the concurring justices, determined that minorities were underrepresented in the medical profession and that race-based remedies were appropriate to rectify this imbalance.[81] Justice

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Higher Education, 109 HARV. L. REV. 1357 (1996) (supporting the use of diversity as a compelling interest).

[74] *See Bakke*, 438 U.S. at 307.

[75] *See id.* at 312-13. Justice Powell stated that a medical student who had an "ethnic, geographic, culturally advantaged or disadvantaged [background would] bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity." *Id.* at 314.

[76] *See id.* at 316.

[77] *Id.* at 316; *see also id.* at 321-24 (Appendix to Opinion of Powell, J., Harvard College Admissions Program).

[78] *See id.* at 319-20.

[79] *See Bakke*, 438 U.S. at 320.

[80] *Id.* at 369 (Brennan, J., concurring in the judgment in part and dissenting in part). *But see* Lino A. Graglia, Hopwood v. Texas: *Racial Preferences in Higher Education Upheld and Endorsed*, 45 J. LEGAL EDUC. 79, 84-85 (1995) (disagreeing with Justice Brennan's conclusion regarding Title VI).

[81] *See Bakke*, 438 U.S. at 370-71 (Brennan, J., concurring in the judgment in part and dissenting in part).

Brennan opted for a more relaxed standard to review race-based programs that were remedial in nature.[82]

In a separate opinion, Justice Stevens, joined by Chief Justice Burger and Justices Stewart and Rehnquist, argued that the question of whether race can be used as a factor in formulating an admissions policy was not an issue.[83] Instead, Justice Stevens would have affirmed on statutory grounds. The Justice determined that under the plain language of Title VI, the medical school had excluded Bakke based on his race, thus violating the Civil Rights Act of 1964.[84]

Since no majority opinion was attained in *Bakke*, Justice Powell's opinion announced the Court's judgment. As such, the standard of what the "law" was on the affirmative action question remained unclear.

C. *City of Richmond v. J.A. Croson Co.*

The Supreme Court had an opportunity to reconsider the question of affirmative action a decade later in *City of Richmond v. J.A. Croson Co.*[85] In *Croson*, the Court faced a challenge to an ordinance adopted by the Richmond City Council entitled the "Minority Business Utilization Plan" (the Plan).[86] Contractors in Richmond who were awarded city construction contracts were forced to subcontract at least thirty percent of the price of the contract to a minority business enterprise.[87] A study relied

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[82] *See id.* at 359 (Brennan, J., concurring in the judgment in part and dissenting in part). Justice Brennan utilized intermediate review; "racial classifications designed to further remedial purposes must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* (citations omitted) (internal quotation marks omitted). Justice Brennan determined that the medical schools' purpose of "remedying the effects of past societal discrimination . . . [was] sufficiently important to justify the use of race-conscious admissions programs." *Id.* at 362 (Brennan J., concurring in the judgment in part and dissenting in part). This determination was conditioned on a finding that there had been a chronic and considerable underrepresentation of minority students, as well as a continued difficulty for minorities in admission. *See id.*

[83] *See id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part).

[84] *See id.* at 412-13 (Stevens, J., concurring in the judgment in part and dissenting in part).

Moreover, Justice Stevens stated that discussion of "whether race can ever be used as a factor in an admissions decision" would not be considered. *See id.* at 411 (Stevens, J., concurring in the judgment in part and dissenting in part).

[85] 488 U.S. 469 (1989).

[86] *See id.* at 478.

[87] *See id.* A Minority Business Enterprise was one in which 51 percent of the organization was "owned and controlled" by "Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." *Id.* (citation omitted); *see infra* note 285-289 and accompanying text (discussing inexactness of the selection process).

upon by the city council showed that although Richmond was fifty percent African American, the city awarded less than one percent of construction contracts to minority businesses.[88] There was no indication that the city had ever been involved as an actor in discriminating on the basis of race.[89]

Justice O'Connor, joined by five other Justices, applied strict judicial scrutiny and struck down the rigid quota system as unconstitutional.[90] The Justice emphasized that the protections of the Fourteenth Amendment applied to *all* persons, and that strict scrutiny was the appropriate standard of review whenever the government classified individuals on the basis of race.[91] The majority considered the government interest presented by the city council; namely, providing a remedy for the "present effects of past discrimination in the construction industry."[92] Justice O'Connor dismissed this interest as being too broad in its scope, and that such a remedy would have "no logical stopping point."[93] The majority also disregarded various studies that attempted to show past discrimination as a problem in the local construction industry.[94] Additionally, the Court disagreed with the notion that if a program was remedial or benign, that it would pass constitutional muster, because "racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice."[95] The majority then criticized the overinclusiveness of the Plan, as no information was provided by the city showing evidence of discrimination against "Spanish speaking, Oriental, Indian, Eskimo, or

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[88] *See Croson*, 488 U.S. at 479-80.

[89] *See id.* at 480.

[90] *See id.* at 511. Justice O'Connor stated that strict judicial scrutiny aids in the "inquiry into the justification for . . . race-based measures [to] determin[e] what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493. Justice O'Connor looked to the purpose behind strict scrutiny, "to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool." *Id.*

[91] *See id.* Justice Marshall, however, disagreed and stated that:

> In concluding that remedial classifications warrant no different standard of review under the Constitution than the most brutal and repugnant forms of state-sponsored racism, a majority of this Court signals that it regards racial discrimination as largely a phenomenon of the past, and that government bodies need no longer preoccupy themselves with rectifying racial injustice. I, however, do not believe this Nation is anywhere close to eradicating racial discrimination or its vestiges.

Id. at 552. (Marshall, J., dissenting).

[92] *Id.* at 498.

[93] *See Croson*, 488 U.S. at 498 (citing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986)).

[94] *See id.* at 500.

[95] *Id.*

Aleut."[96] Finally, Justice O'Connor concluded that the Plan was not narrowly tailored to remedy past discrimination as there was no evidence that the city had considered any race-neutral alternatives to increase the number of minority contractors.[97]

Justice Scalia, concurring in the judgment, raised various critical points. First, the Justice disagreed with the majority's view that racial discrimination may be permissible "to ameliorate the effects of past discrimination."[98] Justice Scalia stressed that a legitimate purpose cannot be achieved by using illegitimate means.[99] Rather, Justice Scalia was of the opinion that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."[100] The only situation in which the state may utilize racial classifications, according to the Justice, is where the government itself was the discriminating actor.[101] Justice Scalia preferred race-neutral alternatives, rather than racial preferences, to remedy Richmond's situation.[102] Justice Scalia concluded by stressing that the utiliza-

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[96] *See id.* at 506; *see also infra* notes 285-289 and accompanying text (discussing the inexactness of the selection process).

[97] *See Croson*, 488 U.S. at 507. Justice O'Connor also stated the 30% requirement was not narrowly tailored, except to achieve the goal of "racial balancing." *See id.* The problem with such a plan, according to Justice O'Connor, is the false assumption that minorities have to be proportionally represented in every employment situation. *See id.* at 507-08; *see also* Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 36 (1992) (discussing the fallacy of "underrepresentation").

[98] *Croson*, 488 U.S. at 520 (Scalia, J., concurring) (citation omitted).

[99] *See id.*

[100] *Id.* at 521 (Scalia, J., concurring) (citing Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[101] *See id.* at 524 (Scalia, J., concurring). Although the Court had, in the past, looked favorably upon "the use of racial classifications by the Federal Government to remedy the effects of past discrimination[,]" Justice Scalia expressed reluctance at applying the same rationale with regard to state governments. *See id.* at 521 (Scalia, J., concurring). This reluctance was premised on the purpose behind the Civil War Amendments, which expanded the powers of Congress in dealing with states that were "the precise entities against whose conduct in matters of race [the Fourteenth] Amendment was specifically directed." *Id.* at 521-22 (Scalia, J., concurring).

[102] *See id.* at 526 (Scalia, J., concurring). Alternatives suggested by Justice Scalia included preferential programs aimed at small or new businesses. *See id.* Such a remedy would ease the entry into areas such as state contracting where minorities had historically been discriminated against. *See id.* Justice Scalia also suggested preference for an "identified victim of state discrimination" who was passed over for a job that was given to a nonminority. *See id.* Justice Scalia was in favor of terminating the nonminority worker, in such a situation, to "undo the effects of past discrimination." *Id.* In such a situation, "the white job-holder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled." *Id.* "That is worlds apart from the system here, in which those to be disadvantaged are identified solely by race." *Id.*

tion of racial preferences only reinforce stereotypes and will ultimately lead to injustice.[103]

D. *Metro Broadcasting v. F.C.C.*

One year after deciding *Croson*, the Supreme Court abruptly changed course and upheld a federal race-based policy in *Metro Broadcasting v. Federal Communications Commission*.[104] The issue in *Metro Broadcasting* concerned two FCC programs that favored minority firms who applied for broadcast licenses.[105] In a five to four decision, the Court upheld the programs as "benign race-conscious measures."[106]

The majority concluded intermediate scrutiny, an important government objective that is substantially related to the achievement of that objective, was the appropriate standard of review.[107] The Court found the race-based policy aided in promoting diversity in broadcasting,[108] and only imposed a slight burden on nonminorities.[109] Justice O'Connor, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy dissented and argued in favor of applying strict scrutiny.[110]

E. *Adarand Constructors, Inc. v. Pena*

In 1989, Adarand Constructors, Inc., a sub-contracting company, submitted a bid to Mountain Gravel & Construction Company, the primary contractor for a highway project in Colorado.[111] Although Adarand submitted the lowest bid, Mountain Gravel awarded the contract to Gonzales Construction Company.[112] Gonzales Construction, unlike Adarand, was certified as a Disadvantaged Business Enterprise (DBE), which meant that it was "controlled by 'socially and economically disadvantaged individuals.'"[113] Mountain Gravel chose Gonzales because the United States Department of Transportation offered financial incentives to companies who hired these "certified" subcontractors.[114]

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[103] *See Croson*, 488 U.S. at 527-28. (Scalia, J., concurring).

[104] 497 U.S. 547 (1990).

[105] *See generally id.* at 556-67.

[106] *Id.* at 564-65.

[107] *See id.* at 565; *see also* Fullilove v. Klutznick, 448 U.S. 448, 490 (1980) (adopting a lenient standard similar to intermediate scrutiny in determining whether federal race-based action is constitutional).

[108] *See Metro Broadcasting*, 497 U.S. at 570, 596-97.

[109] *See id.* at 596-97.

[110] *See id.* at 602-03 (O'Connor, J., dissenting).

[111] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2102 (1995).

[112] *See id.*

[113] *Id.* (citation omitted).

[114] *See id.* The Department of Transportation policy provided that:

Adarand filed suit, alleging violations of the equal protection component of the Fifth Amendment.[115] The Court[116] held that all governmentally-imposed racial classifications are subject to strict scrutiny.[117] Justice O'Connor pointed out, however, that strict scrutiny is "strict in theory, but [not] fatal in fact."[118] Justice O'Connor acknowledged that racial discrimination is a serious problem and that the government must be able to take certain steps to counter the effects that linger.[119]

The majority began by reviewing previous case law in the affirmative action area.[120] In doing so, the Court determined that the "cases through *Croson* had established three general propositions with regard to governmental racial classifications."[121] The first proposition proffered by the majority was "skepticism;" "[a]ny preference based on [race] must necessarily receive a most searching examination."[122] The Court determined that the second general proposition was that of "consistency;" all classifications based on race must be analyzed under strict scrutiny.[123] The Court stated that "congruence" was the final proposition; "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[124] Based on these three principles, the

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> The Contractor will be paid an amount computed as follows:
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> 1. If a subcontract is awarded to one [Disadvantaged Minority Enterprise], 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
> 2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.

Id. at 2104 (citation omitted).

[115] *See Adarand*, 115 S. Ct. at 2101. The Fifth Amendment states, in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. The Supreme Court has stated that "[the] approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Adarand*, 115 S. Ct. at 2108 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

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[117] *See Adarand*, 115 S. Ct. at 2113. Justice O'Connor wrote the majority opinion for a fiercely divided Court, in which Justice Kennedy joined and Chief Justice Rehnquist joined in part. *See id.* at 2101. Justices Scalia, Thomas, and Kennedy joined in part and wrote opinions concurring in part and concurring in the judgment. *See id.* at 2118, 2119. Justices Stevens, Ginsburg, Souter, and Breyer dissented. *See id.* at 2120, 2131, 2134.

[118] *Id.* at 2117 (quoting Fullilove v. Klutznick, 448 U.S. 448, 519 (1980)).

[119] *See id.*

[120] *See id.* at 2108.

[121] *Adarand*, 115 S. Ct. at 2111.

[122] *Id.* (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (plurality opinion)).

[123] *See id.* at 2111. "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Id.* (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989)).

[124] *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

Court concluded strict scrutiny was the proper standard of judicial review.[125]

Next, the court criticized the *Metro Broadcasting* decision, stating that the decision rejected the three propositions outlined above.[126] Because the lower court analyzed the case using the intermediate standard set forth in *Metro Broadcasting*, the Court remanded the case for reconsideration.[127]

Justice Scalia provided a separate opinion, concurring in part and concurring in the judgment.[128] The Justice stressed that discriminating against nonminorities in order to remedy past discrimination against minorities will never satisfy a compelling government interest.[129] Justice Scalia also emphasized that "[i]n the eyes of government, we are just one race here. It is American."[130]

Justice Thomas also concurred; observing "[g]overnment cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[131] Justice Thomas then criticized race-based classifications, whether benign or invidious, calling each discriminatory.[132]

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[125] *See id.* at 2113. The Court stated

> [t]he three propositions undermined by Metro Broadcasting [skepticism, consistency, and congruence,] all derive from the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race-a *group* classification long recognized as [irrelevant and prohibited]-should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. . . . [H]olding 'benign' state and federal racial classifications to different standards does not square with [the Court's understanding of equal protection].

Id. at 2112-13 (citation omitted).

[126] *See Adarand*, 115 S. Ct. at 2112-13.

[127] *See id.* at 2118.

[128] *See id.* at 2118-19 (Scalia, J., concurring in part and concurring in the judgment).

[129] *See id.* at 2118 (Scalia, J., concurring in part and concurring in the judgment). "To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred." *Id.* at 2119.

[130] *Id.*

[131] *Adarand*, 115 S. Ct. at 2119 (Thomas, J., concurring in part and concurring in the judgment).

[132] *See id.* Justice Thomas stated that "[s]o-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence." *Id.*

II. THE *HOPWOOD* CASE

Cheryl J. Hopwood was an applicant to the University of Texas School of Law.[133] She had an undergraduate GPA of 3.8 and a Law School Admission Test (LSAT) score of 39.[134] She was a certified public accountant and worked twenty to thirty hours a week while attending undergraduate classes.[135] Hopwood also had a handicapped child who suffered from an extremely rare muscle disease.[136]

Hopwood's qualifications, when compared to other nonminority students, were considered as falling within the school's "discretionary zone."[137] Admission to the law school was very competitive, and, as often happens, her application was rejected.[138] Many less-qualified applicants, however, were accepted under the law school's affirmative action program.[139]

A. Admissions Process

The affirmative action program that Hopwood was subjected to was not always in place at the University of Texas School of Law. In fact, during the 1960's, all applicants who had at least a 2.0 GPA and had

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[133] *See* Hopwood v. Texas, 78 F.3d 932, 938 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996). Cheryl Hopwood was joined in this lawsuit by Douglas Carvell, Kenneth Elliott, and David Rogers. *See id.* All plaintiffs were rejected nonminority applicants to the University of Texas School of Law. *See id.*

[134] *See id.* at 938. A score of 39 is equivalent to a 160 utilizing the current LSAT scoring method. *See id.* In 1992, a score of 160 was in the 83rd percentile. *See id.* at 937 n.7.

[135] *See* Hopwood v. Texas, 861 F. Supp. 551, 564 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996).

[136] *See* Henry J. Reske, *Law School Affirmative Action in Doubt*, A.B.A. J., May 1996, at 36. Her child has since died. *See id.*

[137] *Hopwood*, 78 F.3d at 938. The law school utilized an admissions policy based on a "Texas Index" number (TI). *See id.* at 935. This was a composite of an applicant's GPA and LSAT score. *See id.* For applicants with a three-digit LSAT score, the formula consisted of: LSAT + (10) (GPA)= TI. *See id.* n.1. For applicants with a two-digit LSAT score, the formula was: (1.25) (LSAT) + (10) (GPA)= TI. *See id.* The law school grouped applicants into three categories based on the corresponding TI score: "presumptive admit," "presumptive deny," or a "discretionary zone." *See id.* at 935. The presumptive admit TI score for resident whites was 199. *See id.* at 936. Mexican Americans and African Americans needed only a 189 to fall within the presumptive admit category. *See id.* For nonminorities, the presumptive deny score was 192, while the same score for Mexican Americans and African Americans was 179. *See id.*

[138] *See id.* at 935, 938. Over 4000 applicants vied for 900 admissions offers which yielded 500 students in the entering class. *See id.* at 935. According to the 1995 *U.S. News and World Report* survey, the law school received a national ranking of 17th. *See id.*

[139] *See* Appendix B.

taken the LSAT were accepted.[140] During the late 1960's, the law school implemented the Texas Index (TI) system, and established a Council on Legal Education Opportunity (CLEO) program.[141] This program allowed for conditional acceptance of minority students upon successful completion of summer classes at the law school.[142] There was a sentiment, however, that the standards set for CLEO students were significantly lower than compared to CLEO programs at other law schools, and the program was terminated.[143] In 1971, after the law school terminated the CLEO program, no African American students were accepted.[144]

The law school initiated a new separate admissions committee, called the "Treece Committee,"[145] which only considered applications from minority students and disadvantaged nonminorities. The stated purpose of this committee was to increase minority enrollment at the law school.[146] These applicants were considered separately from the regular applicants. This dual-committee system continued until 1978 when the school revamped the policy following the Supreme Court's decision in *Bakke*.[147] As such, the law school discontinued the Treece Committee and utilized one admissions staff. [148]

After 1978, an elaborate stratification system was used, whereby set percentages of minority students were offered admission to the law school based upon their standing in a "discretionary zone."[149] This zone was divided into five or six "bands," and the greatest percentage of minority applicants fell within the lower bands.[150] This system was discontinued in 1980.[151]

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[140] *See Hopwood*, 861 F. Supp. at 557.

[141] *See id*; *see also supra* note 137 (explaining Texas Index system).

[142] *See Hopwood*, 861 F. Supp. at 557 n.10.

[143] *See id.* at 557-58. This perception was premised on the notion that CLEO students were not on the cusp of qualified, but instead were "significantly below that level." *Id.* at 557. The CLEO program was disbanded after its administrators found that a summer-long program was insufficient to prepare under-qualified students. *See id.* at 557-58.

[144] *See id.* at 558.

[145] *Id.* This committee was named for its chair, Professor James Treece. *See id.* n.11.

[146] *See id.* at 558.

[147] *See Hopwood*, 861 F. Supp. at 558. For a discussion of *Bakke*, see *supra* notes 45-84 and accompanying text. The Law School determined that although its bifurcated admissions system did not have a set-aside number of seats, it was "defective" in light of *Bakke*. *See Hopwood*, 861 F. Supp. at 558 n.15.

[148] *See Hopwood*, 861 F. Supp. at 558-59.

[149] *See id.* at 559.

[150] *See id.*

[151] *See id.* Administrators determined that two problems arose as a result of this "band" system. *See id.* The first problem was the "potential unfairness to nonminority candidates who could be affected by affirmative action solely as a result of the pile in

During that year, the law school established a minority subcommittee that would review all minority applicants who fell below the "presumptive admit" line.[152] The subcommittee discussed the action to be taken on each application with the regular admissions committee.[153] Eventually, the entire committee voted on each minority applicant.[154] In time, the quality of minority applicants improved, and a more selective process emerged.[155] This enhanced selectivity, however, led to a decrease among minority acceptances, as the focus shifted from "whether to accept a particular minority applicant to a more selective process between the individual minority applicants."[156] Thus, the goal of increasing the number of qualified minority applicants was not being met, and a new admissions policy took effect.

In 1991, a subcommittee was again formed.[157] This subcommittee was to review minority applications and "recommend sufficient candidates for admission to achieve a class that was 5% Black and 10% [Mexican American.]"[158] This subcommittee did not discuss its findings with the regular admissions committee and, instead, submitted a list to the regular committee, whose only determination was deciding the number of offers to extend; not whether or not to extend such offers.[159]

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which they were included[,]" and the second was "the application of personal affirmative action efforts, requiring no justification to the committee as a whole, rather than a system based on a set policy." *Id.*

[152] *See id.*

[153] *See Hopwood*, 861 F. Supp. at 559.

[154] *See id.* The minority subcommittee presented a summary report, as well as the individual files of minority applicants recommended for admission. *See id.* The advantage to this system was the "open discussion" that occurred regarding minority candidates, as opposed to "silent voting" which was the main problem with the "band" system previously in place. *See id.* The end result was that the full committee eventually voted on each minority applicant initially recommended by the subcommittee. *See id.*

[155] *See id.* at 559-60.

[156] *Id.* at 560 n.18. "Had the admissions committee continued to apply its previous standards, the number of minorities in the entering class would have continued to grow." *Id.* "However, the committee elected instead to 'take advantage of this opportunity to have more excellent minority students than we had before . . . .'" *Id.*

[157] *See id.* at 560.

[158] *Hopwood*, 861 F. Supp. at 560. This figure was based on "the percentages of minority college graduates," as well as a "target" by the Office of Civil Rights. *Id.* n.19, 563.

[159] *See id.* at 560. The subcommittee was given discretion to decide which minority applicants were given offers of admission. *See id.* Although the subcommittee and the regular admissions committee did discuss and confer, the bifurcated nature of the process was similar in nature to the Treece Committee, in place prior to the *Bakke* decision. *See id.*

Although the application to the law school instructed applicants to check off one of seven boxes indicating their racial background,[160] only African Americans and Mexican Americans received special consideration under the separate committee.[161] Professor Stanley Johanson, the chair of the regular admissions committee, drew the "presumptive admit," "presumptive deny," and "discretionary zone" lines.[162] Johanson conducted a preliminary review process whereby he attempted to generally separate approximately 500 files into one of the three aforementioned categories.[163] He reviewed both minority and nonminority applications during this preliminary process.[164]

In March 1992, Johanson lowered the presumptive admit score for all applicants.[165] The presumptive admit score for resident nonminorities ranged from a TI of 202/90 to 199/87.[166] The same levels for Mexican Americans ranged from 196/84 to 189/78.[167] The range for African American applicants was 192/80 to 189/78.[168] The presumptive deny score for resident nonminorities was 192/80.[169] The same level for Mexican Americans and African Americans was 179/69.[170] As the lower court emphasized "the presumptive den[y] score for nonminorities was higher than the presumptive admission score for minorities."[171]

Although personal interviews were not offered as a part of the regular admissions process, minority applicants met with the assistant dean of admissions for private meetings and discussions of potential

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[160] *See id.* Applicants were to choose from the following classifications: Black/African American; Native American; Asian American; Mexican American; Other Hispanic; White; or Other. *See id.*; *see also infra* notes 285-89 and accompanying text. (discussing the inexactness of the selection process).

[161] *See* Hopwood v. Texas, 78 F.3d 932, 936 n.4 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996). African American, as the term was defined by the law school, only included "American blacks." *Id.* "Thus, for example, the law school decided that a black citizen of Nigeria would not get preferential treatment, but a resident alien from Mexico, who resided in Texas, would." *Id.* "Likewise, Asians, American Indians, Americans from El Salvador and Cuba, and many others did not receive a preference." *Id.*; *see also infra* notes 285-289 and accompanying text (discussing the inexactness of the selection process).

[162] *Hopwood*, 861 F. Supp. at 560.

[163] *See id.* at 561.

[164] *See id.* n.23.

[165] *See id.* at 561-62. The change was due to a new, three-digit LSAT scoring system. Prior to 1992, the test was scaled using a two-digit formula. *See id.* n.25.

[166] *See id.* at 561-62.

[167] *See Hopwood*, 861 F. Supp. at 561-62.

[168] *See id.* at 562.

[169] *See id.*

[170] *See id.*

[171] *Id.*; *see also* Appendix C.

scholarships.[172] Other school officials "travel[led] the country [for the purpose of] soliciting applications from blacks-and by offering automatic scholarships to blacks (and Mexican-Americans) regardless of need."[173]

B. *Hopwood's Qualifications*

As previously mentioned, Cheryl Hopwood, a resident of Texas, had a GPA of 3.8 and a LSAT score of 39.[174] This calculated to a TI score of 199. If she were of African American descent, Hopwood would be included in the presumptive admit category by a margin of seven points.[175] If Mexican American, Hopwood would clearly fit within the same category by a comfortable three-point margin.[176] But for the unfortunate happenstance of noninclusion into one of the preferred racial classifications, Hopwood fell at the very bottom of the presumptive admit zone.[177] Hopwood's file was then considered by a three-member sub-

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[172] *See Hopwood*, 861 F. Supp. at 563.

[173] Graglia, *supra* note 80, at 83. The automatic scholarship practice was "combined with the denial of scholarships to some needy and better qualified whites." *Id.*

Economic enticements are not limited to the University of Texas. For example, in 1990, "Florida Atlantic University [offered] free tuition to every black student who [was] admitted, regardless of financial need." D'SOUZA, *supra* note 7, at 4. Earlham College offers "black, Hispanic, and American Indian" students grants to replace their student loans. *See id.* At Pennsylvania State University, all "black students who maintain a [GPA] of C to C+" receive a check from the school for $580; for any grades higher than that, they receive $1,160. *See id.* at 3-4. This money is provided regardless of economic need and continues for all four years of college. *See id.* at 4. Miami-Dade Community College offers minority students a "money-back guarantee" of their entire tuition balance if they are unsuccessful in finding employment in their field of study after graduation. *See id.* Nonminority students are not eligible for this program. *See id.* All minority students who attend Pepperdine University School of Law receive scholarships of $9080. LAW SCHOOL ADMISSIONS COUNCIL, THE OFFICIAL GUIDE TO U.S. LAW SCHOOLS 27 (1995). At Texas Tech School of Law, all minority students receive $2033. *See id.* at 28. At Case Western Reserve University School of Law, 96 % of minority students receive grants of $9500. *See id.* at 23.

Courts have recently looked disfavorably upon scholarship opportunities only available to minorities. *See, e.g.*, Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994). In *Podberesky*, the scholarship at issue was only available to African Americans. *See id.* at 152. As a male Hispanic, Podberesky was not eligible for the scholarship program, although he met all academic requirements. *See id.* The court determined that this program was not narrowly tailored as the University failed to consider any race-neutral alternatives. *See id.* at 161.

[174] *See* Hopwood v. Texas, 78 F.3d 932, 936 n.4 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996).

[175] *See Hopwood*, 861 F. Supp. at 562.

[176] *See id.*

[177] *See id.* at 564. Hopwood's position was subsequently downgraded to the "discretionary zone" after the admissions committee learned that Hopwood attended a junior college prior to receiving her degree from California State University. *See id.*

committee of the admissions committee.[178] Hopwood received only one vote recommending acceptance and was offered a place on the school's waiting list.[179] As the responsibilities of caring for her handicapped child prevented her from accepting a last-minute offer, Hopwood never responded to the school's letter.[180]

After effectively being denied admission to the law school, Hopwood instituted an action in the United States District Court for the Western District of Texas seeking injunctive and declaratory relief, as well as compensatory and punitive damages.[181] She alleged that the University of Texas School of Law[182] utilized a quota system whereby non-minority applicants were discriminated against in favor of African American and Mexican American applicants.[183]

C. *Hopwood I*

In January, 1994, the Thurgood Marshall Legal Society and the Black Pre-Law Association moved to intervene as Defendants under Federal Rules of Civil Procedure 24(a) and 24(b).[184] The intervenors alleged

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[178] *See id.*

[179] *See id.* at 564-65.

[180] *See Hopwood*, 861 F. Supp. at 565.

[181] *See id.* at 553.

[182] *See id.* In addition to the State of Texas as defendant, co-defendants named in this action were the University of Texas Board of Regents, Bernard Rapopart, Ellen C. Temple, Lowell H. Lebermann, Jr., Robert J. Cruikshank, Thomas O. Hicks, Zan W. Holmes, Tom Loeffler, Mario E. Ramirez, and Martha E. Smiley as members of the Board, in their official capacities; University of Texas at Austin; Robert M. Berdhal, President of the University of Texas at Austin in his official capacity; University of Texas School of Law; Mark G. Yudof, Dean of the University of Texas School of Law in his official capacity; Stanley M. Johanson, Professor of Law in his official capacity. *See id.* at 553 n.1.

[183] *See id.* at 553.

[184] *See* Hopwood v. Texas, No. A-92-CA-563-SS, 1994 WL 242362, at *1 (W.D. Tex.), *aff'd*, 21 F.3d 603 (5th Cir. 1994). Federal Rule of Civil Procedure 24 provides in relevant part:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:
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> (1) when a statute of the United States confers an unconditional right to intervene; or
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention . . .
>
> (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion

that their "interest in promoting the legal education for African Americans [was] not adequately represented by the Defendants."[185] The United States District Court for the Western District of Texas held that the interests of the intervenors were adequately represented by that of the defendants in the case, and denied the motion to intervene.[186] The court's decision was affirmed by the United States Court of Appeals for the Fifth Circuit.[187]

The United States District Court for the Western District of Texas heard Hopwood's case in August 1994. The court, applying strict judicial scrutiny,[188] held that the affirmative action program utilized by the school was not narrowly tailored because African American and Mexican American applicants were considered separately from nonminority applicants.[189] The court acknowledged, however, that the law school did satisfy two compelling government interests, namely, the implementation of a diverse student body, and the attempted remedy of the effects of past discrimination.[190] In determining damages, however, the court refused to grant injunctive relief because the court could not determine whether the school would have admitted Hopwood under a constitutional system.[191] Instead, the court limited Hopwood's recovery to nominal damages of

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the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

FED. R. CIV. P. 24(a) and (b).

[185] *See Hopwood*, 1994 WL, at *1.

[186] *See id.* at *2-*3.

[187] *See* Hopwood v. Texas, 21 F.3d 603, 606 (5th Cir. 1994).

[188] *See Hopwood*, 861 F. Supp. at 568. "Affirmative action plans based on race trigger strict judicial scrutiny." *Id.* (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 289, 291 (1978).

[189] *See Hopwood*, 861 F. Supp. at 579. In addition, the court noted that a minority candidate could, under the law school's admissions policy, receive a "plus" factor, be admitted, and still not be as qualified as a denied nonminority applicant. *See id.* at 578. Specifically, the reason the program was unconstitutional was because of its failure to compare individual applicants to the entire applicant pool, as opposed to just within their own race. *See id.* at 579.

[190] *See id.* at 570-71, 574. The court found that "obtaining the educational benefits that flow from a racially and ethnically diverse student body remains a sufficiently compelling interest to support the use of racial classifications." *Id.* at 571. Further, the court scrutinized the entire educational system of Texas for the purpose of determining whether past discrimination had been a factor in the application of, and need for, the school's affirmative action program. *See id.* at 571. In doing so, the court found that the effects of past discrimination continued to present current problems. *See id.* at 572.

[191] *See id.* at 582. The court found that the law school had produced evidence showing "legitimate, nondiscriminatory grounds [for the] denial of admission to each of the four plaintiffs." *Id.* at 581. Moreover, the court stated that Hopwood had not met her burden of persuasion by showing that she would have been admitted but for the affirmative action program. *See id.* at 581-82. After reviewing Hopwood's application for admission, the court noted that she produced little background information, and her application was "the least impressive in appearance." *See id.* at 581.

one dollar, explaining that the law school had not intended to discriminate.[192]

D. *Hopwood II*

The University of Texas School of Law appealed, and the United States Court of Appeals for the Fifth Circuit reversed the district court's ruling in part and dismissed in part.[193] Circuit Judge Jerry E. Smith held that the law school failed to show a compelling government interest in "remedying the present effects of past discrimination" that would justify providing favorable treatment to minority applicants.[194] The court specified that the law school may not use race as a factor in achieving a more diverse student body, improving the law school's reputation in the minority community, or eliminating any present effects of past discrimination that was not initiated by or at the law school itself.[195]

The court began by examining the general purposes behind the Equal Protection Clause of the Fourteenth Amendment.[196] The court first reviewed existing case law and concluded that preferential treatment based solely on race or ethnic origin is forbidden by the Constitution.[197] Judge Smith determined that strict scrutiny was the appropriate standard to apply in resolving the issue before the court.[198] The majority explained that in order to satisfy this level of judicial review, the school's racial classification must serve a compelling government interest and the

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[192] *See id.* at 582-83. Specifically, the court commented that the law school "acted in good faith and made sincere efforts to follow federal guidelines and to redress past discrimination." *Id.* at 583. Judge Sparks's decision has been harshly criticized.

> Judge Sparks sits and lives in Austin, the law school is in Austin, and law professors are responsible for the reputation of judges. He can be sure that his *Hopwood* decision and opinion have made him many articulate admirers and friends. In an area laden with pretense and deception, he was credulous and unquestioning. His opinion reads less like a disinterested investigation of the facts than a lawyer's brief for the law school, rarely pausing to consider reality . . . . U.S. District Judge Sam Sparks is a Democrat who was sponsored by Senator Phil Gramm and appointed by President Bush . . . . The nation would have many fewer of its current serious domestic social problems if Republican presidents had not been so egregiously incompetent in making judicial appointments.

Graglia, *supra* note 80, at 87-88.

[193] *See* Hopwood v. Texas, 78 F.3d 932, 962 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996).

[194] *See id.* at 955.

[195] *See id.* at 962.

[196] *See id.* at 939-40.

[197] *See id.* at 940 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 307 (1978)).

[198] *See Hopwood*, 78 F.3d at 940; *see also supra* note 25 (discussing strict scrutiny). The court specified that all racial classifications would be subject to strict scrutiny, regardless of whether they are "benign" or "remedial". *See Hopwood*, 78 F.3d at 940.

classification must be narrowly tailored towards the achievement of that goal.[199] The judge then stated that the specific issue before the court was whether the law school's preferential treatment of minority students was violative of the Equal Protection Clause.[200]

The court next analyzed Justice Powell's opinion in *Bakke*. In doing so, the majority stressed the significance of Justice Powell's discussion of compelling state interests.[201] The court delineated the four interests set forth by the defendants in *Bakke*. First, the court explained that the program in *Bakke* attempted to increase the number of "traditionally disfavored minorities" in the medical field.[202] The court next described the second offer in *Bakke*, which was to counter "the effects of societal discrimination."[203] The third reason discussed in *Bakke*, according to Judge Smith, was increasing the number of physicians who would practice medicine in underrepresented communities.[204] The court identified the final state interest discussed in *Bakke* as that of reaping the educational benefits that could be obtained from having a student body that is ethnically diverse.[205]

Relying on Justice Powell's reasoning, the court noted that the second and third state interests were "never appropriate."[206] Specifically, the judge explained that these interests were inappropriate because Justice Powell had limited remedies to discrimination that could be identified and which had "disabling effects."[207] The majority next considered Justice Powell's contention that diversity could be used as a "sufficient justification for limited racial classification."[208] In doing so, the court described Justice Powell's "plus" system.[209] However, the majority found Justice

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[199] *See Hopwood*, 78 F.3d at 940 (citing Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2111 (1995)).

[200] *See id.* at 941.

[201] *See id.* at 942.

[202] *See id.* (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 289, 305-06 (1978)).

[203] *See id.* (quoting *Bakke*, 438 U.S. at 305-06).

[204] *See Hopwood*, 78 F.3d at 942 (quoting *Bakke*, 438 U.S. at 305-06).

[205] *See id.* (quoting *Bakke*, 438 U.S. at 305-06).

[206] *See id.* Justice Powell emphasized that a "particularized finding of a constitutional or statutory violation must be present before a remedy is justified." *Id.*

[207] *See id.* (quoting *Bakke*, 438 U.S. at 307).

[208] *Id.* at 942-43. Justice Powell explained that a medical student with a different ethnic, geographic, or culturally disadvantaged background would better enrich the school and offer more life experience. *See Bakke*, 438 U.S. at 314. This would serve to "better equip its graduates to render with understanding their vital service to humanity." *See Hopwood*, 78 F.3d at 943 (quoting *Bakke*, 438 U.S. at 314).

[209] *See Hopwood*, 78 F.3d at 943. The court noted that

> [A]n applicant who loses out to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the

Powell's reasoning unpersuasive, and effectively "overruled" the decision in *Bakke*.[210]

The judge began by observing that Justice Powell's view in *Bakke* is "not binding precedent on this issue."[211] The judge expanded on this contention by stating that Justice Powell was the only one to mention "diversity" in the decision, and that Justice Powell's opinion was effectively overruled by the opinion of Justices Brennan, White, Marshall, and Blackmun.[212] The court provided further support by citing to *Adarand*, where the Court commented that the *Bakke* decision "left unresolved the proper analysis for remedial race-based government action."[213] As such, the majority found that the law school could not use race or ethnicity as a factor for the purposes of achieving a diverse student body, as diversity was not a compelling government interest.[214] The judge commented that race-based programs that seek to promote diversity do not help, but in fact hinder, the purposes behind equal protection.[215]

> wrong surname. It would only mean that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of another applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complaint [sic] of unequal treatment under the Fourteenth Amendment.

Id. (quoting *Bakke*, 438 U.S. at 318).

[210] *See id.* at 944.

[211] *Id.* Specifically, the court noted that Justice Powell's opinion, as it relates to diversity as a compelling interest, received

> only his own vote and has never represented the view of a majority of the Court in *Bakke* or in any other case. Moreover, subsequent Supreme Court decisions regarding education state that non-remedial state interests will never justify racial classifications . . . In *Bakke*, the word "diversity" is mentioned nowhere except in Justice Powell's single-Justice opinion.

Id.

[212] *See id.*

[213] *Id.* (citing Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2109 (1995)). The only Supreme Court decision following *Bakke* that accepted diversity as a rationale for racial classifications was *Metro Broadcasting*. *See id.* For a discussion of *Metro Broadcasting*, see *supra* notes 104-110 and accompanying text. However, as the *Hopwood* court stressed, the *Metro Broadcasting* Court applied intermediate judicial scrutiny. *See Hopwood*, 78 F.3d at 944. Moreover, *Metro Broadcasting* was overruled by *Adarand* to the extent that it was in conflict with *Adarand*'s holding. *See id.*

[214] *See Hopwood*, 78 F.3d at 945-46.

[215] *See id.* at 945. Judge Smith commented:

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

Id.

The court next addressed the application of its holding in the context of the Fourteenth Amendment.[216] The majority opined that a university's use of race to select students is just as rational as choosing students based upon their "physical size" or "blood type."[217] Similarly, the judge reasoned that educational institutions may "properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory."[218] The judge then emphasized why schools may not take account of race, along with the aforementioned factors, in promoting diversity. First, the court considered that selecting someone simply based on his or her race promotes the erroneous assumption that this individual would possess characteristics similar to others within that race.[219] The majority acknowledged that this type of selection is bigoted and prejudicial, and instead stressed that diversity should be measured on an individual basis.[220] Next, the court found that there is a danger of stigmatization whenever individuals are classified based simply on race.[221] The court disputed whether the harm associated with such a classification varies when utilized in a benign or invidious fashion.[222]

The court then considered the impact past discrimination would have in the administration of an affirmative action program.[223] The court began by examining Justice Brennan's opinion in *Bakke*, in which the Justice extended remedies to the "present effects of past discrimination."[224] The judge stated that the district court had utilized this "remedial pur-

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[216] *See id.*

[217] *See id.*

[218] *Id.* at 946. Judge Smith commented that the University of Texas did not distinguish between African American and Mexican American applicants in an effort to determine which of them may have been disadvantaged. *See id.* n.28.

[219] *See Hopwood*, 78 F.3d at 946. "[T]he use of a racial characteristic to establish a presumption that the individual also possesses other, and socially relevant, characteristics, exemplifies, encourages, and legitimizes the mode of thought and behavior that underlies most prejudice and bigotry in modern America." *Id.* (quoting Richard A. Posner, *The* DeFunis *Case and the Constitutionality of Preferential Treatment of Racial Minorities*, 1974 SUP. CT. REV. 1, 12).

[220] *See id.*

[221] *See id.* at 947. "'There can be no doubt that racial paternalism and its unintended consequences may be as poisonous and pernicious as any other form of discrimination.'" *Id.* n.34 (quoting Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in judgment)); *see infra* notes 277-279 and accompanying text (discussing stigma as a consequence of racial classifications).

[222] *See Hopwood*, 78 F.3d at 947.

[223] *See id.* at 949.

[224] *Id.* n.39 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 362-66 (1978)).

pose" doctrine as a justification for a compelling government interest.[225] In considering recent Supreme Court decisions, however, the judge found the language inapplicable to affirmative action plans that were "wide-ranging."[226] The court relied on cases such as *Wygant v. Jackson Board of Education*[227] and *City of Richmond v. J.A. Croson Co.*[228] in effecting this limitation as both cases struck down remedial state programs.[229]

The majority next attempted to distinguish between the present effects of past discrimination that occurred within the entire state of Texas, within the public educational systems of Texas, and within the University of Texas School of Law.[230] The judge found that the lower court had erred in examining all public educational systems in Texas.[231] Instead, the court specified that race-based remedies must be strictly limited.[232] The majority concluded that even a system such as the University of Texas would be too large for purposes of considering past discrimination.[233] The judge explained that utilization of such an expansive basis for providing a remedy has no "viable limiting principle."[234] Thus, the court found that scrutiny of the law school itself was the only relevant consideration when determining the present effects of past discrimination.[235]

The court limited this principle even further by finding that the past discrimination must be of a particular type to justify implementing the racial classification.[236] The court elaborated by stating that not only must the discriminatory effects be of "sufficient magnitude," but that the affirmative action program must specifically target these present effects.[237] The judge reviewed the evidence of past discrimination presented by the

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[225] *See id.* at 949 (citing Hopwood v. Texas, 21 F.3d 603, 605 (5th Cir. 1994)).

[226] *See id.* n.39.

[227] 476 U.S. 267 (1986).

[228] 488 U.S. 469 (1989). For a discussion of *Croson*, see *supra* notes 85-103 and accompanying text.

[229] *See Hopwood*, 78 F.3d at 949 n.39.

[230] *See id.* at 951. The court conceded that Texas has had a long history of discrimination in its educational institutions. *See id.*

[231] *See id.* at 950; *supra* note 190 and accompanying text (discussing lower court examination of public educational system).

[232] *See Hopwood*, 78 F.3d at 950. "[L]ike claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." *Id.* (quoting *Croson*, 488 U.S. at 499).

[233] *See id.* at 951.

[234] *See id.* at 950.

[235] *See id.* at 952.

[236] *See id.*

[237] *See Hopwood*, 78 F.3d at 952.

law school, namely that the law school had a poor reputation among the minority community as a "white school," that there was a small amount of minority students, and that there was a perceived hostile environment towards minority students.[238] The judge summarily dismissed the first and third reasons based on the Fourth Circuit's holding in *Podberesky v. Kirwan*.[239]

With regard to the second reason, the small number of minority students at the law school, the court determined that any discrimination that led to this result had not originated at, or been sanctioned by, the school itself.[240] The majority also disagreed with the law school's reliance on *United States v. Fordice*,[241] and distinguished that case on the grounds that the *Fordice* Court did not consider the duty of a state actor to remedy the present effects of past discrimination that were not caused by the actor itself.[242] The court concluded review of this issue by reiterating that the law school did not satisfy the required compelling governmental interest in "remedying the present effects of past discrimination."[243] Thus, the court declined to consider the secondary question of whether or not the law school's program was narrowly tailored.[244]

Finally, with regard to the issue of damages, the court found that Hopwood had suffered a constitutional violation.[245] Contrary to the opinion of the lower court, the judge opined that the law school had the burden of proving that any constitutional violation was harmless.[246] The majority remanded this issue to the district court for determination of

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[238] *See id.*

[239] *See* at 952-53 (citing Podberesky v. Kirwan, 38 F.3d 147, 154 (4th Cir. 1994)). "The *Podberesky* court rejected the notion that either of these rationales could support the single-race scholarship program." *Id.* at 952. The court continued:

> [T]he case against race-based preferences does not rest on the sterile assumption that American society is untouched or unaffected by the tragic oppression of its past . . . . Rather, it is the very enormity of that tragedy that lends resolve to the desire to never repeat it, and find a legal order in which distinctions based on race shall have no place.

Id. at 953 (citing Maryland Troopers Assoc. v. Evans, 993 F.2d 1072, 1079 (4th Cir. 1993)). Judge Smith commented that "one cannot conclude that a hostile environment is the present effect of past discrimination." *Id.* "Any racial tension at the law school is most certainly the result of present societal discrimination and, if anything, is contributed to, rather than alleviated by, the overt and prevalent consideration of race in admissions." *Id.*

[240] *See id.* at 954.

[241] 505 U.S. 717 (1992).

[242] *See Hopwood*, 78 F.3d at 955.

[243] *Id.*

[244] *See id.*

[245] *See id.* at 957.

[246] *See id.*

whether the law school would have admitted Hopwood under a system that conformed with constitutional guidelines.[247] Additionally, the judge commented that although the school had acted in good faith, it did intentionally discriminate against Hopwood.[248] Thus, although the court declined to enter an injunction forcing the school to comply with the ruling, the court cautioned that the school would be subject to fines or penalties if it continued its existing affirmative action program without appropriate modifications.[249].

Judge Wiener concurred in the judgment, and agreed with the majority's ruling that the law school failed to justify the use of a racial classification based on the present effects of past discrimination.[250] The judge parted course with the majority, however, in finding that diversity could, under certain circumstances, be a compelling government interest.[251] Still, the judge agreed in result, concluding that the law school's program was not narrowly tailored.[252] The judge expressed concern that the majority's holding was too broad, and that the Supreme Court should be the deciding body in interpreting the *Bakke* case, not the circuit court.[253]

E. *Hopwood III*

On April 4, 1996, the United States Court of Appeals for the Fifth Circuit, in a per curium decision, denied a *sua sponte* suggestion for rehearing en banc.[254] Chief Judge Politz, joined by six other judges, wrote a bitter dissent.[255] The chief judge acknowledged that the *Hopwood* decision would greatly affect the state of educational institutions across the country.[256] The dissent referred to Judge Smith's decision as "judicial activism"[257] and posited that the lower court had overruled *Bakke* by piecing together inapplicable Supreme Court opinions. The chief judge

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[247] *See Hopwood*, 78 F.3d at 957 n.55.

[248] *See id.* at 957.

[249] *See id.* at 959. Finally, the majority, citing to lack of jurisdiction, dismissed the appeal of the Thurgood Marshall Legal Society and the Black Pre-Law Association in their attempt to intervene. *See id.* at 961; *see also supra* notes 184-187 and accompanying text (discussing denial of intervention by lower court).

[250] *See Hopwood*, 78 F.3d at 962 (Wiener, J., concurring).

[251] *See id.*

[252] *See id.*

[253] *See id.* at 964-65 (Wiener, J., concurring).

[254] *See* Hopwood v. Texas, 84 F.3d 720, 721 (5th Cir. 1996). The court treated the suggestion for rehearing en banc as a petition for a panel rehearing. *See id.*

[255] *See id* (Politz, C.J., dissenting). Judges King, Wiener, Benavides, Stewart, Parker, and Dennis joined the dissent for failure to grant rehearing en banc. *See id.*

[256] *See id.* at 722. (Politz, C.J., dissenting).

[257] *Id.*

also expressed concern over the lower court's failure to follow Supreme Court precedent.[258] Judge Stewart wrote a separate dissenting opinion, calling the lower court's ruling a "travesty" and the refusal to grant rehearing en banc a "grave error."[259]

The law school subsequently filed a petition for writ of certiorari to the United States Supreme Court, which was later denied.[260] In a one-paragraph opinion, Justice Ginsburg, joined by Justice Souter, first acknowledged the importance of the affirmative action question.[261] The Justice stated, however, that the admissions program at issue had been discontinued and would not be reinstated.[262] The Justice pointed out that the law school did not defend the use of the admissions program, but disagreed with the "rationale relied upon by the Court of Appeals."[263] As such, the Justice determined that a program must be "genuinely in controversy" before the Court could consider this important question.[264]

III. THE PROBLEMS WITH AFFIRMATIVE ACTION

Discrimination against minority groups is an immense problem and is not to be taken lightly. Racism, in all of its forms, is to be condemned and denounced in no uncertain terms. Contrary to popular opinion, it is not contradictory to oppose racism while also opposing affirmative action. Although it is unpopular to openly criticize such programs, many people in today's society tend to be "closet conservatives" when it comes to issues like affirmative action.[265] The very notion of elevating or preferring one race over another is contrary to fundamental notions of equality. "Where injustice is the game, [] turnabout is not fair play."[266]

For purposes of clarity, it must be understood what is meant by the term "affirmative action." Advocates and opponents of these programs define the term very differently, and the term often loses its meaning and is clouded by emotion. For the purposes of this Comment, affirmative action can best be described as the preference of a minority group member over a nonminority group member for a competitive position. The

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[258] *See Hopwood*, 84 F.3d at 722. (Politz, C.J., dissenting).

[259] *Id.* at 725. (Stewart, J., dissenting).

[260] *See* Texas v. Hopwood, 116 S. Ct. 2581 (1996).

[261] *See id.* at 2581-82.

[262] *See id.* at 2582.

[263] *Id.*

[264] *See id.*. The Court also denied the petition for writ of certiorari made by the Thurgood Marshall Legal Society, as a potential intervenor. *See* Thurgood Marshall Legal Society v. Hopwood, 116 S. Ct. 2580 (1996).

[265] *See generally* Fletcher, *supra* note 14.

[266] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 524 (1989) (Scalia, J., concurring).

preference is solely based on skin color or ethnicity, and is not merit-based. The minority group member is preferred at the expense of the nonminority group member. The minority group members that are selected for these competitive positions are either less qualified than their non-minority counterparts or are equally qualified.[267] Often times, the minority group member has been aggressively recruited for the competitive position through financial incentives, special programs, or other means.[268] In the context of admissions programs at colleges and law schools, it is also necessary to consider what the ultimate goal of the admissions policy should be: to admit the most qualified candidate for each available position; and to ultimately produce the highest quality student.[269]

Minority groups are severely underrepresented in various settings.[270] Minorities make up a fraction of the total number of individuals practicing in the fields of law,[271] business,[272] and medicine,[273] to name a few.

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[267] *See generally* Kingsley R. Browne, *Affirmative Action: A Rose By Any Other Name*, 22 OHIO N.U. L. REV. 1125 (1996). Browne, addressing Congress with regard to the Equal Opportunity Act of 1995, identified and defined various terms in the realm of affirmative action. *See id.* 1132. Specifically, Browne differentiates between "quotas," "goals and timetables," "affirmative action," "reverse discrimination," and "preferences." *See id.* at 1132-37.

Browne stated that opponents of affirmative action define quotas as "[a] fixed number or percentage of persons of a particular race, color, religion, sex, or national origin which must be attained, or which cannot be exceeded, regardless of whether such persons meet necessary qualifications for the job." *Id.* at 1132. With regard to preferences, Browne indicates that the two most prevalent uses of such come in the forms of the "tie-breaker" situation, and the "plus factor" situation. *See id.* at 1134. For an example of the tie-breaker scenario, see Taxman v. Board of Educ., 91 F.3d 1547, 1567 (3rd. Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997). Here, the Third Circuit held that a school board violated Title VII of the Civil Rights Act of 1964 by the layoff of a white teacher rather than a black teacher who was equally qualified. *See id.* For an example of the use of plus-factors, see generally Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Johnson v. Transportation Agency, 480 U.S. 616 (1987).

[268] *See generally* Graglia, *supra* note 80; *see, e.g.*, Browne, *supra* note 267, at 1132. "Outreach," according to Browne, is where the recruiting body takes affirmative steps to increase minority applicants. *See id.* For examples of outreach programs in the extreme, see *supra* note 173 and accompanying text.

[269] DeFunis v. Odegaard, 416 U.S. 312, 342 (1973) (Douglas, J., dissenting). "The purpose of [law schools] cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . ." *Id.*

[270] *But see* Eastland, *supra* note 97, at 36. Eastland argued that the notion of "underrepresentation" is a fallacy in that it is nearly impossible to determine to what degree minorities should be proportionally represented. *See id.*

[271] *See* Alex, *supra* note 7, at A6. In 1993, of the top 28 law firms in New Jersey there were 882 partners, only 13 of which were members of minority groups. *See id.*; *see also* Manning Marable, *Staying on the Path to Racial Equality*, *in* THE AFFIRMATIVE ACTION DEBATE 3, 13 (George E. Curry ed., 1996). Although African Americans com-

Surely these fields would be benefited by an increase in the numbers of qualified minority practitioners. Assuredly, the minority population as a whole would be better served by an influx of minority doctors, lawyers, and businessmen and women. Affirmative action, however, is not the method by which to achieve this meritorious goal. The means by which the ends are attained are based on a flawed premise. As such, the end result yields less-qualified individuals who were selected at the expense of better-qualified ones.

Most, if not all schools do not *intend* to discriminate against nonminority students. Instead, most schools are caught in the proverbial "catch-22." The rates of minority applicants and matriculating students are low, and schools are forced to compensate. Schools must, however, maintain their competitive reputation, and continue to attract the best and brightest students.

A. There Are Victims of Affirmative Action Programs[274]

For every "plus" that Justice Powell would give to a minority applicant, there is a nonminority applicant who must bear the "minus." In *Hopwood*, for example, consider the nonminority student who had a GPA of 3.4 and a LSAT score of 159. Such a student would fall below the median scores set for a nonminority, but above the median numbers for a minority applicant. The University of Texas School of Law would most likely have rejected this student. If this student was a Mexican American or an African American, however, he or she would have certainly been accepted. Such a practice is inherently discriminatory and unfair. Justice Powell's reasoning does not consider the plight of rejected individual applicants. It is easy to institute a program in which there will be general nameless, faceless victims when it is being done in furtherance of a "greater good."

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pose 12.4% of the U.S. adult population, only 3.3% of lawyers are African American. *See id.* at 13. The same numbers for Latinos are 9.5%, and 3.1%, respectively. *See id.*

[272] *See, e.g.*, Catherine Yang, *A 'Race-Neutral' Helping Hand?*, BUS. WK., Feb. 27, 1995, at 120 (citing a 1992 report that showed only 5.3% of blacks, 3.2% of Hispanics, and 2% of Asian Americans hold managerial positions).

[273] *See* Marable, *supra* note 271, at 13. Only 4.2% of U.S. physicians are African American, and 5.2% of physicians are Latino. *See id.*

[274] *See DeFunis*, 416 U.S. at 333 (Douglas, J., dissenting). "The minority admissions policy is certainly not benign with respect to nonminority students who are displaced by it." *Id.* (citation omitted). "Racial preferences appear to 'even the score' . . . only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white." City of Richmond v. J.A. Croson Co., 488 U.S. 469, 528 (1989) (Scalia, J., concurring); *see also* Browne, *supra* note 267, at 1151 ("Preferences are not victimless phenomena.").

Any variation of an affirmative action program yields unjust results. Consider two law school applicants (A and B) who are exactly equally qualified.[275] Each graduated from the same college, had the same GPA, LSAT score, and extracurricular activities. The only discernible difference between the two is that "A" is a minority student whereas "B" is not. The law school's available seats rapidly fill until only one space is left. Who gets the seat? Under Justice Powell's "plus" system, "A" would be selected. In many schools, "A" might also be entitled to scholarship funds for which "B" is ineligible. To extend the analogy, assume that A and B are now from different backgrounds. "A" is a wealthy minority student who was fortunate enough to be educated in the finest high school and attend an exceptional private college. Should "A" receive preferential treatment in law school admissions merely because he or she can identify with a minority group? Alternatively, assume "B" is a lower-class nonminority student who attends the poorest quality inner-city school and must attend a local community college. Under the current system, "B" would be ineligible for a special admissions program that only considers race as a factor.[276] This system causes a multitude of problems. Invariably, the rejected nonminority student will come to resent the less-qualified affirmative action recipient.

B. Affirmative Action Recipients Are Stigmatized

Affirmative action sends the message to minority recipients that mediocrity is permissible. The underlying assumption behind affirmative action is that minority students are incapable of competing equally without assistance from the government. Justice Thomas explained that "so-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence."[277] Affirmative action also denies minorities the right to be treated and considered as an individual, and not

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[275] *See* Browne, *supra* note 267, at 1150-51. Browne makes use of the A versus B analogy as examples in the outreach and preference context. *See id.*

[276] The variation of the A-B configuration where A is a disadvantaged minority who has struggled to succeed though high school and B is a wealthy nonminority with opportunity should not automatically yield preference to A simply because he is a minority. If A is to receive preference, it should be granted based on his disadvantage and his excellence in overcoming adversity. *See infra* notes 299-301 and accompanying text (discussing experience as an alternative to preferences based on minority status).

[277] Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2119 (1995) (Thomas, J., concurring in part and concurring in the judgment); *see also* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth.").

merely as a group member.[278] As such, affirmative action plans imply that skin color is the most important characteristic of a candidate.[279]

C. *Affirmative Action is Overinclusive*[280]

In *Hopwood* the only minority candidates who were selected for preferential treatment were Mexican Americans and African Americans.[281] Apparently, applicants who were Hispanics, Native Americans,

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[278] *See* Chen, *supra* note 73, at 1844 (quoting Daniel A. Farber, *Missing the "Play of Intelligence,"* 36 WM. & MARY L. REV. 147, 159 (1994)). Farber concisely stated the argument against affirmative action:

> Whether you call them affirmative action or reverse discrimination, racial preferences are wrong. They are morally wrong whichever group is favored. They are also dangerous, because they reinforce the legitimacy of racial thinking and racial stereotypes. Race is simply an irrelevant personal characteristic.

Id. (footnote omitted).

[279] *See, e.g.*, Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POL'Y REV. 402, 403 n.3 (1987). Thomas stated that race-based preferences were contrary to the legal protections against employment discrimination. *See id.* Furthermore, Thomas predicted affirmative action programs would increase polarization between races, and "disempower . . . minorities by fostering the notion that they are permanently disabled and in need of handouts." *Id.*; *see* Robert L. Woodson, Sr., *Personal Responsibility*, *in* THE AFFIRMATIVE ACTION DEBATE 111, 115 (George E. Curry, ed., 1996). Woodson stated that affirmative action programs perpetuate a victim mentality by removing personal responsibility and self-determination in the African American community. *See id.*; *see also* Eastland, *supra* note 97, at 41-42. "Under affirmative action the quality that earns us preferential treatment is an implied inferiority." *Id.* at 42. "'However this inferiority is explained . . . it is still inferiority.'" *Id.* (citation omitted); *see also* Krista L. Cosner, Note, *Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court*, 71 IND. L.J. 1003, 1011 (1996). Affirmative action works as an obstacle to advancement by creating doubt in the minds of a recipient's clients, customers, etc., as to the recipient's qualifications. *See id.*

[280] *See* DeFunis v. Odegaard, 416 U.S. 312, 338-39 (Douglas, J., dissenting). As Justice Douglas recognized

> The reservation of a proportion of the law school class for members of selected minority groups is fraught with [danger], for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group . . . . What standard is the Court to apply when a rejected applicant to Japanese ancestry brings suit to require . . . privileges to his group? The [admissions] committee might conclude that the population [of the state where the school is located] is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%.

Id.

[281] *See* Hopwood v. Texas, 78 F.3d 932, 936 n.4 (5th Cir), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996). The law school asked applicants to indicate if they were "Black/African American, Native American, Asian American, Mexican American, Other Hispanic, White, or Other." *See* Hopwood v. Texas, 861 F. Supp. 551,

Asian Americans, and every other unspecified minority group did not require the special consideration given the preferred groups. It is a fact that almost every ethnic group who immigrated to the United States was discriminated against. Is every ethnic group therefore entitled to special consideration?[282] Proponents of affirmative action often, and correctly, cite to slavery as the distinction whereby African Americans should be afforded preferential treatment. It is unquestionable that the discrimination experienced by African Americans in this country is incomparable to that of other ethnic groups. How then, are Mexican Americans entitled to the same preference under the *Hopwood* plan?

In comparison, surely no discrimination suffered by any ethnic group can compare to the tragedies endured by Native Americans. Why are admissions committees less concerned with the number of Native American applicants, or Swedish, or the random Lithuanian who suffered an inordinate amount of discrimination?[283] There must be a quantifiable method by which these minority groups are selected for preference, but this is an incredibly difficult formula to arrive at. It is nearly impossible to ascertain to what extent various ethnic groups have suffered from discrimination. It is just as arduous a task to determine what remedy to afford such a group, and which groups are more deserving than others.[284]

D. Affirmative Action Is Ineffective

One main goal of affirmative action is to increase the number of minorities in colleges and universities. As Appendix D indicates, affirma-

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560 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996); *see also DeFunis*, 416 U.S. at 320 ("[B]lack, Chicano, American Indian, or Filipino"); *Bakke*, 438 U.S. at 274 ("Blacks, Chicanos, Asians, and American Indians") (internal quotation marks omitted) (citation omitted); *Croson*, 488 U.S. at 478 ("Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts"); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 553 n.1 ("Black, Hispanic surnamed, American Eskimo, Aleut, American Indian and Asiatic-American extraction").

[282] *See, e.g.*, Robert S. Boyd, *Census Categories Spark Renewed Debate*, THE NEWS & OBSERVER, Oct. 8, 1996, at A2. Even the White House Office of Management and Budget observed that "[t]here are no clear, unambiguous, objective, generally agreed-upon definitions of the terms 'race' and 'ethnicity.'" *See id.*

The responses included in the 1990 census revealed over 300 different descriptions of race, 600 Native American tribes, and 600 different nationalities. *See id.* An individual who is one-eighth Native American may legally classify himself as such. *See id.*

[283] *Cf. DeFunis*, 416 U.S. at 340 (Douglas, J., dissenting). Justice Douglas made a similar argument, stating that the use of ethnicity in law school admissions policies will not solve the problems of minority underrepresentation. *See id.*

[284] For a thorough discussion of the difficulties in determining who should receive preferences, see generally Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855 (1995).

tive action has been minimally productive, if at all, at the following schools.[285]

Despite the aggressive affirmative action programs in place at many law schools, minority law school enrollment has made only minimal improvement. From 1981 to 1992, the number of minorities enrolled in law school went from 9.2% to fifteen percent; an increase of less than six percent.[286]

E. *Affirmative Action Fails To Consider the Underlying Sources of Minority* Underrepresentation

Most importantly, affirmative action programs fail to answer the most integral question facing the minorities it purports to benefit; why are minorities underrepresented in the first place?[287] Affirmative action is only concerned with the cure, and not the underlying disease.[288] For purposes of analogy, consider that the problems faced by minorities are on a continuum ranging from birth to adulthood. Affirmative action is only concerned with high school or college age as the critical time period in which to apply corrective social policy. Remedial programs, however, must look much further in the past to be effective.[289] If the quality of early education does not prepare minority students as well as nonminority students, then the analysis and remedy must begin at that early stage. If the effects of poverty and inner-city life adversely affects the number of qualified minority applicants, then the appropriate social programs must be utilized at those corresponding time periods.[290] Other determinants such as crime,[291] drugs, and the breakdown in the family structure,

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[285] *See* Appendix D.

[286] *See* Dennis Kelly, *Colleges Rethink Affirmative Action*, USA TODAY, Sept. 30, 1992, at D1 (citing American Bar Association statistics).

[287] *See* John H. Bunzel, *The University's Pseudo-Egalitarianism*, WALL ST. J., July 12, 1991, at A10 (raising questions of cultural traditions, economic status, and cognitive skills).

[288] As an example, the great disparity between standardized test scores must be accounted for. The median LSAT score for whites is at approximately the 65th percentile. *See* Graglia, *supra* note 80, at 82. The median score for Mexican Americans is at approximately the 30th percentile while the same score for African Americans is at or near the 22nd percentile. *See id.*

[289] *See* Becker, *supra* note 13, at 16. "To be effective, programs for the disadvantaged must begin when children are very young, since their handicaps worsen with age . . . . Even the best affirmative-action schemes do not bring unprepared minorities up to the level of the students and workers who gain their positions on merit alone." *Id.*

[290] *See* Tifft, *supra* note 10, at 64 (discussing "family patterns and cultural barriers" as potential difficulties for minority students in considering college).

[291] *See* George Gilder, *The Roots of Black Poverty*, WALL ST. J., Oct. 30, 1995, at A18. Forty percent of black men between the ages of 17 and 35 are either in prison, on probation, or fugitives from justice. *See id.* Forty percent of young black women state

among others, have been cited to as disproportionately affecting minority families.[292] Affirmative action is simply inadequate to counter the numerous obstacles facing minorities.

IV. CONCLUSION

A. *Hopwood and its Aftermath*

Politicians, educators, and legal commentators have harshly, and unjustly criticized the decision by Judge Smith and the denial of certiorari by the Supreme Court.[293] The *Hopwood* decision has been called "the greatest threat to America's commitment to equality since the end of Jim Crow legislation."[294] Moreover, some commentators have predicted that many law schools will discontinue the use of affirmative action as a result of the *Hopwood* decision.[295] One commentator noted that "the four more liberal justices would have jumped at the chance to reverse *Hopwood* had they been confident of a fifth vote; [and] that the three more conservative justices would have done the same had they been confident of five votes to affirm."[296]

Hopwood signifies the beginning of the end for affirmative action programs in university admissions settings. The *Hopwood* decision should be lauded for its unavoidable disposal of race-based remedial programs. If the Equal Protection Clause of the Fourteenth Amendment is to truly apply to "any person," then that protection should apply identically, liberally, and equally, regardless of race. It is antithetical to basic foundations of justice and equality that persons should be treated differently merely based on the color of their skin. Obviously, Judge Smith's

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that they have been victims of sexual assaults. *See id.*; *see also* Woodson, *supra* note 279, at 116. An African American male born in Harlem, NY, "has a shorter life expectancy than a baby born in the poverty and famine of Bangladesh." *See id.*

[292] *See, e.g.*, Mortimer B. Zuckerman, Editorial, *Black America's Mirror Images*, U.S. NEWS & WORLD REP., May 6, 1996, at 76.

[293] *See, e.g., Supreme Court Refuses to Rule on Race-Based College Admissions Program*, JET MAG., July 22, 1996, at 14. Jesse Jackson criticized the Supreme Court's denial of certiorari, commenting that:

> This is another example of how the black robes (Supreme Court justices) are rolling back the gains made by African Americans and other minorities this century . . . . The blue suits mask their efforts to roll back Second Reconstruction through public policy, calling it conservatism. The white sheets burn churches. The fact that 1996 looks more like 1896 every day cannot be ignored.

Id. at 15.

[294] Roger Abrams, *The Threat of* Hopgood, [sic] N.J. L.J., May 13, 1996, at 31.

[295] *See id.* at 37; Reske, *supra* note 136, at 36 ("[The] ruling could jeopardize affirmative action programs at universities across the country.").

[296] Stuart Taylor, Jr., *By Ducking* Hopwood, *Court Picked Lesser Evil*, N.J. L.J., July 8, 1996, at 27.

intentions were not to discriminate against minorities, but to end reverse-discrimination against nonminorities. *Hopwood* merely levels the playing field and ends the use of preferential treatment, set-asides, quotas, and similar programs.[297]

B. Productive Alternatives to Affirmative Action

It is all too easy to criticize a program which is ineffective. It is a much more arduous task to propose adequate alternatives to such plans. It is necessary to recognize the obstacles that prevent minorities from equal competition, while at the same time increasing the number of qualified minority candidates in the fairest manner possible. This Comment suggests three broad alternatives: expansive admissions programs that emphasize more creative and personal recruitment techniques; preferential treatment programs based on socioeconomic status; and, early remedial educational programs such as Head Start and Upward Bound.

Schools of higher education almost exclusively rely on standardized testing and scholastic achievement as pertinent admissions criteria. As indicated, for purposes of increasing minority representation, these methods have proven to be inadequate. Admissions officers should consider the use of more subjective methodology in selecting students. For example, a question such as "how have you overcome adversity?" allows an applicant to showcase individual characteristics without the use of explicit racial classifications.[298]

Instead of emphasizing membership in a minority group, schools should consider each applicant's individual strengths. Various indicators may include an applicants work experience, volunteer work, extracurricular activities, leadership ability, and demonstrated interest in the subject matter.

In addition, aggressive outreach programs can be implemented to increase the number of minority applicants. Admissions officers should pursue events at urban high schools in an attempt to attract potential applicants. Examples of such programs might include informational or

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[297] Another recent case dealing with affirmative action is *Taxman v. Board. of Education*. *See* 91 F.3d 1547, 1567 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997). In *Taxman*, the Third Circuit held that a school board violated Title VII of the Civil Rights Act of 1964 by the layoff of a white teacher rather than an African American teacher who was equally qualified. *See id.*; *see also* Marcia Coyle, *Third Cir. Decision Limits Options in Firing: Firms Need to Show Prior Bias or Imbalance*, NAT'L L. J., Aug. 26, 1996, at A6 (discussing the *Taxman* decision).

[298] *See* Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 979 (1995). Ramirez endorses the use of open-ended questions for admissions purposes such as "[a]re you from a disadvantaged background or have you overcome significant obstacles in your life? If so, please explain." *Id.*

motivational lectures by enrolled minority students, college fairs, advertising, and open-house tours. Finally, individual interviews should be used to better identify disadvantaged students or those who are unable to demonstrate their ability to succeed.

Affirmative action based on socioeconomic status has not been met with widespread acceptance.[299] However, providing preference to individuals on the basis of economic disadvantage, as opposed to race, will not only reduce the controversy connected with affirmative action, but would be more closely related to the "letter and spirit of our Constitution."[300] In the context of admissions policies, proposals have included questions with broad economic criteria.[301] The importance of the use of economic programs lies in the shift of focus away from irrelevant personal criteria such as race, for purposes of determining disadvantage. Assuming minorities are disproportionately disadvantaged economically, an affirmative action program based on class would provide the necessary benefit without racial classification. Since the lower economic classes are composed of all races and nationalities, preference will be distributed more fairly.

Programs such as Upward Bound may be useful in preparing minorities for equal competition later in life.[302] Upward Bound, established in 1965, provides disadvantaged high school students with educational support.[303] Over 50,000 students whose families have not previously attended college, or who are poor, are enrolled in over 600 programs

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[299] *See generally* Richard H. Fallon, Jr., *Affirmative Action Based on Economic Disadvantage*, 43 U.C.L.A. L. REV. 1913 (1996); Paul E. Mirengoff, Editorial, *Preference to the Poor; Why Class-Based Affirmative Action Is a Bad Idea*, WASH. POST, Dec. 19, 1996, at A27.

[300] Cosner, *supra* note 279, at 1026 (quoting City of Richmond v. J.A. Croson Co, 488 U.S. 469, 528 (1989) (Scalia, J., concurring)).

[301] *See* Fallon, *supra* note 299, at 1927 n.47. Fallon remarks:

> For example, a task force at UCLA School of Law has recommended that the School base its admissions decisions partly on a "socio-economic index." This index does not expressly refer to income, but instead includes such factors as: (i) Father had no education beyond high school; (ii) Mother had no education beyond high school; (iii) More than 36% of adults in the zip code in which the student attended high school never completed high school; (iv) The poverty rate in the zip code in which the student attended high school is greater than 18%; (v) More than 5% of the adults in the zip code where the student resided during high school receive welfare; and (vi) More than 20% of the households where the student resided during high school are female-headed.

Id.

[302] *See generally* Teresa Moore, *Concern for Upward Bound Program/Cuts Feared in Highly Successful Class-Based College Prep Project*, S.F. CHRON., Aug. 14, 1995, at A13.

[303] *See id.*

across the country.[304] Students who are in ninth through twelfth grade receive instruction in English, mathematics, and science.[305] This instruction is either given after-school, on weekends, or over the summer.[306] Participants also receive assistance with SAT tests, application essays, and selecting which college or university to attend.[307] Over ninety-five percent of participants go on to college, and are four times more likely to graduate than similarly situated students who do not participate in the program.[308]

C. *Conclusion*

Because we have lived contemporaneously with affirmative action, it has been difficult to see just how damaging this program is to society. Fixing the problems that plague the minority community will ultimately lead to natural representation, as opposed to artificial manipulation. Given time, history, and hindsight, affirmative action will obtain the infamy of an ineffective, divisive, and quick-fix program that was doomed from its inception.

Shane H. Freedman

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[304] *See id.*

[305] *See id.*

[306] *See id.*

[307] *See* Moore, *supra* note 302, at A13.

[308] *See id.* "Nationwide, students in the Upward Bound program are 42% white, 35% black, 15% Latino, 4% Native American, and 4% Asian." *Id.*

Appendix A

Class Entering in 1973[309]

	SGPA	OGPA	Verbal	Quant.	Science	General
Bakke	3.44	3.46	96	94	97	72
Average of Regular Admits.	3.51	3.49	81	76	83	69
Average of Special Admits.	2.62	2.88	46	24	35	33

Class Entering in 1974

	SGPA	OGPA	Verbal	Quant.	Science	General
Bakke	3.44	3.46	96	94	97	72
Average of Regular Admits.	3.36	3.29	69	67	82	72
Average of Special Admits.	2.42	2.62	34	30	37	18

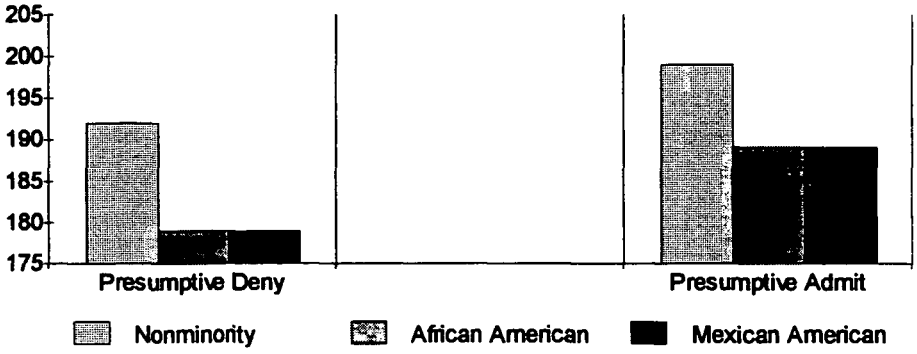
[309] *See* Bakke v. Regents of Univ. of Cal., 438 U.S. 265, 277 n.7. SGPA indicates "Science Grade Point Average," OGPA indicates "Overall Grade Point Average." *See id.*

Appendix B
1992 Median Scores[310]

	GPA	LSAT	LSAT Percentile
Nonminority	3.56	164	93
African Amer.	3.3	158	78
Mexican Amer.	3.24	157	75

[310] *See* Hopwood v. Texas, 861 F. Supp. 551, 563 n.32 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir.), *cert. denied sub nom.* Texas v. Hopwood, 116 S. Ct. 2581 (1996).

Appendix C


205
200
195
190
185
180
175
Presumptive Deny
Presumptive Admit
Nonminority
African American
Mexican American

Appendix D
Black Enrollment Trends at Major State Universities in States with Sizable Black Populations[311]
Undergraduate Enrollment—Percent Black

	1984	1986	1988	1990
Univ. of Alabama	9.70%	N/A	9.50%	9.60%
Auburn	3.00%	3.60%	3.70%	4.30%
Univ. of Arkansas	5.50%	5.20%	4.90%	6.70%
Univ. of Delaware	5.50%	5.20%	4.90%	6.70%
Univ. of Florida	6.00%	6.30%	6.40%	6.50%
Univ. of Georgia	5.70%	5.30%	5.10%	5.80%
Univ. of Illinois (Urbana)	3.90%	4.50%	5.70%	6.90%
Louisana State University	7.00%	7.60%	7.70%	8.10%
Univ. of Mich. (Ann Arbor)	4.70%	5.20%	5.80%	6.40%
Univ. of Mississippi	6.20%	5.70%	N/A	7.50%
Univ. of Missouri	3.80%	3.50%	3.70%	4.00%
Rutgers (New Brunswick, NJ)	8.10%	8.10%	8.70%	8.80%
SUNY (Binghamton)	3.70%	4.50%	5.20%	5.00%
Univ of N.C. (Chapel Hill)	9.70%	8.60%	8.80%	9.60%
Ohio State (Main Campus)	4.70%	4.60%	4.50%	5.40%
Clemson (S.C.)	4.70%	4.60%	4.50%	7.00%
Univ. of S.C. (Columbia)	15.40%	13.90%	13.50%	13.90%
Univ . of Tenn.	4.60%	4.40%	4.50%	5.10%
Univ. of Texas (Austin)	3.70%	3.70%	3.90%	3.80%
Virginia Polytechnic Inst.	4.70%	3.70%	3.70%	4.60%
Univ. of Va. (Main Campus)	8.50%	7.60%	9.10%	10.00%

[311] Podberesky v. Kirwan, 38 F.3d 147, 154 n.3 (4th Cir. 1994). *But see* Yang, *supra* note 272, at 121 (commenting that historically black colleges have seen an increase of 25% from 1986 to 1992).