

11-1-1996

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Robert A. Sedler

Wayne State University, [rsedler@wayne.edu](mailto:rsedler@wayne.edu)

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## Recommended Citation

Robert A. Sedler, *The Constitution and Racial Preference in Law School Admissions*, 75 Mich. B. J. 1160 (1996).

Available at: <http://digitalcommons.wayne.edu/lawfrp/21>

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# The Constitution and Racial Preference in Law School Admissions

By Robert A. Sedler

One of the consequences of the civil rights movement of the 1960s was the demand by African-Americans and other racial minorities that they be able to participate equally with whites in the legal profession, where racial minorities were seriously underrepresented.<sup>1</sup> The law schools responded to this demand by adopting racially preferential admission policies under which qualified minority applicants would be admitted with lower grades and LSAT scores than white applicants. These policies continue in effect today.

Racially preferential law school admission policies have substantially increased the representation of racial minorities in the legal profession, both in terms of percentage and in terms of absolute numbers. Minority lawyers serve as judges, prosecutors and law professors. They are lawyers for the government, "members of the firm," and bar association officers. They are in a position to contribute directly to the American legal system, to make that system responsive to the needs of minority persons, and to build the confidence of minority persons in the legal system and in the administration of justice precisely because minority lawyers are part of that system.

This increase in the representation of racial minorities in the legal profession has, however, been accomplished at the cost of denying admission to some white applicants at particular law schools because of

their race. These are the nonadmitted white applicants who have higher grades and LSAT scores than a number of the admitted minority applicants. These nonadmitted white applicants may properly claim that they have been the victims of racial discrimination,<sup>2</sup> and for this reason the racially preferential admission policies of public universities are subject to constitutional challenge under the Fourteenth Amendment's equal protection clause.<sup>3</sup>

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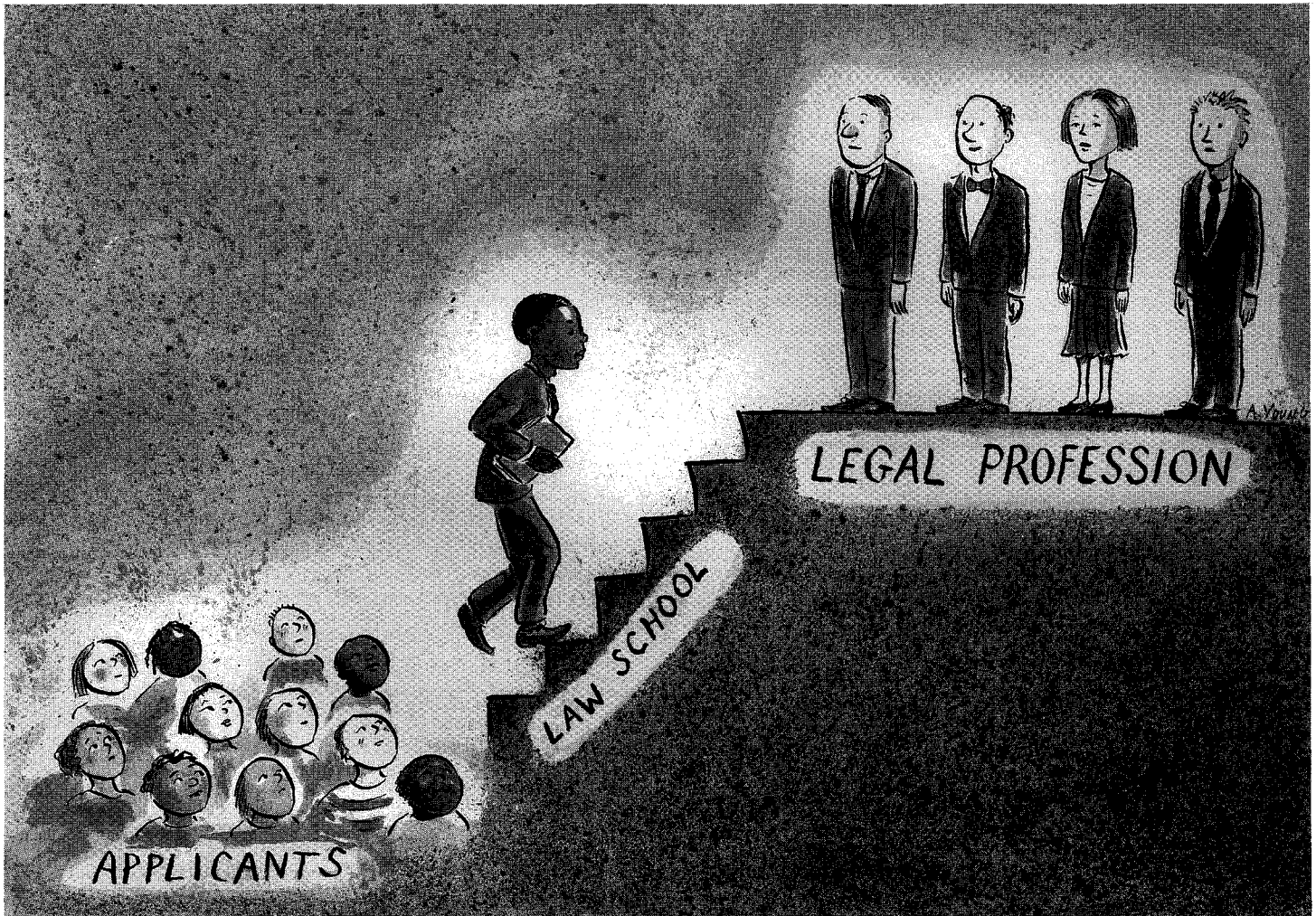
The Supreme Court considered such a challenge to the racially preferential admission policies of a public university medical school in *Bakke v Regents of the University of California*,<sup>4</sup> where the school reserved 16 of the 100 places in the entering class for minority applicants. In *Bakke*, four justices, Stevens, Burger, Rehnquist and Stewart, in an opinion by Justice Stevens, avoided the constitutional question and took the position that the use of any racial preference in

university admissions was prohibited by Title VI of the Civil Rights Act of 1964.<sup>5</sup>

Four other justices, Brennan, White, Marshall and Blackmun, took the position that overcoming the present consequences of past societal discrimination—reflected both in the underrepresentation of minority physicians and the generally lower grades and test scores of minority applicants—was a compelling governmental interest, and that the use of a reasonable racial quota was a constitutionally permissible means of advancing that interest.<sup>6</sup>

Justice Powell cast the deciding vote. Disagreeing with the "Brennan four" on this point, he insisted that overcoming the present consequences of past societal discrimination was not a compelling governmental interest justifying the use of race-conscious admissions policies.<sup>7</sup> However, according to Justice Powell, the university's interest in achieving a racially diverse student body was a compelling governmental interest, justifying the use of precisely tailored race-conscious admissions criteria.

He went on to say that a racial quota was a constitutionally impermissible means of advancing this interest, since it would "hinder rather than further attainment of genuine diversity." Rather, the university could take race into account as a "single but important factor" in admissions and could give "competitive consideration to race and ethnic origin." The university could also "pay some attention to the numbers" to ensure that in a given year a reasonable number



of minority students would be enrolled.<sup>8</sup> The Brennan opinion reluctantly agreed with Powell's educational diversity position in a footnote.<sup>9</sup>

Since five justices in effect agreed that educational diversity was a compelling governmental interest, justifying at least some consideration of race in the admissions process, there was a holding on that issue in *Bakke*. Where there is a Court majority on the point in issue, but no majority opinion, the Court's holding on that issue is based on the "narrowest ground of agreement of those members of the Court who concurred in the judgment."<sup>10</sup> Since the circumstances in which Justice Powell would find the use of race-conscious admissions criteria constitutionally permissible are narrower than those in which the Brennan four would find it permissible, the Powell opinion sets forth the holding of the Court on this issue, even though no other justice joined in it.

Following *Bakke*, public universities revised their race-conscious admissions

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programs in accordance with what they thought would comply with Justice Powell's competitive consideration of race and ethnic origin approach and justified the programs as advancing what was now recognized as the universities' compelling governmental interest in attaining educational diversity.<sup>11</sup>

As stated previously, the primary purpose for the adoption of racially preferential law school admissions programs was not attaining educational diversity, but increasing the underrepresentation of racial minorities in the legal

profession and in this sense "diversifying" the legal profession. Nonetheless, since these programs do succeed in bringing about educational diversity in the law schools, their continued existence can be justified on this basis, and it is not necessary for constitutional purposes that the law schools demonstrate that the interest in increasing minority representation in the legal profession is compelling as well. And it cannot be doubted that a racially diverse student body (and faculty) does make a positive contribution to the educational experience of all law students.<sup>12</sup>

In a series of cases after *Bakke*, however, the Supreme Court has generally invalidated the government's use of racial preference in contexts other than university admissions. In these cases, the Court has held that the government's use of racial preference was constitutionally impermissible unless it was remedial, and there was a "substantial basis in evidence" for concluding that the particular use of racial preference was necessary to eliminate the present consequences of identified past racial discrimination for which the government itself was responsible.<sup>13</sup>

The most recent cases coming before the Court indicate that the Court, although divided on this question, is reluctant to uphold any form of racial preference or use of race-conscious criteria except for this remedial purpose.<sup>14</sup>

In reliance on these cases, in *Hopwood v State of Texas*,<sup>15</sup> the Fifth Circuit held that the University of Texas law school's preferential admissions program for African-Americans and Mexican-Americans violated equal protection.<sup>16</sup> Two of the judges took the position that educational diversity was not a compelling governmental interest justifying the use of race-conscious admissions criteria. They said that the educational diversity rationale of Powell's opinion in *Bakke* did not represent a Court holding on that issue,<sup>17</sup> and that the subsequent Supreme Court cases had made it clear that the only compelling governmental interest justifying the use of race-conscious criteria was the remedial interest of overcoming the present consequences of identified past discrimination for which the government itself was responsible.<sup>18</sup>



Robert A. Sedler is a professor of law at Wayne State University. He has written extensively in the area of racial preference and the Constitution and is a strong proponent of racial preference as a means of bringing about the equal participation of

racial minorities in the legal profession and in all other important areas of American life. He is the chair of the Admissions Committee at Wayne State University Law School and has long been involved in efforts to increase minority representation in the law school student body.

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The third judge assumed *arguendo* that educational diversity could be a compelling governmental interest, but found that the law school's admissions program was unconstitutional because it was not narrowly tailored to achieve diversity.<sup>19</sup> The U.S. Supreme Court denied the university's petition for *certiorari*. Justices Ginsburg and Souter concurred separately in the denial of the petition, pointing out that the law school's 1992 admissions program that had been invalidated in *Hopwood* had long since been discontinued and was not now being defended by the university. According to these justices, "we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition."<sup>20</sup>

Where does the result in *Hopwood* leave the constitutionality of racial preference in law school admissions today? In the three states comprising the Fifth Circuit, Texas, Louisiana and Mississippi, any use of racial preference in law school admissions will be found unconstitutional in a federal court challenge under *Hopwood*. In other states, the matter remains unsettled. *Hopwood* may spark a spate of constitutional challenges to racially preferential admissions programs by rejected white applicants.<sup>21</sup> It may be that the first decision on the question by a federal court of appeals or the highest state court will be reviewed by the Supreme Court. Or the Supreme Court may decide to wait until there are conflicting decisions. In any event, it will be some time before the matter is definitively resolved by the Supreme Court.

When the case does come before the Court, the Court will squarely decide whether educational diversity is a compelling governmental interest, justifying the use of race-conscious admissions criteria. The Court may also decide whether or not increasing minority representation in the legal profession is a compelling governmental interest. If the Court holds that diversity and/or increasing minority representation in the legal profession is a compelling governmental interest, it will then

have to decide what are the constitutionally permissible means by which a university may employ racial considerations in the admissions process.

In so doing, the Court obviously will not be constrained by the "competitive consideration of race or ethnic origin" approach of Powell's *Bakke* opinion. The Court might decide to approve any use of race-conscious criteria, such as a reasonable racial quota, that does not unnecessarily trammel the interests of rejected white applicants.<sup>22</sup> Or it may impose very restrictive and specific constitutional guidelines for the permissible use of race-conscious admissions criteria.

In the cases coming before the lower courts in the interim, the constitutional question is quite different. The courts will have to decide whether, in light of *Bakke* and subsequent Supreme Court decisions, educational diversity continues to constitute a compelling governmental interest justifying the use of race-conscious admissions criteria. If the court concludes that it does constitute a compelling governmental interest, it will then have to decide whether the particular racially preferential admissions program is precisely tailored to advance that interest.

The result will not only depend on the particular facts, but on how the court interprets the competitive consideration of race or ethnic origin approach of Powell's *Bakke* opinion, and on whether the court concludes that this is the only constitutionally permissible means of advancing the law school's interest in educational diversity.

In the final analysis, however, I do not think that the constitutional invalidation of racially preferential law school admissions programs, should this occur, will have a significant impact on the overall admission of racial minorities to law schools and thus on increased minority representation in the legal profession. This is so for two reasons.

As an initial matter, if racial preference were eliminated entirely, the minority students with the credential levels that now enable them to be admitted at "elite" and

middle-ranked law schools would be admitted to some other law schools. In this sense, the elimination of racial preference would probably not have much effect on the efforts to increase minority representation in the legal profession. It would only mean that fewer minority lawyers would come from higher-ranked schools.

**B**ut there is a second, and probably more significant, consideration. Those who are opposed to the use of racial preference, in law school admissions and otherwise, generally are not opposed to and may even strongly favor the equal participation of racial minorities in the legal profession and in other important areas of American life. Their objection is to the use of racial preference to bring about this result. What stands out most strikingly in the debate over racial preference in the courts and elsewhere is the insistence of opponents of racial preference that the equal participation of racial minorities in the activity in question can be accomplished by racially neutral means. Indeed, the "golden mean" appears to be the accomplishment of the racial result by the use of racially neutral means. This can be done, it is said, by the consideration of factors that "correlate with race."

In *Hopwood*, the Fifth Circuit was careful to emphasize that the university could consider "a host of factors—some of which may have some correlation with race—in making admissions decisions, such as the economic or educational background of one's parents."<sup>23</sup> When *Bakke* was before the California Supreme Court, that Court said that since racial minorities were disproportionately economically disadvantaged in comparison with whites, the university could bring about the admission of minority students by giving preference to economically disadvantaged students of all races.<sup>24</sup>

And in *City of Richmond v J A Croson Co*,<sup>25</sup> Justices O'Connor and Scalia, who were part of the Court majority that struck down a minority business set-aside program, emphasized that a constitutionally permissible set-aside for economically disadvantaged businesses would disproportionately benefit racial minorities.

There is no doubt that if the Supreme Court holds that racially preferential law school admissions policies are unconstitutional, the law schools will adopt in their place policies that consider factors that "may have some correlation with race," such

as economic disadvantage or geographic location. So long as these factors are administered in a racially neutral manner and result in the preferential admission of whites as well as minority persons, they are likely to withstand constitutional challenge.<sup>26</sup>

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student body (and faculty)  
does make a positive  
contribution to the  
educational experience  
of all law students.**

Therefore, it does not appear that the Court's invalidation of racially preferential law school admissions policies, if it should do so, would in practice have much effect on the enrollment of minority students at most law schools. With or without racially preferential law school admissions policies, minority students will continue to enroll in law schools, and minority representation in the legal profession will continue to increase. ■

**Footnotes**

1. The data showing underrepresentation of minority lawyers at that time is discussed in Sedler, "Racial Preference, Reality and the Constitution: *Bakke v Regents of the University of California*," 17 Santa Clara L Rev 329, 346-47, ns. 65-71 (1977) [hereinafter cited as "*Bakke*"].
2. The discrimination seems particularly unfair when the minority students who receive the preference have come from the same advantaged backgrounds as the non-admitted white students. However, any form of preference in university admissions that is not based on purely academic factors (such as athletic ability) is also unfair. The policy question, as well as the constitutional one, depends not only on fairness but on justification. I submit that racial preference designed to bring about the full and equal participation of racial minorities in the legal profession and in all important aspects of American life may be unfair, but it is not unjustifiable. See generally the discussion in Sedler, *The Constitution, Racial Preference, and the Equal Participation Objective* 123, 139, n.17, in *Slavery and Its Consequences; The Constitution, Equality and Race* (Goldwin & Kaufman, eds. 1988) [hereinafter cited as "*Racial Preference*"].
3. The explicit use of race in the admission policies of private universities receiving

federal funds, as virtually all private universities do, would render those policies subject to challenge as constituting "discrimination on the basis of race" under Title VI of the Civil Rights Act of 1964. See n.5, *infra* and accompanying text.

4. 438 US 265 (1978).
5. 438 US at 411-21.
6. 438 US at 362-79.
7. 438 US at 310. Justice Powell did, however, acknowledge that the government would have a compelling interest in overcoming the present consequences of its own identified past discrimination.
8. 326 US at 316-19.
9. See 438 US at 326, n 1.
10. *Marks v United States*, 430 US 188, 193 (1977).
11. See Lesnick, "What Does *Bakke* Require of Law Schools?" 128 U Pa L Rev 141 (1979).
12. In his opinion in *Bakke*, Justice Powell referred to the Harvard College admission program, which states simply that a "black student can usually bring something that a white person cannot offer." 438 US at 316. That "something" is the perspective that comes from the experience of being black in America. In the educational context, that experience can be shared with white students, so that black and white students, interacting with one another, can "contribute to the robust exchange of ideas." *Id.* at 313.
13. See *Richmond v J A Croson Co*, 488 US 469 (1989) (minority business set-aside program); *Wygant v Jackson Board of Education*, 476 US 267 (1986) (out-of-line seniority layoff of teachers in order to preserve racial hiring gains).
14. In *Adarand Constructors, Inc v Pena*, 115 S Ct 2097 (1995), the Court held that the use of racial preference by the federal government is subject to the same "strict scrutiny" standard as its use by state and local governments. In so doing, the Court overruled *Metro Broadcasting, Inc v FCC* (1990), where the Court applied an intermediate standard of review to the use of racial preference by the federal government and on this basis upheld a minority preference program for the issuance of broadcast licenses that was justified as promoting "broadcasting diversity." The *Adarand* holding also may have called into question the Court's approach of giving some deference to congressional findings of identified past discrimination in *Fullilove v Klutznick*, 448 US 448 (1980).
15. 78 F3d 932 (5th Cir. 1996).
16. Under this program the law school sought to achieve an entering class consisting of approximately 10 percent Mexican-Americans and five percent African-Americans, proportions roughly comparable to the percentages of these races graduating from Texas colleges. In order to achieve this goal the applications of African-Americans and

## Pro Bono HONOR ROLL

In January, 1991, former State Bar President James K. Robinson encouraged law firms, corporations and organizations to endorse the voluntary State Bar Pro Bono Standard adopted by the Representative Assembly, and to adopt written Pro Bono policies for their lawyers. Listed below are the names of those firms, corporations and organizations which have both adopted such policies and advised that their attorneys are making a good faith effort to comply with the Standard.

The Pro Bono Involvement Committee salutes these firms, corporations and organizations for their important public service efforts.

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 Barris, Sott, Denn & Driker  
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 Benson McCurdy & Wotila, P.C.  
 Blaske & Blaske, P.C.  
 Bodman, Longley & Dahling  
 Bos & Glazier  
 Brinks & Associates  
 Butzel Long  
 Charles P. Reisman  
 Clark Hill, P.L.C.  
 Daniel L. Kraft  
 David E. Bulson, P.C.  
 David B. Herrington  
 Dickinson, Wright, Moon, Van Dusen  
 & Freeman  
 Dunning and Frawley, P.C.  
 Dykema Gossett  
 Flanigan, Traver, Emerson & Lepley  
 Foster, Swift, Collins & Smith, P.C.  
 Francine Cullari  
 Freeman McKenzie, P.C.  
 Grant W. Parsons, P.C.  
 Honigman Miller Schwartz  
 and Cohn  
 J. Thomas Carroll, Jr., P.C.  
 John B. Payne, Jr.  
 Josephson & Fink  
 Kerr, Russell and Weber  
 Kreis, Enderle, Callander  
 & Hudgins, P.C.  
 Law, Weathers & Richardson, P.C.  
 Leon J. Weiss  
 Marietta S. Robinson

Michelle L. Gullet  
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 Morganroth, Morganroth, Alexander  
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 Mossner, Majoros & Alexander, P.C.  
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 Rudolph A. Serra  
 Serra and Isopi, P.C.  
 Shaltz & Royal, P.C.  
 Warner, Norcross & Judd  
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### Corporations

Dow Corning Corporation  
 Ford Motor Company  
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 Kellogg Company  
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### Organizations

American Corporate Counsel  
 Association, Michigan Chapter  
 Genesee County Bar Association  
 Grand Traverse-Leelanau-Antrim  
 Counties Bar Association  
 Legal Services Association  
 of Michigan  
 Legal Services of Southeastern  
 Michigan, Inc.  
 Macomb County Bar Association  
 Michigan Trial Lawyers Association  
 Oakland County Bar Association  
 Saginaw County Bar Association  
 State Bar of Michigan  
 Washtenaw County Bar Association

Every reader is urged to initiate steps within the firm, corporate legal department, or organization with which he or she is associated leading to adoption of this policy. We ask that notice of adoption be provided to the State Bar office in Lansing (Attn: Jane Martineau); and a list will be compiled of firms and legal departments which have taken this action.

See the December 1990 Bar Journal at page 1259 for more information.

Mexican-Americans were considered separately from the applications of whites by a minority admissions subcommittee, and the file of every minority applicant was reviewed individually. The result was that many minority applicants were admitted with lower grades and LSAT scores than white applicants who were not admitted. 78 F3d at 935-38.

17. I strongly disagree with that conclusion. See the discussion, *supra*, n 11 and accompanying text.
18. 78 F3d at 943-49.
19. This was because the law school's efforts to achieve diversity were limited only to two racial-ethnic groups rather than including all groups that could contribute to diversity. 78 F3d at 965-66.
20. *Texas v Hopwood*, 116 S Ct 2581 (1996).
21. Any rejected white applicant would have standing to challenge the constitutionality of a racially preferential admissions program, since that applicant would have been treated differently because of race. It is not necessary for standing purposes that the white applicant show that he or she would have been admitted if the program were not in effect. *Heckler v Mathews*, 465 US 728 (1984).
22. The Supreme Court, for example, has held the use of a reasonable and flexible racial quota to be a constitutionally permissible means of advancing the government's interest in overcoming the present consequences of identified prior discrimination for which the government is responsible. *Fullilove v Klutznick*, 448 US 448 (1980). The Court has also upheld the power of the federal courts to order the implementation of a racially preferential hiring or promotional plan to remedy an employer's past discrimination in a Title VII case. See *Local 28, Sheet Metal Workers Int'l Ass'n v EEOC*, 478 US 421 (1986); *United States v Paradise*, 480 US 149 (1987).
23. 78 F3d at 945.
24. *Bakke v Regents of the University of California*, 18 Cal 3d 34, 553 P2d 1152, 1166-67 (1976), *aff'd in part and rev'd in part*, 438 US 265 (1978).
25. 488 US 469 (1989).
26. Some of these minority students will be different students from those who were admitted under the former race-conscious admissions program—lower income and inner city minority students as opposed to advantaged and suburban minority students. Likewise these factors will result in the admission of some white students who would have not been admitted previously—again lower income and inner city white students, who were not given special consideration under the race-conscious admissions policies.