A CRY FOR HELP TO THE UNITED STATES SUPREME COURT: WHAT IS THE CONSTITUTIONAL STATUS OF AFFIRMATIVE ACTION IN HIGHER EDUCATION?

Patricia A. Celano

I. INTRODUCTION

> *In a world where the dominant public ideology is one of non-racism, where the charge of racism is about as explosive a rhetorical move as one can make, disagreement about affirmative action often divides us in an angry and tragic manner.*[1]

Few constitutional issues have been as polemic as affirmative

[1] Thomas Ross, *Innocence and Affirmative Action*, 43 VAND. L. REV. 297, 297-98 (1990).

action in higher education.[2] Opponents of affirmative action contend that society's commitment to an integrated environment demands both the strategy and goal of strict color-blindness in decisionmaking.[3] In this view, "there is nothing in the Constitution that licenses the national government to establish racial shares, to . . . . [legitimize] measuring the worth of people by their race, or to tender entitlements by race."[4] On the other hand, proponents of affirmative action retort that only *malign* distinctions are prohibited and, therefore, support *benign* distinctions

---

[2] Affirmative action is a policy designed to provide preferential treatment based solely upon classification to a particular group. Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1327 n.1 (1979). In the context of education, affirmative action policies vary greatly. The most innocuous form of affirmative action favors equally qualified student over another because one student qualifies as a member of a selected class. *See* Robert M. O'Neil, *Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education*, 80 YALE L.J. 699, 700 n.3 (1971). In contrast, there are the "fixed quotas" which are numerical requirements or goals set for the selection of members of designated groups within a certain time frame or until a specific percentage is attained. *Id. See also* James W. Nickel, *Preferential Policies in Hiring and Admissions: A Jurisprudential Approach*, 75 COLUM. L. REV. 534, 535 (1975). Under the quota system, members of specified groups are admitted despite the fact that their objective qualifications fall below those of non-quota applicants who are rejected. O'Neil, *supra*, at 700 n.3. This extreme form of affirmative action has been repeatedly criticized. *See, e.g.*, Ken Feagins, *Affirmative Action or Same Sin?* 67 DENV. U. L. REV. 421, 421 n.2 (1990) (coining the term "samesin" to mean sexual or racial discrimination under the euphemistic guise of preferential admissions treatment, which is essentially the "separate but equal" doctrine enunciated in Plessy v. Ferguson, 163 U.S. 537 (1896)); Thomas G. Gee, *Race Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 63, 64 (1986) (contending that "[s]uch measures send chills down the spines of those of us who are old enough to remember the Dark Ages from which our polity has so recently been delivered."). In between these two extreme affirmative action policies, there lie several options. For example, if the raw score of a standardized admissions test is considered to be an unfair reflection of an examinee's potential or ability, points may be added to his or her score. O'Neil, *supra*, at 700 n.3. In this regard, under certain circumstances, test scores may also be disregarded altogether in evaluating an applicant or members of specified groups. *Id.* Applicants may also be chosen based upon qualifications that are specific to that individual, such as military service or graduate work. *Id.* In other instances, a policy of conditional admission may accept unqualified applicants who must satisfactorily complete a preparatory course or program. *Id.* Finally, schools may also admit students below usual standards in particular areas and thereafter, provide supplemental programs to remedy the deficiencies. *Id.*

[3] William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775, 809-10 (1979).

[4] Kennedy, *supra* note 2, at 1329.

favoring minorities.[5] Meanwhile, the judiciary has provided little guidance in articulating the constitutional validity of these preferential treatment programs.[6] Indeed, only once did the United States Supreme Court attempt to address this issue, resulting in a fragmented decision known as *Regents of the University of California v. Bakke*.[7]

This comment will explore the Supreme Court's reaction to the

---

[5] Benign discrimination refers to the use of a racial classification to benefit, rather than burden, particular ethnic or racial minorities. Defunis v. Odegaard, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting). Significantly, legal commentators seem to support the use of benign racial classifications. *See, e.g.*, Arval A. Morris, *Equal Protection, Affirmative Action and Racial Preferences in Law Admissions*: Defunis v. Odegaard, 49 WASH. L. REV. 1, 20-24 (1973); Norman Vieira, *Racial Imbalance, Black Separatism, and Permissible Classifications By Race*, 67 MICH. L. REV. 1553, 1555-56 (1969).

While the affirmative action debate has been raging in academic circles, the United States Congress has recently overhauled Title VII of the Civil Rights Act of 1991 by overruling some recent Supreme Court decisions. More specifically, Congress' most recent Civil Rights enactment attempts to protect employees with disparate impact claims by lessening their burden of persuasion. *See* The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 2000e-2). The Civil Rights Act of 1991 (the "Act") provides in relevant part:

> An unlawful employment practice based on disparate impact is established under this subchapter only if-
>
> > (i) a complaining party demonstrates that a respondent was engaged in a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and respondent fails to demonstrate that the challenged practice is job related for the position in question and, consistent with business necessity . . . .

42 U.S.C. § 2000e-2(k)(1)(A)(i). This provision of the Act Congressionally overruled the United States Supreme Court's decision in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989). *See* H. REP. NO. 102-40 (I), 102d Cong., 2d Sess. 23-43 (1991), *reprinted in* 1991 U.S.C.C.A.N. 561, 581. The Court in *Wards Cove* held that a plaintiff with a disparate impact claim bears the burden of persuasion in establishing that the challenged practice does not serve in a "significant way, the legitimate goals of the employer." The Act overruled *Wards Cove* by placing this burden with the employer. 42 U.S.C. 2000e-2(k)(1)(A)(ii).

[6] *See infra* notes 54-93 and accompanying text (discussing the lack of the Supreme Court's guidance in affirmative action cases in higher education).

[7] 438 U.S. 265 (1978). For a discussion of the *Bakke* decision, see *infra* notes 65-93 and accompanying text.

affirmative action debate and its failure to provide any guidance in this important area of constitutional law. Part II presents a discussion of the various degrees of judicial review that may be applied to affirmative action programs concluding that strict scrutiny is the appropriate standard. Part III of this comment will demonstrate that the Court has been prolific in its review of preferential policies in employment cases.[8] Consequently, jurists, attorneys, and scholars must look to employment cases for guidance on the constitutionality of affirmative action in the context of higher education.

II. THE APPROPRIATE STANDARD OF JUDICIAL REVIEW FOR PREFERENTIAL TREATMENT IN HIGHER EDUCATION[9]

A. REJECTING RATIONAL REVIEW

The United States Supreme Court has traditionally applied three distinct standards to evaluate the constitutionality of governmental

---

[8] Part III of this comment encompasses the Supreme Court's review of preferential policies in the employment sector.

[9] A misperception exists that all racial classifications are *per se* invalid. The focal point of this fallacy is commonly attributable to a misunderstanding of Justice Harlan's famous dissent in *Plessy v. Ferguson,* wherein he stated:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in the view of the Constitution, in the eyes of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. *Our Constitution is color-blind,* and neither knows nor tolerates classes among citizens.

163 U.S. 537, 559 (1896)(Harlan, J., dissenting)(emphasis added). Using this statement as their guidepost, some commentators have postulated that the Constitution mandates "strict color-blindness" in governmental policy. *See, e.g.,* William B. Reynolds, *Individualism vs. Group Rights: The Legacy of* Brown, 93 YALE L.J. 995, 998-1001 (1984). The context of this statement, however, was in disagreement over the judicial validation of a state policy in favor of mandated segregation. *See Plessy,* 163 U.S. at 559 (Harlan, J., dissenting). As such, it would be completely inappropriate to manipulate this statement to argue that all racial classifications are *per se* invalid. In fact, the Court has avoided the use of a *per se* test in several contexts. For a thorough examination of these instances, *see* Vieira, *supra* note 5.

classifications.[10] The minimum standard of review, known as the "rational basis test, "has been predominantly employed by the Court in the context of economic and social regulation.[11] In applying the rational basis test, a court merely considers whether the classification bears a rational relationship to the desired governmental end in a manner that is not constitutionally repugnant.[12] Pursuant to this standard, "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[13] Indeed, the theory of rational basis is predicated upon the assumption that many laws result in discrimination in one form or another which affect individuals differently,[14] thereby recognizing that in a democratic society, the most responsive political bodies are supposed to experiment, divide, and distribute the often limited governmental resources whenever

---

[10] JOHN E. NOWAK AND RONALD D. ROTUNDA, CONSTITUTIONAL LAW 573 (4th ed. 1991). These standards are known as the rational basis test, middle level scrutiny, and strict scrutiny.

[11] *See, e.g.*, Schweiker v. Wilson, 450 U.S. 221, 230-31 (1981) (holding that an equal protection challenge to a statutory scheme providing subsistence allowances only to blind, needy, poor, elderly, and disabled persons, is only subjected to the most lenient level of review); United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174-75 (1980) (stating that when congressional economic legislation is challenged on equal protection grounds, rational basis is the appropriate standard of review); Vance v. Bradley, 440 U.S. 93, 97 (1979) (stating that whether Congress violated the Equal Protection Clause by instituting a mandatory retirement age of 60 for federal employees covered by the foreign service disability and retirement system is determined by the presence of any rational relation to the furtherance of a legitimate interest); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (per curiam) (noting that an equal protection challenge to local economic regulation is deferred to the rationale of the legislature); Railroad Express Agency v. New York, 336 U.S. 106, 110 (1949) (determining the constitutionality of a traffic regulation prohibiting all vehicular advertising unless such advertisement concerned the usual business of the vehicle's owner depends upon whether there is some type of relation to the purpose of the regulation).

[12] *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1985) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[13] McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See also* McDonald v. Board of Election Comm'rs, 394 U.S. 802, 809 (1969) (classifications subjected to rational review will be overturned "only if no grounds can be conceived to justify them.").

[14] *See* Martin H. Redish, *Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments*, 22 UCLA L. REV. 343, 351 (1974).

appropriate.[15]

In practice, when employing the rational basis standard, the Supreme Court had, until recently, periodically resorted to relying on speculative reasoning in an effort to find a legitimate government purpose in situations where improper objectives were far more plausible.[16] In this regard, the Supreme Court has been nothing more than obsequious to legislative decisionmaking.[17] On the other hand, the Court while often purporting to apply rational basis review, has nevertheless examined claims of a rational relationship more skeptically.[18]

---

[15] *Id.* at 351.

[16] Kent Greenawalt, *Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions*, 75 COLUM. L. REV. 559, 562 (1975). *See, e.g.*, Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 470 (1981) (holding that a state ban on sale of milk in nonreturnable, nonrefillable plastic containers, where such sale was permitted in other containers, bore a rational relationship to the objectives of decreasing solid waste, promoting resource conservation, and conserving energy); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314-15 (1976) (holding that a Massachusetts statute requiring the retirement of uniformed state police officers at age fifty was rationally related to legitimate objective protecting the public by assuring the "physical preparedness" of its uniformed police); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 564 (1947) (determining that state requirement of apprenticeship and board certification in order to be appointed as a state pilot was related to the legitimate statutory objective of securing the most efficiently operated and safest pilotage system practicable).

[17] *See* Greenawalt, *supra* note 16, at 562. Utilizing this standard, the Court has rarely reversed state action. *See* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 537-38 (1973) (invalidating food stamp program excluding a household with unrelated individuals because the exclusion did not rationally further the governmental interest of maintaining adequate nutrition levels thereby excluded those who desperately needed aid); Morey v. Doud, 354 U.S. 457, 469 (1957) (invalidating a state currency act providing for inspection, licensing, regulation and bonding of "currency exchanges" engaged in selling or issuing money orders but exempted a certain company from all its provisions on the grounds that it violated equal protection).

[18] Greenawalt, *supra* note 16, at 562. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 883 (1985) (holding an Alabama statute imposing a substantially higher tax rate on out-of-state insurance companies than on domestic insurance companies violated the Equal Protection Clause because the state's aim in promoting domestic industry was completely discriminatory in its design); Williams v. Vermont, 472 U.S. 14, 23 (1985) (finding no legitimate purpose furthered by a Vermont statute requiring the collection of a "use tax" when a car was registered with the state, but imposing no such tax where the car was bought in the state and the purchaser paid sales tax); Zobel v. Williams, 457 U.S. 55, 65 (1982) (striking down state dividend distribution plan as violative of equal protection because neither the state's interest in the rewarding of its citizens for their

In addition to the Supreme Court's practice of restricting its use to cases involving economic and social regulation, legal scholars have proposed other reasons to preclude the invocation of rational review in cases challenging preferential admissions programs in higher education.

---

past contributions, nor its interest in offering financial incentive for residence in Alaska constitutes a legitimate state purpose). *See also* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1535 n.9 (1974). At least one commentator has asserted that in certain cases, while the Court purports to be applying rational basis review, it is actually utilizing a middle tier level of scrutiny. *See* Gerald Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972). Professor Gunther argues that in these types of cases, the Supreme Court applies rational review with "bite." *Id.* at 20. Despite this supposed heightened judicial scrutiny recently attributable to the rational basis test, the Court continues to maintain that it is utilizing "mere rational review" in evaluating the constitutionality of challenged social and economic legislation. *See supra* note 11 15 and accompanying text (discussing the Supreme Court's review of state classifications in the context of economic and social regulation).

The Supreme Court has also employed a "due process" irrebuttable presumption doctrine to invalidate classifications that would otherwise have been upheld if examined against the *de minimis* scrutiny of the rational basis standard. *See, e.g.*, Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632, 647-48 (1974) (striking down rule requiring a pregnant woman to take unpaid maternity leave after five months into her pregnancy as violative of due process); Vlandis v. Kline, 412 U.S. 441, 448-59 (1973) (prohibiting a state from disallowing a student to present evidence of bona fide residence, which entitled students to lower tuition). *See also* Greenawalt, *supra* note 16, at 562 n.22. Professor Greenawalt explains that a possible interpretation of this doctrine imposes special barricades to challenged classifications even when only rational review is appropriate and conceivably affects certain claims raised against preferential treatment policies which are based on particular justifications. *Id.* According to Professor Greenawalt, government regulations evaluated under this doctrine found to have a rational connection to a legitimate state interest may be declared unconstitutional unless they permit individuals covered by the regulation to demonstrate that the proffered legitimate reasons are inapplicable on an individual basis and that such assessment is possible without administrative inconvenience. *Id.* Thus, if the justification for a preferential law school admissions policy is that preferential treatment is to be given to applicants who are "culturally disadvantaged," and the preference only applies to members of specified minority groups, a white individual who qualifies as "culturally disadvantaged" could assert that the admissions preference erected an unsuitable, irrebuttable presumption that the white individual is not disadvantaged. *Id.*

In this regard, Professor Greenawalt believes that the irrebuttable presumption doctrine is not easily applicable to preferential admissions policies. *Id.* The reason for this opinion is that the doctrine is premised on the Due Process Clause of the Fourteenth Amendment and is a denial of due process to preclude an applicant from proving that justifications for disadvantageous treatment are inapplicable to them. *Id.* In fact, the due process predicate of this doctrine would pose a hurdle to challengers of these admissions policies who could have difficulty establishing the requisite liberty or property interest necessary to demonstrate a denial of due process. *Id.*

As one commentator explains, racial differences are immutable regardless of whether or not the government draws attention to them.[19] Thus, a recognition of a class based upon ethnic-group membership or race reinforces barriers that cannot be trespassed, and permits the government to condone these characteristic distinctions for which individuals are not responsible and over which they have no control.[20] Therefore, it is both illogical and inappropriate for the judiciary to consider employing a mere rational review as the standard of scrutiny applicable to affirmative action programs in the context of higher education. Another commentator has warned that "any classification by race weakens the government as an educative force,"[21] and when the legislature enacts laws based upon racial distinctions, some will interpret this as a significant departure from principles of equality and neutrality.[22]

B. THE APPLICATION OF AN INTERMEDIATE LEVEL OF REVIEW

The Supreme Court has suggested that classifications based upon minority status require more exacting judicial scrutiny than mere rational basis review.[23] When a court opts to apply this heightened, or

---

[19] *See* O'Neil, *supra* note 2, at 710.

[20] *Id.*

[21] John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro-the Problem of Special Treatment,* 61 NW. U. L. REV. 363, 379 (1966).

[22] *Id.* at 379.

[23] As Justice Stone's celebrated footnote in United States v. Carolene Products Co. states: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 152 n.4 (1938). In response to this proposition, however, Chief Justice Rehnquist has retorted that "[i]t would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road." Sugarman v. Dugall, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting). For a thorough examination of Chief Justice Rehnquist's comments, *see* John H. Ely, *The Constitutionality of Reverse Racial Discrimination,* 41 U. CHI. L. REV. 723, 729-30 (1974).

As one recent commentator points out, judicial caution with respect to Justice Stone's "political processes" may not be appropriate when a particular government action *benefits* the "discreet and insular" minority. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1523 n.9 (2d ed. 1988). Professor Tribe proffers that when a

intermediate level of review, the government must prove that the challenged classification serves an important governmental objective and is substantially related to the achievement of that end.[24] This middle tier level of review is generally reserved to evaluate the constitutionality of government classifications based upon gender[25] and illegitimacy.[26]

---

predominantly white public body decides to confer a significant advantage upon racial minorities effectively disadvantaging all nonminority applicants, the reviewing court should only make sure that the decision did not hide any type of racial, ethnic, or other type of discrimination. *Id.* According to Professor Tribe, in this situation, the judiciary would not possess the usual reasons to apply the heightened level of scrutiny appropriate when prejudice against insular minorities appears to be present, and when the political process appears to be unworthy of deference. *Id.* Professor Tribe concludes that when the majority itself adopts a classification that protects or otherwise benefits a minority group and burdens the majority group, there is no reason to regard the decision suspiciously, and more importantly, no reason to apply a more exacting scrutiny. *Id.*

[24] *See, e.g.*, Personnel Adm'r v. Feeney, 442 U.S. 256, 281 (1979) (holding that no violation had occurred when Massachusetts granted absolute lifetime preferences to veterans because the gender-based classification bore a substantial relationship to an important governmental objective).

[25] Until 1971, the Supreme Court had applied the rational basis test to classifications based upon gender. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (explaining that "[t]he Constitution does not require legislatures to reflect sociological insight, or shifting social standards" in upholding Mississippi's prohibition against all women working in bars). In Reed v. Reed, the Court considered the idea of applying strict scrutiny to gender-based classifications. 404 U.S. 71 (1971). *See also* Frontiero v. Richardson, 411 U.S. 677 (1973). Nevertheless, the Court finally determined that an intermediate level of review was the appropriate scrutiny to be applied in evaluating gender-based classifications. Craig v. Boren, 429 U.S. 190 (1976). Interestingly, the *Craig* Court did not specifically announce that the applicable standard was that of intermediate level scrutiny. In fact, the Court stated that it was following the standard applied in *Reed* and *Frontiero*. *Id.* at 197-99. The concurring and dissenting opinions, however, interpreted the standard employed by the majority as intermediate review. *Id.* at 210-11 (Powell, J., concurring), 213-14 (Stevens, J., concurring), 215 (Stewart, J., concurring), 216-17 (Burger, C.J., dissenting), and 217 (Rehnquist, J., dissenting).

In Mississippi Univ. for Women v. Hogan, the Supreme Court invalidated a single-sex admissions policy from a university's nursing school, concluding that it violated the Equal Protection Clause of the Fourteenth Amendment because the gender-based classification did not serve an important governmental objective and was not substantially related to its asserted objective. 458 U.S. 718, 724, 732 (1982). The Court found that the policy "reflect[ed] archaic and stereotypic notions" of the "proper" roles of women and men, thereby perpetuating the banishment of women to an inferior status. *Id.* at 725-26. In his dissenting opinion, Justice Powell argued that a more lenient test was applicable because *Hogan* did not advance a "serious equal protection claim." *Id.* at 742 (Powell, J., dissenting). Contrary to Justice Powell, Justice Blackmun labelled the applicable test for gender-based discrimination as "rigid" and productive of "needless

In *Bolling v. Sharpe,*[27] in holding that the federal government's use of racial classifications were subject to the most arduous judicial scrutiny, the Supreme Court indicated that the constitutional guarantee of equal protection was equally binding upon the federal government, and not exclusive to the states.[28] However, twenty-six years later in

---

conformity." *Id.* at 734-35 (Blackmun, J., dissenting). In response, the *Hogan* majority explained that, regardless of the laudable nature of the objective, the analysis for a classification which discriminates on the basis of gender remains the same in that the Court will apply the intermediate level of scrutiny to determine the constitutionality of the legislation. *Id.* at 724 n.9. *See also* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 152-55 (1980) (holding that the provision of Missouri worker's compensation laws which denied a widower benefits from his wife's work-related death unless he is either mentally or physically handicapped or proves dependence on his wife's earnings, but granted a widow death benefits without having to prove such dependence, violated the Equal Protection Clause of the Fourteenth Amendment because the classification was not justifiable as serving an important governmental purpose and substantially relating to the achievement of those objectives).

[26] The Supreme Court has used a variety of standards in evaluating the constitutionality of government classifications in the area of an illegitimacy. *See, e.g.*, Matthews v. Lucas, 427 U.S. 495, 506, 509-16 (1976) (explicitly rejecting the employment of the strict scrutiny analysis, the Court validated a Social Security scheme that entitled all legitimate and some illegitimate children to a presumption of dependency, but required illegitimate children to prove dependency); Labine v. Vincent, 401 U.S. 532, 537-40 (1971) (using only *de minimis* review, the Court upheld an intestate succession provision preventing all illegitimate children from sharing equally with legitimate children in the estate of a parent); Levy v. Louisiana, 381 U.S. 68, 75-77 (1968) (applying mid-level review, the Court invalidated a state legitimacy-based classification). The most recent cases addressing this issue, however, indicate that the Court is likely to formally adopt an intermediate level of review. *See* Pickett v. Brown, 462 U.S. 1, 5-6 (1983) (invalidating a two year statute of limitations for paternity suits as violative of equal protection); Mills v. Habluetzel, 456 U.S. 91, 98-101 (1982) (holding that a state requirement of a paternity suit for the purpose of obtaining child support before the child is one year old was not substantially related to a legitimate state interest).

[27] 347 U.S. 497 (1954).

[28] *Id.* at 499-500. *Bolling* was the companion case to Brown v. Board of Education, 347 U.S. 497 (1954), and involved the extensive regulation by Congress of the segregated public school system in the District of Columbia. *Bolling*, 347 U.S. at 498. The petitioners claimed that they were denied admission to an all white public school solely because of their race. *Id.* Writing for the Court, Chief Justice Warren began by pointing out that the Fifth Amendment, applicable to the federal government, does not contain an Equal Protection Clause similar to the Fourteenth Amendment which is only applicable to the states. *Id.* at 499. The majority then opined that although the concepts of due process and equal protection are not mutually exclusive because they both originate from the American ideal of fairness. These two concepts are not always

Metro Broadcasting, Inc. v. Federal Communications Comm'n,[29] the Supreme Court rejected the strict scrutiny standard in favor of an intermediate level of review for federally-based racial classifications.[30] In *Metro Broadcasting*, because relatively few minorities held broadcast licenses to construct and operate radio and television broadcast stations in the United States,[31] the Federal Communications Commission

---

interchangeable because the "equal protection of the laws" more explicitly safeguards against prohibited unfairness than does "due process of law." *Id.* The Chief Justice explained that liberty under law can only be restricted for a proper governmental objective. *Id.* at 499-500. Because segregation in public education was not found to be reasonably related to any appropriate governmental objective, the *Bolling* Court concluded that African-American children were arbitrarily denied their liberty in violation of the Due Process Clause. *Id.* at 500. Accordingly, Chief Justice Warren asserted that since it is constitutionally unacceptable for the states to maintain racially segregated public schools, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.* In applying the strict scrutiny analysis, the Court held that racial segregation in the public school system in the District of Columbia amounted to an unconstitutional denial of due process guaranteed by the Fifth Amendment. *Id.*

In Fullilove v. Klutznick, the Supreme Court was asked to assess the constitutionality of a federal affirmative action program. 448 U.S. 448 (1980) (plurality opinion). In *Fullilove*, the "Minority Business Enterprise" ("MBE") provision of the Public Works Employment Act of 1977 mandated that at minimum, 10% of the federal funds earmarked for public works projects had to be used by the local or state grantee to employ businesses owned by minorities absent an administrative waiver. *Id.* at 454 (citation omitted). While neither rejecting nor approving the use of strict scrutiny in evaluating federal affirmative action programs, a majority of the Justices posited that strict scrutiny might be more appropriate. *Id.* at 492. Three Justices asked "whether the *objectives* of th[e] legislation [we]re within the power of Congress" and "whether the limited use of racial and ethnic criteria . . . is a constitutionally permissible means for achieving the Congressional objectives." *Id.* at 473 (Burger, C.J., White, & Powell, JJ.). After approving Congress' power under section five of the Fourteenth Amendment to remedy past societal discrimination, the Court upheld the MBE set-asides enacted by Congress. *Id.* at 476-78.

[29] 497 U.S. 547 (1990). *Metro Broadcasting* is considered to be the seminal case on federal affirmative action. *See* Neal Devins, *The Rhetoric of Equality*, 44 VAND. L. REV. 15, 34 (1991).

[30] *See Metro Broadcasting*, 497 U.S. at 564-65.

[31] According to Justice Brennan, in 1971, only 10 of the approximately 7,500 radio stations and none of the approximately 1,000 television stations in the country were owned by minorities. *Id.* at 553. Seven years later, minorities owned less than 1% of the radio and television stations in the United States. *Id.* Furthermore, in 1986, minorities owned only 2.1% of the more than 11,000 radio and television stations in the nation. *Id.* Justice Brennan stated that these do not reflect the fact that late entrants were

("FCC") sought to encourage minority participation in the broadcast industry through a two-part plan.[32]

---

often only able to get less valuable stations, forcing many minority broadcasters to serve geographically limited markets with relatively small audiences. *Id.* at 553-54.

[32] Historically, minority status was not considered a factor in licensing decisions because the FCC did not believe such a consideration was warranted. *Id.* at 554. Indeed, prior to the implementation of this scheme, the FCC adopted rules prohibiting licensees from discriminating against minorities in employment. *Id.* The FCC justified these rules as being necessary to satisfy its obligation under the Communications Act of 1934 to promote diversity of programming. *Id.* at 554-55. As a result of a conference on minority ownership policies sponsored in 1977, the FCC altered its decision making process to reflect a consideration of minority status. *Id.* at 555. At the conference, participants testified that minority preferences were justifiable as a way of increasing the diversity in broadcast viewpoints. *Id.* The results of the conference, the decisions of the Court of Appeals for the District of Columbia, the recommendations of a task force, and a petition proposing several minority ownership policies filed with the FCC by the Office of Telecommunications Policy and the Department of Commerce combined, in 1978, to make the FCC adopt its *Statement of Policy on Minority Ownership of Broadcasting Facilities*. *Id.* at 556. After reviewing its previous attempts to rectify the lack of minority ownership, the FCC concluded:

> [W]e are compelled to observe that the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming services not only serves the needs and interests of the minority community but also enriches and educates the nonminority audience. It enhances the diversified programming which is a key objective not only of the Communications Act of 1934 but also of the First Amendment.

Id. (quoting STATEMENT OF POLICY ON MINORITY OWNERSHIP OF BROADCASTING FACILITIES, 68 F.C.C.2d 979, 980-81 (1978)).

Accordingly, the FCC announced its two-part plan to increase minority ownership. *Id.* First, the Commission pledged that minority ownership would be one factor in comparative proceedings for new licenses. *Id.* Minority ownership and participation would be considered as a "plus" in this proceeding to be weighed together with all factors deemed to be relevant. *Id.* at 557. The second part of the plan involved an increase in minority opportunities to receive reassigned and transferred licenses through a "distress sale" policy. *Id.* Generally, a licensee whose qualifications to hold a broadcast license were questionable was not able to transfer or assign that license until the FCC had resolved any doubts in some type of noncomparative hearing. *Id.* The distress sale became an exception to this practice because such a sale permitted a broadcaster whose license had been designated for hearing, to assign such a license to "an FCC-approved minority enterprise." *Id.* In this regard, the assignee had to meet the FCC's basic qualifications, and the minority ownership had to be greater than 50% or be "controlling." *Id.* Furthermore, the buyer was required to purchase the license

Metro Broadcasting challenged the FCC's policy of awarding preferences to minority owners in comparative licensing proceedings and the distress sale procedure on equal protection grounds.[33] Writing for the majority,[34] Justice Brennan found Congress' mandate and subsequent approval of the FCC's minority ownership programs pivotal in upholding the federal affirmative action policy.[35] The Court stated that judicial deference is appropriate considering the institutional competence of Congress as the national legislature and its authority under the Commerce Clause, the Spending Clause, and the Civil War Amendments.[36] The Court further declared that regardless of whether

---

prior to the commencement of the renewal or revocation hearing, and the cost could not exceed 75% of the license's fair market value. *Id.* at 557-58.

[33] *Id.* at 558.

[34] *Id.* at 551-601. Justices White, Marshall, Blackmun, and Stevens joined in the majority opinion. Justice Stevens also authored a brief concurring opinion. *Id.* at 601-02 (Stevens, J., concurring). Justice O'Connor, joined by Chief Justice Rehnquist, and Justices Scalia and Kennedy, dissented. *Id.* at 602-31 (O'Connor, J., dissenting). Additionally, Justice Kennedy authored a separate dissent in which Justice Scalia joined. *Id.* at 631-38 (Kennedy, J., dissenting).

[35] *Id.* at 563. Justice Brennan explained in Fullilove v. Klutznick that Chief Justice Burger, and Justices Powell and White stated:

> [A]lhough "[a] program that employs racial or ethnic criteria . . . calls for close examination[,]" when a program employing a benign racial classification is adopted by an administrative agency at the explicit direction of Congress, we are "bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for . . . the general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment."

Id. (quoting 448 U.S. 448, 472 (1980)(plurality opinion)).

[36] *Id.* at 563. The majority explained that the plurality's deference to Congress in *Fullilove* was not completely based on Congress' powers under section five of the Fourteenth Amendment. *Id.* at 563 n.11 (citing U.S. CONST. Amend. XIV, § 5 ("[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."). Rather, Justice Brennan maintained that in *Fullilove*, the Chief Justice expressly pointed out that in enacting the scheme at issue, "'Congress employed an amalgam of its specifically delegated powers.'" *Id.* (quoting *Fullilove*, 448 U.S. at 473.).

In a spirited dissent, Justice O'Connor asserted that the Court had already

or not the measures were remedial in the sense of compensating victims of past governmental or societal discrimination, the appropriate standard of judicial review with respect to affirmative action programs required by Congress is the intermediate level of scrutiny.[37] The intermediate level of scrutiny provides that the measure must serve an *important* governmental purpose within Congress' power and must be *substantially* related to the achievement of that objective.[38] In determining whether the interest in enhancing broadcast diversity was an important governmental objective, the majority concluded that there was a sufficient basis for minority ownership policies advanced by the Commission.[39] Justice Brennan reasoned that Congress clearly indicated that the minority ownership policies furthered the goal of

---

determined in *Bolling* that the equal protection principles of the Fifth Amendment's Due Process Clause prohibited the *federal government* from maintaining racially segregated schools. *Id.* at 604 (O'Connor, J., dissenting). Accordingly, Justice O'Connor disagreed with *Metro Broadcasting* majority holding that Congress' role justified the use of intermediate level scrutiny. *Id.* Justice O'Connor argued that despite the respect to a co-equal branch, the judiciary should be no less vigilant in defending equal protection principles. *Id.* The dissenting Justice further rejected the notion that this case implicated Congress' powers under section five of the Fourteenth Amendment, explaining that section five empowers Congress to act with regard to the states. *Id.* at 605-06 (O'Connor, J., dissenting).

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

[38] *Id.* at 565. Defending its choice of mid-level review, the Court asserted that strict scrutiny, as applied in Richmond v. J.A. Croson Co., to a minority set-aside program adopted by a *municipality*, was not applicable to a racially-based classification promulgated by Congress. *Id.* (citing 488 U.S. 468 (1989)). Justice Brennan held that "race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments." *Id.*

[39] *Id.* at 566. In determining that increased minority participation in broadcasting promotes programming diversity, the Court found that the FCC's reasoning with respect to the minority ownership policies was consistent with their longstanding practices under the Communications Act of 1934. *Id.* at 569-70. In fact, public regulation of broadcasting had always been premised on the assumption that diversified ownership would broaden the range of available programming to the broadcast audience. *Id.* at 570. Consequently, public policy primarily relies on *ownership* to ensure diversified content, and historically, it has proved to be significantly influential with regard to editorial comments and the presentation of the news. *Id.* Justice Brennan further noted that the market was not the only factor that the FCC had relied upon to ensure that the needs of the media's audiences were satisfied. *Id.*

diverse programming.[40]

According to the *Metro Broadcasting* majority, Congress had endorsed the minority ownership preferences and agreed with the FCC's assessment that race-neutral alternatives failed to achieve the necessary programming diversity.[41] The Court further found that in rejecting other types of minority preferences, the Commission was quite cautious with the nature of the programs it chose to adopt.[42] Furthermore, the *Metro Broadcasting* Court found that the adopted policies were directly aimed at the barriers minorities encounter in entering the broadcasting industry.[43] Finally, the Court held that these policies did not

---

[40] *Id.* at 572. Justice Brennan explained that despite efforts by the FCC to produce broadcast diversity through race-neutral means, these steps did not result in any significant increase in ownership diversity. *Id.* at 589. Based upon this finding and the fact that the FCC evaluated its policies three times in 1960, 1971, and 1978 before adopting the minority ownership programs, the Court concluded that the Commission did not act prematurely in devising the broadcasting affirmative action program. *Id.*

[41] *Id.* at 589-90.

[42] *Id.* at 591-93. For instance, the FCC had declined to implement a more expansive policy whereby certain frequencies would be set aside for minority broadcasters. *Id.* at 591-92. Moreover, the day after the Commission adopted its two-part plan, the FCC refused to adopt a plan which would have required 45-day advance public notice before the sale of a station which had been advocated on the ground that it would have ensured minorities an opportunity to bid on stations that might be otherwise sold to industry insiders without ever coming to the market. *Id.* at 592. Additionally, the Commission also rejected suggestions by the Office of Telecommunications Policy and the Department of Commerce advancing proposals that would alter the FCC's multiple ownership, time brokerage, and other policies. *Id.* at 592-93.

[43] *Id.* at 593. According to the majority, the Commission's Task Force outlined several key factors preventing the growth of minority ownership including broadcast inexperience, paucity of adequate financing, and lack of information regarding license availability. *Id.* A preference was assigned to the minority status during the comparative licensing proceeding because such a preference was a compensatory measure for the dearth of broadcasting experience. *Id.* Justice Brennan recognized, however, that the majority of acquisitions were purchases of existing stations because of the limited availability and less desirable locations of new stations. *Id.* at 593-94. Justice Brennan then insinuated that based on these similar findings, Congress had determined that the distress sale policy would overcome these problems by providing existing licensees an incentive to look for minority purchasers. *Id.* at 594. The Court concluded that the FCC's choice of minority policies directly addressed the same factors that it had outlined as being responsible for the underrepresentation of minorities in the broadcast industry. *Id.*

impermissibly burden non-minorities.[44] The majority added that in the context of broadcast licenses, the burden on minorities is slight.[45]

In *Metro Broadcasting*, the Court's utilization of a more deferential level of review than strict scrutiny was based upon the particular facts of the case. First, the Court recognized that Congress was compelled to rectify the dearth of minority ownership of broadcasting licenses.[46] Second, the Court concluded that judicial deference was appropriate to determine the constitutional validity of congressionally promulgated affirmative action because of the unique powers of Congress to rectify societal discrimination.[47] These specific powers, however, are not paralleled by those of the states. Accordingly, an intermediate level of scrutiny, whose applicability is limited to the *federal* government in the context of affirmative action, is not the appropriate standard for which to review racially based classifications promulgated by the states.

C. Strict Scrutiny Review of Racially Based Classifications in the Admissions Process

In 1944, the United States Supreme Court first adopted the standard of strict scrutiny for racially-based classifications in the often-cited case of *Korematsu v. United States*.[48] In *Korematsu*, the Court

---

[44] *Id.* at 596. Justice Brennan stated that the Commission's programs did not stigmatize minority broadcasters as being inferior, including those who had obtained their licenses as a result of the Commission's program. *Id.* at 597 n.49. According to Justice Brennan, audiences would not know the race of a broadcaster and would not be inquisitive about the method by which the broadcaster obtained his license. *Id.* In fact, the Court concluded that the broadcasters would be judged on the merits of their programming. *Id.* Finally, minority licensees were required to satisfy otherwise relevant FCC qualifications requirements. *Id.*

[45] *Id.* at 597. The responsibility of the Commission is to grant licenses in the "'public interest, convenience, or necessity[.]'" *Id.* (quoting 47 U.S.C. §§ 307, 309 (1982)). The limited availability of frequencies on the electromagnetic spectrum means that "'[n]o one has a First Amendment right to a license.'" *Id.* (quoting Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 389 (1969)). Nonminority applicants should not expect that their applications will be granted without the consideration of public interest factors such as minority ownership. *Id.*

[46] *Id.* at 588.

[47] *Id.* at 596-97.

[48] 323 U.S. 214 (1944).

upheld a post-Pearl Harbor military order,[49] which effectively removed Japanese-American citizens from their homes near certain military areas on the west coast and relocated them to "assembly centers."[50] Prior to concluding that the relocation order was in fact constitutional, the Supreme Court declared that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . .[C]ourts must subject them to the most rigid scrutiny."[51] The Court explained that the purpose of applying strict judicial review for racial classifications is to detect whether such classifications reflect "pressing public necessity" or merely "racial antagonism."[52] In applying this standard the Court reasoned that there was a compelling need to prevent sabotage and espionage and concluded that the relocation order of all Japanese-American citizens survived the "most rigid scrutiny."[53]

Three decades later, the Court was for the first time presented with the opportunity to confront the constitutionality of racially-based classification in higher education.[54] In *Defunis v. Odegaard*,[55] Marco

---

[49] *Id.* at 216. The military order provided, in pertinent part:

> [W]hoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of war, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Id. (quoting Act of March 21, 1942, 56 Stat. 173 (1942)).

[50] *Id.* at 222.

[51] *Id.* at 216.

[52] *Id.*

[53] *Id.* at 223-24. The Court stressed that the plaintiff's exclusion from the particular military area was based upon a fear of a Japanese invasion on the west coast and not because of racial prejudice. *Id.* The Court also accepted the fact that because there was no time efficient method of segregating loyal Japanese-Americans from disloyal Japanese-Americans, *all* citizens were required to be relocated. *Id.*

[54] *See* Defunis v. Odegaard, 416 U.S. 312 (1974) (per curiam).

Defunis, Jr., a white male, applied for admission to the University of Washington Law School, a state-operated institution.[56] After being denied admission, Defunis sued the University alleging that the procedures and criteria utilized by the admissions committee were racially discriminatory because they gave preferential treatment to African-American students on the basis of their race,[57] Defunis contended that this policy violated the Equal Protection Clause of the Fourteenth Amendment.[58]

Agreeing with Defunis' contention, the trial court granted an injunction mandating that the law school admit Defunis.[59] By the time

---

[55] *Id.* at 314.

[56] *Id.* Mr. Defunis was one of approximately 1,600 applicants for the 150 seats allocated for the first-year class. *Id.*

[57] The President of the University testified at trial as to the origin of the policy:

> More and more it became evident to us that just an open door, as it were, at the point of entry to the University, somehow or another seemed insufficient to deal with what was emerging as the greatest internal problem of the United States of America, a problem which obviously could not be resolved without some kind of contribution being made not only by the schools, but obviously, also, by the colleges in the University and the University of Washington, in particular, given the racial distribution of this state.
>
> . . .
>
> So that it was the beginning of a growing awareness that just an open door sheer equality in view of the cultural circumstances that produced something other than equality, was not enough; that some more positive contribution had to be made to the resolution of this problem in American life, and something had to be done by the University of Washington.

Defunis v. Odegaard, 507 P.2d 1169, 1175 (Wash. 1973).

[58] *Defunis*, 416 U.S. at 314. The Equal Protection Clause of the Fourteenth Amendment provides, in pertinent part, that "no state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[59] *Defunis*, 416 U.S. at 314. The trial court indicated that the United States Supreme Court's decision in Brown v. Board of Educ., 347 U.S. 483 (1954), dictated the *per se* invalidity of racial classifications. *Defunis*, 507 P.2d at 1178. In *Brown*, a state law had validated the segregation of white and African-American children in the public schools.

the United States Supreme Court granted certiorari, Defunis was already in his third year of law school.[60] Accordingly, the Court concluded that Defunis' case was moot[61] and declined to address the constitutionality of preferential admissions policies in higher education.[62]

Brown, 347 U.S. at 488. Explaining that separate educational facilities are inherently unequal and imply a negative stigma, a unanimous Supreme Court held that separate treatment on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 495. The *Brown* Court did not, however, imply that use of racial classifications by the government to integrate the races was also invalid. According to one commentator, an activist reading of *Brown* would revise Fourteenth Amendment principles to their most basic level by directing our judiciary, in light of more enlightened values, to create a basic right either to never be disadvantaged by the law because of one's race, or to be disadvantaged only upon a demonstration of a strictest national necessity. *See* TRIBE, *supra* note 23 at 1526 (citing Reynolds, *supra* note 9 at 997-98). A better interpretation of the *Brown* decision is that the Court embraced, in light of the modern, social understanding of the meaning of segregation, the underlying principle of the Fourteenth Amendment that *de jure* racial segregation in both public schools and facilities is "in fact subjugated blacks, despite its symmetrical and equal appearance because it stood for white supremacy and therefore denied individuals in the minority 'equal protection' of the laws." *Id.* Professor Tribe contends that this interpretation of *Brown* represents a change in the understanding of racial segregation, instead of a change in the central legal principle. *Id.*

Therefore, the opponents of "benign" racial classifications who argue that such classifications are no less suspect than if the classifications were part of an apartheid system, find no support for their presumptions in *Brown*. *Id.* Instead, these opponents rely on the notion that differences among the various governmental uses of race are equally egregious, unless their only purpose is to compensate those proven to be victims of racial discrimination by divesting proven discriminators from their race-specific, ill-gotten gains. *Id.* at 1527.

[60] *Defunis*, 416 U.S. at 315.

[61] *Id.* at 315-20. Noting that Defunis was already admitted into the law school, the Court declared, "[t]he controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touch[es] the legal relations of parties having adverse legal interests.'" *Id.* at 317 (quoting Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937)).

[62] *Id.* at 319-20. In a spirited dissent, Justice Douglas first determined that if a state school utilizes racial classifications in the selection of its students, the classifications must be subjected to the most arduous scrutiny under the Equal Protection Clause. *Id.* at 333. (Douglas, J., dissenting). The dissenting Justice then rejected the assertion that the need for "strict population equivalencies for every group in every population" was in fact a compelling state interest justifying the classifications. *Id.* at 342 (Douglas, J., dissenting). Justice Douglas recognized, however, the possibility of cultural bias in the Law School Admissions Test "(LSAT)." *Id.* at 335 (Douglas, J., dissenting). Further reasoning that the separate treatment of minorities increases the chances that racial considerations do

Several theories explain the *Defunis* Court's retreat from addressing the constitutionality of affirmative action in higher education. One theory is that the Court purposely and consciously declined to confront the issue to avoid condemning or authorizing affirmative action programs in order to perpetuate their existence.[63] Another theory is that the Supreme Court was in discord with the significance of its own constitutional precedents.[64] Nevertheless, irrespective of the Court's failure the constitutional merits of this issue, the *Defunis* decision failed to provide the necessary guidance as to the constitutional propriety of preferential admissions programs in higher education.

Four years later, in *Regents of the Univ. of Ca. v. Bakke*,[65] the United States Supreme Court finally addressed the constitutionality of affirmative action in higher education. In *Bakke*, a state-owned medical school implemented a special admissions program for "disadvantaged" students in order to diversify its student body.[66] Under this program,

---

not in any way militate against any applicant or on the applicant's behalf, the Justice found that the Admissions Committee acted properly in setting aside minority applications for separate processing. *Id.* at 334, 336 (Douglas, J., dissenting).

[63] *See* Paul J. Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 911-16 (1983) (contending that the Court intentionally avoided condemning or authorizing affirmative action programs in order to perpetuate their existence); *but see* Richard A. Posner, *The* Defunis *Case and the Constitutionality of Preferential Treatment of Minorities*, 1974 SUP. CT. REV. 2, 3 n.5 (suggesting that a superficial answer to this contention is that if the Supreme Court wanted to avoid the issue, it could have done so by denying certiorari and that perhaps when the Court granted certiorari, the Court did not realize the controversial nature of the case).

[64] *See* Ely, *supra* note 23, at 725.

[65] 438 U.S. 265 (1978) (plurality opinion).

[66] *Id.* at 272-73. Under the regular admissions procedure, candidates were able to submit their applications beginning in July of the prior academic year during which the applicant wanted to begin. *Id.* at 273. Candidates with less than a 2.5 grade point average on a 4.0 scale were summarily rejected. *Id.* A few applicants were invited for interviews and subsequently rated on a scale of 1 to 100 by the interviewers and members of the admissions committee. *Id.* at 274. The rating included factors such as the candidates' cumulative grade point average and their average in science classes, the interviewer's summaries, letters of recommendation, Medical College Admissions Test scores ("MCATS"), extracurricular activities, and other biographical information. *Id.* (citation omitted). A total of ratings gave a "benchmark score" to each applicant. *Id.* The full committee then reviewed these ratings and offered admission on a rolling basis. *Id.*

sixteen seats were specifically set aside for minority students.[67] Allan Bakke was a white male who had applied twice to the medical school and was rejected both times despite the fact that the school had admitted applicants whose qualifications were less than Bakke's based solely upon their race.[68] After his second rejection, Bakke commenced a lawsuit alleging that the university's special admissions program excluding him because of his race violated his rights under the Equal Protection Clause of the Fourteenth Amendment.[69]

The *Bakke* decision emerged without a majority opinion and with most members writing separately with varying views. Six separate opinions were written by the nine Justices, with no more than four Justices in agreement on any one issue.[70] Justices Brennan, Marshall, White and Blackmun declared that the special admissions program was

---

In contrast, the special admissions program had its own committee, comprised of primarily members of minority groups. *Id.* On one year's form, applicants could indicate that they wanted to be considered as "'economically and/or educationally disadvantaged applicants[.]'" *Id.* On the next year's form, the applicant could indicate whether they wanted to be considered as a member of a "minority group," apparently "'Blacks,' 'Chicanos,' 'Asians' and 'American Indians.'" *Id.* If the applicant indicated membership of a particular group, the special admissions committee would be given their application. *Id.* Once it was determined that an application was either educationally or economically deprived, the special committee rated these "special applications" in a manner similar to that utilized by the general admissions committee, with the exception of the 2.5 G.P.A. cutoff. *Id.* at 275. Therefore, about 20% of these applicants were granted interviews. *Id.* After the interview, the special committee calculated a benchmark score for each applicant. *Id.* The committee then presented its top choices to the general admissions committee. *Id.* Although the general committee did not compare special candidates to general applicants, the committee could reject recommended special candidates for specific deficiencies. *Id.* The special committee did not stop presenting its "top choices" until a prescribed number were admitted. *Id.*

[67] *Id.* at 275.

[68] *Id.* at 276-77.

[69] *Id.* at 277-78.

[70] The Justices agreed only that the admissions program violated Title VI of the Civil Rights Act. *Id.* at 269-324. Justices Brennan, Marshall, Blackmun and White joined in the opinion on this issue, but also filed an opinion concurring in part and dissenting in part. *Id.* at 324-79 (Brennan, Marshall, Blackmun, White, JJ., concurring in part and dissenting in part). Additionally, Justices White, Marshall, and Blackmun each filed separate opinions. *Id.* at 379 (White, J.), 387 (Marshall, J.), 402 (Blackmun, J.). Justice Stevens authored an opinion, concurring in part and dissenting in part, in which Chief Justice Burger and Justices Stewart and Rehnquist joined. *Id.* at 408-21 (Stevens, J., concurring in part and dissenting in part).

not violative of the Equal Protection Clause because the program was directly aimed at the sufficiently important interest of "remedying the effects of past societal discrimination."[71] In contrast, Justice Stevens, joined by Chief Justice Burger, Justices Stewart and Rehnquist did not address the constitutional issue at all. Instead, Justice Stevens concluded that the special admissions program violated section 601 of the Civil Rights Act of 1964.[72] Further positing that the meaning of the ban on exclusion in Title VI was "crystal clear," Justice Stevens explained that "[r]ace cannot be the basis of excluding anyone from participation in a federally funded program."[73] Accordingly, Justice Stevens explained that because the medical school received federal financial assistance and that Bakke was denied admission solely because of his race, the program had violated Title VI.[74] Providing the deciding vote to form a majority on this issue, Justice Powell concluded that the challenged admissions program violated Title VI, explaining that a constitutional standard must be applied since Title VI proscribed only racial classifications which would violate the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment.[75]

The majority, however, failed to agree on anything else. Justice Powell opined that any type of racial or ethnic distinctions are inherently suspect and will be subjected to "the most exacting judicial examination."[76] In applying strict scrutiny to the special admissions

---

[71] *Id.* at 362 (Brennan, Marshall, Blackmun, White, JJ., concurring in part and dissenting in part).

[72] *Id.* at 412 (Stevens, J., concurring in part, dissenting in part). Section 601 of the Civil Rights Act of 1964, "[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." *Id.* (quoting Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000(d)).

[73] *Id.* at 418 (Stevens, J., concurring in part, dissenting in part).

[74] *Id.* at 412 (Stevens, J., concurring in part, dissenting in part).

[75] *Id.* at 287.

[76] *Id.* at 291. According to Justice Powell, the meaning of the guarantee of equal protection does not change when applied to different people of different colors. *Id.* at 289-90. The Justice examined the classifications of many groups of people to which heightened judicial scrutiny had been applied and pointed out that other groups, besides African-Americans, had been afforded such scrutiny. *Id.* at 291-94. Additionally, Justice Powell added that certain ethnic minorities which now compose the white majority had once been victims of prior discrimination. *Id.* at 295. Thus, if heightened scrutiny

program at issue, Justice Powell found that the objective of "attaining . . . a diverse student body" was a clear "constitutionally permissible goal for an institution of higher education."[77] According to Justice Powell, such an objective was well within the First Amendment freedom of the university to formulate its own judgments as to education and the selection of its own student body.[78] Despite approving the consideration of race or ethnic background as a factor in the admissions process to achieve this goal, Justice Powell adamantly rejected the necessity of

---

applied to discrimination against these ethnic minorities, only a minority of white Anglo-Saxon Protestants would remain. *Id.* at 295-96. Justice Powell asserted that "[t]here is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not." *Id.* at 296. Justice Powell concluded that the application of strict scrutiny to all racial classifications was the only way to achieve consistency because the guarantee of equal protection would be afforded to individuals, and not solely based on group membership. *Id.* at 297-99. Despite acknowledging that Bakke was a white male and not a member of a "'discrete and insular minority,'" the Justice refuted the contention that discreetness and insularity were prerequisites to subjecting ethnic or racial distinctions to strict scrutiny. For example, Justice Powell stated "racial and ethnic classifications . . . are subject to stringent examination. . . ." *Id.*

[77] *Id.* at 311-12. Justice Powell rejected the three other asserted purposes of the program. *Id.* at 306-11. If the program was supposed to remedy the historic deficit of minorities in both medical schools and the medical profession, the Justice explained that such a purpose was facially invalid because the classification would then be discrimination for its own sake, which is unconstitutional. *Id.* at 307. Furthermore, Justice Powell rejected the asserted purpose of remedying the effects of past societal discrimination because such a classification "aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307-10 (citations omitted). Justice Powell stressed that without specific findings of statutory or constitutional violations, the government does not have any compelling justification for preferential policies. *Id.* at 308-09. Finally, the Justice rejected the asserted purpose of improving the health care delivered to communities currently underserved because no evidence was presented to demonstrate that the special admissions program was either needed or designed to promote such a goal. *Id.* at 310-11.

[78] *Id.* at 311-12. Justice Powell reasoned that there was a national commitment to safeguarding academic freedoms within University communities and that a diverse student body promotes an atmosphere of "'speculation, experiment[ation] and creation.'" *Id.* at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J, concurring)). Justice Powell concluded that the right of a University to select applicants who would contribute the most to the "'robust exchange of ideas,'" is a constitutional interest of paramount importance under the First Amendment. *Id.* at 313.

quotas for attaining diversity.[79]

Justice Brennan joined by Justices White, Marshall and Blackmun concurred with Justice Powell's contention that race was a permissible consideration in the admissions process, but disagreed with the Justice's choice of the appropriate standard of review.[80] In a dissent to Justice Powell's opinion, Justices Brennan, White, Blackmun, and Marshall (collectively "the Justices") postulated that not all racial classifications must be subjected to strict scrutiny.[81] The Justices then outlined four criteria that special admissions programs would have to meet in order to avoid strict scrutiny.[82] First, the program must not restrict a fundamental right.[83] Second, the disadvantaged class must not possess "any of the 'traditional indicia of suspectness: the class is not be saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[84] Third, the racial classifications must

---

[79] *Id.* at 315-19. The Justice explained that if minority status is deemed a "'plus'" in the applicant's file, the flexibility of such an admissions program would allow for the consideration of all aspects of diversity, weighed with all qualifications of the applicant, and such flexibility would put the applicants on the same level for consideration, although not necessarily affording them the same weight. *Id.* at 317. Specifically, the Justice approved the non-quota plan of Harvard College to increase racial diversity. *Id.* at 316-17. The "Harvard Plan" provided that when the admissions committee reviewed a large middle group of candidates deemed to be "'admissible'" and capable of doing well, the race of an applicant as well as the geographic origin or unique life experience may tip the balance in the applicant's favor. *Id.* at 316. The most important attribute of the "Harvard Plan" according to Justice Powell, was that the Harvard Admissions Committee did not set a minimum number of minorities to be admitted. *Id.* at 318.

[80] *Id.* at 359 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[81] *Id.* at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[82] *Id.* at 357-58 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[83] *Id.* at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). According to the Justices, no fundamental right was involved in the Davis program since education is not a fundamental right. *Id.* (citing San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 29-36 (1973)).

[84] *Id.* (quoting *San Antonio*, 411 U.S. at 28, and citing United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938)).

not be "'irrelevant and therefore prohibited.'"[85] Fourth, the racial classifications must not stigmatize; meaning that they are neither created under the presumption that a race is inferior to another nor do they promote racial hatred and separatism.[86]

According to the Justices, strict scrutiny was not applicable because all four tests were met by the special admissions program.[87] In addition, the Justices dismissed the mere rational basis standard of review.[88] The Justices did advocate, however, that a mid-level standard of review was appropriate, and found that the program met that standard.[89] Maintaining that there was no difference between the

---

[85] *Id.* (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[86] *Id.* at 357-58 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part) (citing Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886), Strauder v. West Virginia, 100 U.S. 303, 308 (1880); Korematsu v. United States, 323 U.S. 214, 223 (1944); Oyama v. California, 332 U.S. 633, 663 (1948) (Murphy, J., concurring); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964); Loving v. Virginia, 388 U.S. 1, 11-12 (1967); Reitman v. Mulkey, 387 U.S. 369, 375-76 (1967); United Jewish Orgs. v. Carey, 430 U.S. 144, 165 (1977)).

[87] *Id.* at 357-62 (1978) (plurality opinion) (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[88] *Id.* at 358-61 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). These Justices explained that a program created to ameliorate the results of past discrimination as exemplified by the Davis program, possessed the hazard of stigmatizing minorities as inferior. *Id.* at 360 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). Furthermore, the Justices opined that the classification was based upon an "immutable characteristic" and was thus contrary to America's deep belief that advancement which the State approves or sponsors should be based on individual achievement or merit, or at least on those factors that are within an individual's control. *Id.* at 360-61 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part) (citations omitted). Finally, such programs could force the most 'discrete and insular' of whites . . . "to bear the immediate, direct costs of benign discrimination." *Id.* at 361 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part) (citations omitted).

[89] *Id.* at 359, 361-62 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). According to these Justices, the persistent underrepresentation of minorities in medical schools made the special admissions program a reasonable method to remedy the effects of past discrimination. *Id.* at 370 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). Specific findings, that effects of past discrimination actually handicapped minority candidates to the medical school, were not necessary. *Id.* at 364-65 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). Rather, it was sufficient that the Admissions Committee reasonably concluded that the failure of minority groups to

sixteen seat set-aside program and the type of program exemplified by the "Harvard Plan,"[90] which considered race as one factor in the admissions process,[91] the Justices found the reservation of seats valid.[92]

Therefore, despite the perfect opportunity for the Court to unequivocally pronounce the appropriate standard of judicial review in evaluating affirmative action programs in the context of higher education, a bitterly divided Court emerged without any clear standard of review. Moreover, the only issue resolved was that the use of "quotas" and "set-asides" are unconstitutional modes of implementing a valid affirmative action program.[93] Since *Bakke*, the Supreme Court has not addressed this issue. The Supreme Court has, however, addressed quite extensively the issue of affirmative action in the

---

qualify for admission to the medical school under a regular admissions process was mainly the result of the effects of past discrimination. *Id.* at 365 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). Moreover, since the program did not stigmatize any group, race was reasonably used to achieve the program's objectives. *Id.* at 373-74 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). The Justices determined that the medical school's rejection of Bakke did not stamp him as inferior or affect him as dramatically as public school segregation stamps minority children. *Id.* at 375 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). Additionally, according to the Justices, the special admissions program neither discriminated unintentionally nor intentionally against any minority group that it purports to benefit. *Id.* Finally, the Justices found that race-conscious measures were the only practical means to meet the goals of the program in the foreseeable future. *Id.* at 376 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). Use of a factor, such as poverty, instead of race, would result in the admission of more whites, which would defeat the purpose of the program. *Id.* at 376-77 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[90] *See supra* note 79.

[91] *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 378-79 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part). The Justices maintained that there was no constitutional distinction between adding points to a rating of a minority applicant and reserving a specific number of places for minority applicants. *Id.* at 378-79 n.63 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[92] *Id.* at 379 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part, dissenting in part).

[93] *Id.* at 315-19. Justice Powell's conclusion that race may be considered in the admissions process, along with Justice Brennan's group's same conclusion, resulted in a majority for this issue as well.

employment context.[94] It is in this context to which jurists, practitioners, and legal scholars must turn to attempt to fill the voids left in the jurisprudence of preferential admissions policies.

III. THE CONSTITUTIONALITY OF AFFIRMATIVE ACTION IN HIGHER EDUCATION IN VIEW OF CASE LAW IN THE EMPLOYMENT SECTOR

Although the *Bakke* Court invalidated the mandatory sixteen seat set-aside, the Supreme Court subsequently upheld a voluntary affirmative action program which included a mandatory percentage of minorities, in order to remedy persistent past racial discrimination.[95] In *United Steel Workers of America v. Weber*,[96] United Steel Workers of America and Kaiser Aluminum & Chemical Corp. ("Kaiser") entered into a collective-bargaining agreement, which included the conditions and terms of employment at several Kaiser plants.[97] A provision in the agreement required the implementation of an affirmative action program designed to eradicate any conspicuous racial imbalances in any of the almost exclusive nonminority "craftwork forces."[98] African-American hiring goals were established for each Kaiser plant according to the proportion of African-Americans in the particular local labor force.[99] Additionally, the affirmative action plan reserved for African-American employees one-half of the openings in a newly implemented in-plant training

---

[94] *See, e.g.*, United Steel Workers of Am. v. Weber, 443 U.S. 193 (1979); Wygant v. Board of Educ., 476 U.S. 267 (1986) (plurality opinion); Fullilove v. Klutznick, 448 U.S. 448 (1980) (plurality opinion); Local 28, Sheet Metal Workers Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421 (1986); United States v. Paradise, 480 U.S. 149 (1987); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

[95] United Steel Workers of Am. v. Weber, 443 U.S. 193 (1979).

[96] *Id.*

[97] *Id.* at 197-98.

[98] *Id.* at 198.

[99] *Id.* In order to meet their individual goals, on-the-job training was provided to teach unskilled production workers, white and African-American, the skills that were necessary to become craftworkers. *Id.*

program.[100] Pursuant to the collective-bargaining agreement, Kaiser changed its craft-hiring practice.[101] Rather than hiring experienced, outside craftworkers, Kaiser trained its own production workers to fill the available craft openings.[102] The trainees were chosen based on seniority, with at least 50% of the trainees having to be African-American until the percentage of African-American craft-skilled workers was proportionate to the number of African-Americans in the surrounding labor force.[103] One of the rejected production workers instituted suit claiming that the procedure at the plant resulted in junior African-American workers receiving preference over senior white workers, and thus, discriminated against the rejected production workers in violation of section 703(a)[104] and 703(d)[105] of Title VII.[106]

---

[100] United Steel Workers of Am. v. Weber, 443 U.S. 193, 198 (1979). Up until 1974, Kaiser only hired craftworkers who had prior craft experience. *Id.* Few African-Americans had such experience because they had been excluded from craft unions. *Id.* (footnote omitted). Consequently, only 1.83% of the skilled craftworkers at the particular plant were African-American, despite the fact that the work force of the surrounding area was approximately 30% African-American. *Id.* at 198-99.

[101] *Id.* at 199.

[102] *Id.*

[103] *Id.* (citation omitted). In the first year of the implementation of the affirmative action program at the plant, thirteen trainees were selected, seven of which were African-American, and six of which were white. *Id.* Several of the rejected white production workers had more seniority than those African-Americans selected. *Id.*

[104] *Id.* Section 703(a) provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer-
>
> (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
>
> (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(a) (1988).

Examining the historical context and legislative history of Title VII, the *Weber* Court rejected an interpretation of section 703(a) and 703(d), prohibiting all race-conscious affirmative action since such interpretation would result in a conflict with the purpose of the statute.[107] Rather, the Court noted that the legislative history indicated that the language of the statute was intended to cause unions and employers to evaluate and examine their own employment practices and to attempt to eliminate, as far as possible, "'the last vestiges of an unfortunate and ignominious page in this country's history.'"[108] Additionally, the Court found that an examination of the legislative history of section 703[109] of Title VII revealed that it was designed to prevent undue regulation of businesses and to prevent any limitations on the freedom of businesses to undertake any voluntary, race-conscious

---

[105] Section 703(d) provides, in pertinent part:

> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including one-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2(d) (1988).

[106] United Steel Workers of Am. v. Weber, 443 U.S. 193, 199-200 (1979).

[107] *Id.* at 201-02. The Court maintained that the primary concern of Congress in promulgating the prohibition against racial discrimination in Title VII was with the economic situation of African-Americans. *Id.* at 202. The prohibition against discrimination in employment was essentially addressed to the problem of opening opportunities for African-Americans in occupations which had been traditionally closed to them. *Id.* at 202-03.

[108] *Id.* at 204 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)). In suggesting this self-examination and self-evaluation, the Court concluded that Title VII could not be perceived as an absolute prohibition against every voluntary, private, race-conscious affirmative action program attempting to cease such vestiges. *Id.*

[109] *Id.* at 205-06 & n.5. Section 703(j) provides, in pertinent part, that nothing contained in Title VII "shall be interpreted to *require* any employer . . . to grant preferential treatment . . . to any group because of the race . . . of such . . . group on account of" a *de facto* racial imbalance within the work force of the employer. 42 U.S.C. § 2000e-2(j) (1988) (emphasis added).

affirmative action measures.[110] The Court concluded that Title VII's prohibition against racial discrimination did not prohibit all voluntary, private, race-conscious affirmative action plans.[111]

Admittedly, the *Weber* case involved an affirmative action plan in the private sector, thereby implicating neither the Fifth nor

---

[110] Weber, 443 U.S. at 205-06. Furthermore, the Court noted that using the word "require" rather than "require or permit" in section 703 (j) fortified the conclusion that the United States Congress did not intend to limit business freedom to such a degree as to forbid all race-conscious, voluntary affirmative action programs. *Id.* at 207.

Subsequent to *Weber*, the Supreme Court, in Local Number 93, Int'l Ass'n of Firefighters v. Cleveland, 478 U.S. 501 (1986), upheld a voluntary affirmative action program embodied in a consent decree which was entered by Hispanic and African-American firefighters. Hispanic and African-American firefighters had charged the city of Cleveland with racial and ethnic discrimination in hiring, assignment, and promotion of firefighters in violation of Title VII of the 1964 Civil Rights Act. *Id.* at 504. In turn, the district court adopted a consent decree providing for race-conscious remedial action and other affirmative action procedures in the promotion of firefighters. *Id.* at 512.

The *Firefighters* Court afforded greater latitude to voluntary affirmative action programs, than to court-ordered remedies. The Court explained, "We have on numerous occasions recognized that Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." *Id.* at 515. The majority pointed out that:

> '[i]t would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long,' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.'

Id. at 516 (quoting *Weber*, 443 U.S. at 204).

[111] Weber, 443 U.S. at 208. The *Weber* Court explained that the affirmative action plan was structured to "break down old patterns of racial segregation and hierarchy," which mirrored the purpose of the statute. Both the statute and the plan were designed to "'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'" *Id.* (quotations omitted). Concomitantly, the program did not trammel the interests of white workers because the program did not mandate the discharge of white employees and their replacement with African-American hirees. *Id.* According to the *Weber* Court, the plan did not prohibit the advancement of white workers since half of the program's trainees were white. *Id.* The Court noted, however, that the program was only a temporary measure, intended only to eliminate a racial imbalance, and would be terminated as soon as the percentage of African-American workers in the plant was proportional to the percentage of African-Americans in the surrounding labor force. *Id.* at 208-09.

Fourteenth Amendments.[112] Nevertheless, *Weber* is important from a policy standpoint in predicting how the Supreme Court would interpret preferential racial policies in higher education. For example, at the time of its decision, *Weber* was a case of symbolic significance because it represented the Court's understanding of the economic deprivation that African-Americans had endured along with extremely high poverty levels and income disparities despite promises of amelioration by the

[112] Based on Rust v. Sullivan, 111 S. Ct. 1759 (1991), an argument can be made that an enterprise receiving substantial federal funding falls within the parameters of the definition of a state institution, thereby being bound by the restraints of the United States Constitution. In *Rust*, Title X of the Public Health Service Act provided that none of the federal funds appropriated under the Act for family-planning services "'shall be used in programs where abortion is a method of family planning.'" *Id.* at 1764-65 (quoting 42 U.S.C. § 300a-6 (1970)). Additionally, one of the conditions attached to the regulations on the grant of federal funds was that a "'[t]itle X project . . . [could] not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning.'" *Id.* at 1765. The Court held that the limits under Title X neither violated any First Amendment Due Process right to speech nor a woman's Fifth Amendment right to choose whether or not to terminate her pregnancy. *Id.* at 1775-77.

This argument, however, is somewhat problematic. Several scholars have discussed the applicability of the Constitution, specifically the Fourteenth Amendment, to affirmative action programs in higher education, and thus, rejected such a proposal. *See, e.g.*, Redish, *supra* note 14, at n.13 (positing that whether private colleges receiving a substantial amount of federal or state funding come within the ambit of the Fourteenth and Fifth Amendments, is subject to doubt); Posner, *supra* note 63, at n.27 (postulating that monopolistic or governmental enterprises have a greater tendency to practice discrimination than private competitive enterprises could provide the basis for a functional definition of the requirement of "'state action'" under the Fourteenth Amendment). *But see* Larry Lavinsky, Defunis v. Odegaard: *The "'Non-Decision'" With A Message*, 75 COLUM. L. REV. 520, n.3 (1975) (maintaining that where an Equal Protection violation is asserted involving a racial discrimination claim, a lesser showing may be required in order to establish state action.

Moreover, the Court, itself, has been hesitant to approve such a proposition. *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991, 1003 (1982) (holding that even though the state had subsidized the cost of the institution, had paid the expenses of those using the institution's facilities, and had licensed the institution, the action of the institution was not thereby converted into "'state action'"). *See also* Rendell-Baker v. Kohn, 457 U.S. 830, 836 (1982) (holding that actions by a private enterprise can be considered "state action" depending on four factors: (i) extent of government regulation, (ii) source of funding, (iii) exclusivity of the government function, and (iv) existence of a symbiotic relationship. The court held that a private school whose funding came primarily from public grants was not a public institution for purposes of determining state action).

Civil Rights legislation of the 1960's.[113] This Supreme Court decision, in the employment context, instilled hope in many minorities for real equal opportunity.[114] Where *Bakke* had left only a jurisprudential fog on the constitutionality of these types of programs,[115] the sensitivity of expression of the *Weber* Court indicated judicial encouragement to the development of workable solutions to a very pressing problem.[116]

Although the *Weber* Court did not address the constitutionality of affirmative action programs in the public arena, the Supreme Court subsequently confronted the constitutionality of affirmative action in public sector employment in *Wygant v. Board of Educ.*,[117] In *Wygant*, due to racial tensions that had permeated a community's school system, the Jackson Board of Education, in 1972, added a provision to its collective bargaining agreement, giving protection against layoffs to members of certain minority groups.[118] In 1974, layoffs were

---

[113] Harry T. Edwards, *Affirmative Action or Reverse Discrimination: The Head and Tail of* Weber, 13 CREIGHTON L. REV. 713, 738 (1980). In fact, the conservative political climate at that time rendered the Civil Rights Movement less effective than during the 1960's.

[114] *Id.*

[115] *See supra* notes 65-93 (discussing the lack of constitutional guidance advanced by the Court in *Bakke*).

[116] Edwards, *supra* note 113 at 742-43.

[117] 476 U.S. 267 (1986) (plurality opinion).

[118] *Id.* at 270 (footnote omitted). Prior to adding the provision to the collective bargaining agreement, the Minority Public Affairs Office of the Jackson Public Schools distributed to all teachers a questionnaire pertaining to the layoff policy. The questionnaire presented two alternatives: (1) freezing minority layoffs to ensure that the number of minority teachers was exactly proportional to the number of minorities in the student population, or (2) continuing the existing seniority system. *Id.* at 270 n.1. Ninety-six of the respondents to the questionnaire preferred the existing seniority system. *Id.* The provision eventually accepted read as follows:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the Board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of layoff. In no event will the number given notice of possible layoff be greater than the number of positions to be eliminated. Each teacher so affected will be called back in reverse order for positions

necessary.[119] If the Board had adhered to the agreement, tenured nonminority teachers would have been laid off, while minority teachers would have been retained on probationary status.[120] Instead, the Board retained the teachers and laid off the probationary minority teachers, thereby failing to maintain a number of minority personnel equivalent to the percentage of minorities in the student body.[121] Two minority teachers and the union brought suit, claiming that the board's failure to adhere to the layoff provision violated Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[122]

In a plurality opinion, the Supreme Court struck down the scheme at issue.[123] Recognizing that the Court had previously rejected distinctions between people solely because of their ancestry, Justice Powell concluded that the requisite level of review was strict scrutiny, regardless of whether or not the challenged classification operated to discriminate against a group not subject to historical discrimination.[124] The Court thereafter addressed three reasons proposed by the Board to justify the racial classification within the layoff provision.[125] First, since "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy," Justice Powell rejected the notion that *in general* societal discrimination against African-Americans was a

---

for which he is certificated maintaining the above minority balance.

Id.

[119] *Id.* at 271.

[120] *Id.* at 271.

[121] *Id.*

[122] Wygant v. Board of Educ., 476 U.S. 267, 271 (1986) (plurality opinion).

[123] *Id.* at 284. Writing the opinion for the plurality, Justice Powell was joined by Chief Justice Burger, Justice Rehnquist, and in every part except Part IV, Justice O'Connor. *Id.* at 269.

[124] *Id.* at 273. The Court determined that the layoff provision of the collective bargaining agreement operated to favor certain minorities and against whites. Accordingly, "'[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.'" *Id.* at 273-74 (citation omitted).

[125] *Id.* at 274-78.

sufficiently compelling reason to justify the classification.[126] Moreover, the purpose of assuring "role models" for minority students was deemed by the Court to be an inadequate reason for the classification.[127] Lastly, the Board asserted that the objective of its layoff provision was to remedy its own historical racial discrimination against minorities.[128] The Court rejected this reasoning, however, since such a purpose required findings of fact, which the district court did not make.[129] Even if the Board pursued a compelling objective, the plurality pointed out that the Board's layoff program was not sufficiently narrowly tailored

---

[126] *Id.* at 274, 276. Rather, the Court required specific evidence of prior discrimination by the particular governmental unit involved before the Court would permit limited use of any racial classifications to remedy this discrimination. *Id.*

[127] *Id.* at 275-76. Providing role models to minority students, otherwise known as the "role model theory", had no limitations. *Id.* at 275. For example, Justice Powell warned that the board would be authorized to engage in discriminatory hiring and layoff practices even beyond the point needed by a legitimate remedial purpose. *Id.* In fact, the provision could even be employed to exclude minority teachers by justifying the low number of minority teachers with a showing of a low number of minority students. Additionally, a disparity between the percentage of minority students and the percentage of minority teachers could well be the result of factors other than racial discrimination. *Id.* at 276.

[128] *Id.* at 277.

[129] *Id.* at 277-78. Justice Powell stresses that although serious discrimination did exit , such a generality was overexpansive and insufficient to serve as a basis for imposing any discriminatory "*legal* remedies that work against innocent people[.]" *Id.* at 276. The Court declined to make any conclusions with respect to whether the objective of remedying its own prior discrimination was a compelling reason to justify such a classification. Nevertheless, Justice Powell explained that the trial court must make a specific factual finding that the employer had a strong basis for the conclusion that some type of remedial action was necessary. *Id.* at 277. Indeed, it was the burden of the employees to demonstrate the unconstitutionality of an affirmative action plan. *Id.* at 277-78. However, the Court emphasized that without such a factual determination, an appellate court examining a challenge to the remedial action by nonminority employees could not decide whether such a race-based action was justified as some type of remedy for past discrimination. *Id.* at 278.

In addition, the Justices found that if the Board had, itself, discriminated in the past, such a factual determination would have been made in earlier litigation. *Id.* No such findings had been made in past litigation. Rather, in prior litigation, the disparities were explained by the result of general societal discrimination and not by specific discrimination by the Board. *Id.*

because other, less intrusive means were available.[130] In holding that the program was not sufficiently narrowly tailored, the Court concentrated on the expectations of nonminority workers in the unique factual circumstances of a layoff provision, as compared to a hiring provision, and found that "[d]enial of a future opportunity is not as intrusive as loss of an existing job."[131] Therefore, the plurality invalidated the minority layoff provision.[132]

Justices Marshall, Brennan, and Blackmun vigorously dissented. The basic premise behind the dissent was that with the full cooperation

---

[130] *Id.* at 283-84. A less intrusive means could be the adoption of hiring goals. *Id.* at 284.

[131] *Id.* at 283-84. According to the plurality, although racial classifications within a hiring goal plan force innocent individuals to bear the burden, such a burden is diffused greatly among society generally. *Id.* at 282. Indeed, hiring goals impose burdens which do not impose the same type of injury which layoffs impose. *Id.* For instance, employees in union seniority plans typically are heavily dependent upon wages for day-to-day living expenses. *Id.* at 283. Thus, Justice Powell concluded that even a temporary layoff would result in severe economic and psychological hardship. *Id.* Layoffs result in the disruption of settled expectations in a way that hiring objectives do not. *Id.* Accordingly, a racially based layoff program forces the entire burden of the achievement of racial equality on certain individuals, frequently disrupting their entire lives. *Id.*

[132] *Id.* at 284. Even though Justices O'Connor and White agreed with most of the plurality's reasoning, they wrote two separate concurrences. Justice O'Connor agreed with that the objectives asserted by the Board were not compelling and that the means chosen were not sufficiently narrowly tailored, but, the Justice disagreed with the reason why the means chosen was not sufficiently narrowly tailored. *Id.* at 293 (O'Connor, J., concurring). According to Justice O'Connor, it is crucial to examine the layoff policy with reference to the goal of remedying past discrimination. *Id.* at 294 (O'Connor, J., concurring). For example, in this particular situation, the hiring goal which the layoff provision was supposed to protect was linked to the percentage of minority students within the school district, rather than the percentage of competent teachers in the appropriate labor pool. *Id.* Explaining that the disparity in the percentage of minority students and in the percentage of minority teachers was not due to any racial discrimination, Justice O'Connor maintained that the disparate proportion is established only when "the availability of minorities in the relevant labor pool substantially exceeded those hired that one may draw an inference of deliberate discrimination in employment." *Id.* The Justice found that because the layoff provision acted to preserve levels of minority hiring that were not related to remedying employment discrimination, the program could not be characterized as "'narrowly tailored'" to achieve its asserted remedial objective. *Id.*

In a brief concurrence, Justice White determined that in order to achieve an integrated work force, it was constitutionally impermissible to discharge whites and hire African-Americans until the latter comprised a suitable proportion of the work force. *Id.* at 295. Such a layoff policy is violative of the Equal Protection Clause of the Fourteenth Amendment. *Id.*

of its employees, a public employer should be allowed to preserve the benefits of an affirmative action hiring program even when the work force is reduced.[133] Although agreeing with the majority that there was insufficient findings that a remedial program was necessary, Justice Marshall suggested that the Court remand for such findings, instead of holding that the board had failed to present sufficient evidence.[134]

In addition, the dissenting Justices argued that regardless of the standard of review adopted by the Court, the program passed constitutional muster.[135] With regard to the means chosen, the dissent articulated that it was the only means possible to maintain the achieved levels of faculty integration.[136] Accordingly, Justice Marshall would have upheld the program.[137]

In *Fullilove v. Klutznick*,[138] the Court confronted a quota for

---

[133] *Id.* at 296 (Marshall, J., dissenting).

[134] *Id.* at 306 (Marshall, J., dissenting). According to Justice Marshall, the board did not render specific and formal findings of discrimination because it did not wish to subject an already volatile and turbulent school system to further disruption of formal accusations and trials. *Id.* at 303-04 (Marshall, J., dissenting). Rather, the board attempted to achieve the goals outlined in the layoff provision by working with the union and various committees. *Id.* Specific allegations, on the other hand, would have been the catalyst to further litigation and would have contributed nothing to advancing the urgent community goal of integrating the schools. *Id.*

[135] *Id.* at 303 (Marshall, J., dissenting). Justice Marshall did, however, find that the objective of maintaining the levels of faculty integration achieved through an affirmative action plan adopted several years ago, was an important governmental objective. *Id.* at 306 (Marshall, J., dissenting).

[136] *Id.* at 307 (Marshall, J., dissenting). According to Justice Marshall, such integration could not have been maintained as long as layoffs continued to eliminate the last hired teacher. *Id.* Additionally, the layoff plan did not result in an absolute benefit or burden to any particular group because, although race was a factor, along with seniority, race was not dispositive of a teacher's fate. *Id.* at 309 (Marshall, J., dissenting). Indeed, the layoff protection was not employed as a method for increasing minority representation since less severe hiring policies are entrusted with that goal. *Id.* Furthermore, the dissenting Justices believed that the layoff program was the least burdensome of all of the options because the program was the result of collective bargaining, a bilateral process of negotiation, agreement, and ratification. Id. at 310-11 (Marshall, J., dissenting). The process gave both the union and the board the opportunity and the incentive to formulate the most narrow means to preserve the levels of faculty integration. *Id.* at 311 (Marshall, J., dissenting).

[137] *Id.* at 312 (Marshall, J., dissenting).

[138] 448 U.S. 448 (1980) (plurality opinion).

minorities similar to that in Bakke.[139] In 1977, Congress passed the Public Employment Act of 1977, which amended the Local Public Works Capital Development and Investment Act of 1976.[140] One of the changes made was the addition of section 103 (f)(2) of the 1977 Act, commonly known as the "'minority business enterprise'" or "MBE" provision, which precluded federally funded grants on local public works projects unless a specified percentage was expended on minority business enterprises.[141] In the same year, the Secretary of Commerce promulgated regulations that governed administration of the program.[142] Additionally, the Economic Development Administration issued guidelines supplementing the regulations and the statute with regard to minority business participation in local public works grants.[143]

The Court addressed the claim that the MBE provision on its face violated the Equal Protection Clause of the Fourteenth

---

[139] Regents of the Univ. of Ca. v. Bakke, 438 U.S. 265 (1978) (plurality opinion). For an analysis of *Bakke*, *see supra* notes 65-93 & accompanying text.

[140] *Id.* at 453. These amendments appropriated an additional $4 billion for federal grants distributed by the Secretary of Commerce to both local and state governmental entities to be used in local public works projects. *Id.*

[141] The "'MBE'" provision provides, in pertinent part:

> Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id. at 454 (quoting 42 U.S.C. § 6705(f)(2)(1976)).

[142] *Id.*

[143] *Id.* The EDA later issued a bulletin which promulgated detailed information and instructions to aid grantees and their contractors in satisfying the 10% MBE requirement. *Id.*

Amendment.[144] Chief Justice Burger first determined that the legislative objectives of the administrative program and the MBE provision were to ensure that the extent to which federal funds were granted under the Act, grantees would not use employment policies which would result in perpetuating the effects of prior discrimination.[145] According to the Chief Justice, Congress determined that such employment practices perpetuated the effects of prior discrimination which, in turn, impaired or foreclosed access by minority businesses to public contracting opportunities.[146] Although not

---

[144] Fullilove v. Klutznick, 448 U.S. 448, 456-72 (1980) (plurality opinion).

[145] *Id.* at 456-72. According to Chief Justice Burger, it was necessary to consider the legislative goals of the MBE provision against the background of continuous efforts directed toward delivering the assurance of equal economic opportunity. *Id.* at 463. For example, a previous administrative program under section (a) of the Small Business Act of 1953, which was supposed to promote minority opportunity in government procurement, had not achieved the requisite results. *Id.* at 463-67. The Act permitted an agency to contract with any procurement agency of the Federal Government in order to furnished necessary services and goods, and to enter into subcontracts with small business for the performance of these contracts. *Id.* at 463. An executory order required the agency to develop a program analogous to its section 8(a) authority to aid small business concerns controlled and owned by economically or socially disadvantaged persons to acquire a competitive economic position. *Id.* at 464-65. Under section 8 (a), such disadvantaged persons included, but were not limited to, African-Americans, American Indians, Spanish-Americans, Asian-Americans, Eskimos, and Aleuts. *Id.* In fact, according to the guidelines accompanying the regulations, minority enterprises could not be maintained in the program unless the business had been deprived of the opportunity to develop and maintain a competitive economic position due to economic or social disadvantage. *Id.*

[146] *Id.* at 465. The Court reviewed the report from the House Committee on Small Business which had provided, in pertinent part:

> *'The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.*
>
> While minority persons comprise about 16 percent of the Nation's population, of the 13 million business in the United States, only 382,000 or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this

specifically asserting that the Court was employing strict scrutiny, Chief Justice Burger further maintained that any program which uses racial or ethnic criteria, even in a remedial situation, "calls for close examination."[147]

Explaining that the Court approached its task with appropriate, but not subservient deference to Congress, the Chief Justice first determined that the 1977 Act was an exercise of Congress' Spending Power under Article I of the Constitution[148] because the Act conditioned the receipt of federal moneys upon the compliance with federal administrative and statutory directives.[149] In addition, Chief Justice Burger noted that Congress also had the power to regulate the practices of prime contractors in federally funded projects pursuant to

---

> situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.'

Id. at 465-66 (citation omitted). According to the report, the section 8(a) program had limited effectiveness since minority business had great difficulties in gaining access to government contracting opportunities at the local, state, and federal levels. *Id.* at 466-67. The minority business faced difficulties such as inability to meet the bonding requirements, deficiencies in working capital, disabilities because of a past of inadequacies, lack of awareness of bidding opportunities, and government procurement officers exercising their discretion to disfavor minority businesses. *Id.* at 467.

[147] *Id.* at 472.

[148] *Id.* at 473. Article I, § 8, cl. 1 provides, in pertinent part, for the authority of Congress to "provide for the . . . general Welfare." *Id.* at 474 (citing U.S. Const. art. I, § 8, cl. 1).

[149] *Id.* The Court contended that the Spending Power reaches at least as broadly as does Congress' regulatory powers. *Id.* at 473-75. Accordingly, if through its regulatory powers, the Congress could have accomplished the same objectives of the program, then Congress may do the same under the Spending Power. *Id.* Furthermore, the Court concluded that with regard to the MBE pertaining to the actions of local and state grantees, Congress could have achieved its goals by using its power under section eight of the Fourteenth Amendment "to enforce, by appropriate legislation" the equal protection guarantee of the Fourteenth Amendment. *Id.* at 476-78. Based upon abundant historical evidence, Congress could have concluded that when traditional procurement practices are applied to minority businesses, the effects of prior discrimination are perpetuated. *Id.* According to Chief Justice Burger, Congress could also have concluded that a prospective elimination of these barriers to the access of minority-firms to public contracting opportunities "was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws." *Id.* at 478.

the Commerce Clause,[150] because there was a "rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses,"[151] regardless of whether the contractors were not "responsible for any violation of antidiscrimination laws."[152] Focusing on the *remedial* nature of the program, the majority rejected the contention that it was underinclusive because Congress had simply embarked on a remedial program to equalize the economic position of minority groups with that of nonminority groups.[153] The Court, therefore, upheld the validity of the MBE program.[154]

---

[150] The Commerce Clause provides, that Congress has the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST., Art I, § 8, cl. 3.

[151] *Fullilove*, 448 U.S. at 475. Because Congress had this rational basis to make its conclusion, the Court found that Congress could take necessary and proper action to remedy the situation. *Id.*

[152] *Id.* According to the majority, the fact that the expectations of some parties who were innocent of any prior racial discrimination were thwarted did not render the program constitutionally invalid. *Id.* at 484. In fact, if the program were designed to remedy the effects of prior discrimination, it could constitutionally require innocent parties to share some of the burden. *Id.*

[153] *Id.* at 485-86. Recognizing that the program only benefitted certain minority groups and not other disadvantaged classes, the majority maintained that there was no showing that Congress had acted with an invidious and discriminatory purpose. *Id.* In addition to rejecting the claim of underinclusiveness, the Court also refused to accept the assertion that the MBE program was overinclusive. *Id.* at 486-89. Chief Justice Burger stressed that the MBE provision provided reasonable assurance that application of ethnic or racial criteria would be narrowly limited to the accomplishment of Congress' remedial objectives and that any misapplications of the program will be immediately fixed. *Id.* In fact, the MBE program contained the safeguard that MBEs that are not "'bona fide'" or "attempt to exploit the remedial aspects of the program by charging an unreasonable price, i.e. a price not attributable to the present effects of past discrimination," would be eliminated from participation in the program." *Id.* at 488. Furthermore, if the grantee could have proved that their best efforts could not achieve or have not achieved the requisite 10% within those limitations of the program's remedial objectives, then the grantee could have obtained a waiver from the program. *Id.* Essentially, the Court viewed the program as a "pilot project," which was appropriately limited in duration or extent, and subject to periodic re-evaluation and re-assessment. *Id.*

[154] *Id.* at 492. In a concurring opinion, Justice Marshall joined by Justices Brennan and Blackmun argued that the appropriate inquiry for determining whether racial classifications which remedied the effects of past racial discrimination and benefitted

The import of the *Fullilove* decision is significant to affirmative action in higher education because it firmly established the constitutional legitimacy of preferential programs, with set-asides similar to the type at issue in *Bakke*.[155] Indeed, *Fullilove* validated the congressional use of race-conscious remedies to ameliorate the effects of both past and present discrimination and to prevent their recurrence.[156] The United States Supreme Court rebuked the notion that affirmative action could be belittled to "reverse discrimination" or that the Constitution was color-blind.[157] Furthermore, although arising out of federal legislation, *Fullilove* paved the way for the constitutionally permissible adoption of local and state minority set-asides.[158]

The most important characteristic, however, of the *Fullilove* decision was Chief Justice Burger's assertion that "innocent parties"[159]

---

minorities were constitutional depends upon whether the classifications serve important governmental objectives and are substantially related to the achievement of those objectives. *Id.* at 519 (Marshall, J., concurring). Finding that the classification achieved the congressionally promulgated objective of remedying the present consequences of past racial discrimination, Justice Marshall concluded that the program passed muster under the Equal Protection Clause. *Id.* at 521 (Marshall, J., concurring).

[155] According to one commentator, despite the fact that the Court maintained that the affirmative action plan was only a temporary remedial solution to a history with abundant evidence of discrimination, the evidence was meager and derivative from past hearings on other legislation. *Tribe, supra* note 23, at 1534. Accordingly, such factors were illusory. *Id.*

[156] *See* Drew S. Days, III, *Fullilove*, 96 Yale L.J. 453, 454 (1987).

[157] *Id.* at 454.

[158] *Id.* In fact, only Chief Justice Burger and perhaps, Justice White believed it was significant that the set-aside was congressionally mandated. *See also* Sophia Androgue, *When Injustice Is the Game, What Is Fair Play?* 28 HOUS. L. REV. 363, 375 (1991); *but see* Michel Rosenfeld, *Affirmative Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 900 (1985) (claiming that *Fullilove* did not provide sufficient constitutional support for the adoption of a similar plan by a state, and that *Fullilove* "leaves the constitutional contours of affirmative action vague and uncertain").

[159] The use of the excuse of the innocent party in order to invalidate an affirmative action is frequently known as the "'rhetoric of innocence.'" *See, e.g,* Ross, *supra* note 1, at 299; Kathleen M. Sullivan, *Comment: Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986). Those who frequently employ this rational are commonly "'white rhetoricians.'" Ross, *supra* note 1, at 299-300. According to

may be required to share the burden of programs designed to eliminate the effects of past discrimination.[160] One of the most frequently declared condemnations of any type of affirmative action program is that the plan harms those parties who did not and still do not discriminate against minorities.[161] Clearly, the fact that the *Fullilove* Court believed that some nonminority businesses had reaped competitive benefits for many years because of the exclusion of minority enterprises from these contracting opportunities,[162] indicates a judicial sanction of such plans, regardless of any incidental affect the programs may have on nonminority parties.

Professor Ross, this innocence is presumed innocence, and not the consequence of any particular and actual injury because the innocent party claims, himself, to have never denied to a minority the job or position which the applicant seeks. *Id.* at 300-01. However, this "'rhetoric of innocence'" rationale avoids the argument that non-minorities have generally benefitted from oppressing minorities, in a myriad of ways. *Id.* at 301. Professor Ross asks, "What white person is 'innocent,' if innocence is defined as the absence of advantage at the expense of others?" *Id.*

Moreover, this rhetoric also revolves around the questioning of the "'actual victim'" status of the African-American beneficiary. Victim status is only applicable to those who have actually suffered such discrimination. Again, Professor Ross asks, "[I]f discrimination against people of color is pervasive, what Black person is not an 'actual victim?'" *Id.*

Professor Ross asserts that this rhetoric uses an extremely powerful cultural symbol-the symbol of innocence and its nemesis, the symbol of the "defiled taker." *Id.* at 310. If a white person is called the innocent victim of a preferential policy program, then the "rhetorician" invokes both the idea of innocence and the idea of the not-so-innocent "defiled taker." *Id.* In addition to the use of cultural significance of language, the Professor posits that the "rhetoric of innocence" draws its power from its connection to "'unconscious racism.'" *Id.* We are all racists because our common historical and cultural heritage has fashioned many attitudes and ideas, attaching unconscious and repressed significance to a person's race, and inducing unconscious and repressed negative feelings about non-whites. *Id.* In fact, our culture continues to teach racism, as reflected by the facts that our media and language are infected with racial stereotypes, and that white families have a tendency to leave a neighborhood when the African-American population reaches a certain percentage of the total population. *Id.* at 311 & n.47.

[160] Fullilove v. Klutznick, 448 U.S. 448, 484 (1980) (plurality opinion).

[161] *See, e.g.*, Richard H. Fallon & Paul C. Weiler, Firefighters v. Stotts: *Conflicting Models of Racial Justice*, 1984 SUP. CT. REV. 1, 27 (claiming that "[p]referential employment remedies typically result in the exclusion from employment opportunities a class of persons, most often white males, who themselves may be innocent of any race-based wrongdoing.").

[162] *Fullilove*, 448 U.S. at 485.

Although the decision in *Wygant* revealed that the Supreme Court might find that the objective behind a program for eliminating the effects of past discrimination could be a compelling governmental interest, the Court in *Local 28, Sheet Metal Workers International Association v. Equal Employment Opportunity Commission*,[163] subsequently determined that the benefits of an affirmative action program are not circumscribed only to those who could demonstrate that they were victims of prior discrimination.[164] Prior to the action, a district court had found petitioners, Union Local 28 and the Apprenticeship Committee,[165] guilty of a Title VII violation of the Civil Rights Act of 1964 for discriminating against non-white workers in the selection, recruitment, training, and admission of members into the union.[166] Ordering the petitioners to discontinue their discriminatory practices, the lower court established a 29% minority membership goal, based upon the percentage of minorities in the relevant labor pool in the surrounding area, and instructed the petitioners to implement programs to effectuate that goal by a certain time period.[167] After two incidents of nonadherence to the court order and civil contempt, the district court ultimately amended the membership goal to 29.23% which had to be met within a prescribed

---

[163] 478 U.S. 421 (1986).

[164] *Id.* at 453.

[165] Local 28 Apprenticeship Committee was a management-labor committee that operated a four year training program designed to teach sheet metal skills. *Id.* at 427. Apprentices enrolled in the program received training from both on-the-job work experience and classes. *Id.* After completing the program the apprentices became journeyman members of Local 28. *Id.* Successfully completing the program was the principal means of attaining union membership. *Id.*

[166] *Id.* The New York State Commission for Human Rights found that petitioners had excluded African Americans from union membership and the apprenticeship program. *Id.* In fact, Local 28 never had any African-American members, and membership was typically achieved through nepotism, with incumbent union members sponsoring candidates. *Id.* Naturally, this procedure operated to create an impenetrable barrier for minority applicants. *Id.*

[167] *Id.* at 432. The District Court adopted an affirmative action program mandating that petitioners offer nondiscriminatory, annual apprentice and journeyman examinations, choose members according to a white-nonwhite ratio, conduct extensive publicity and recruitment campaigns directed to minorities; secure the consent of an administrator prior to distributing temporary work permits, and maintain detailed membership records. *Id.* at 432-33.

time.[168] Petitioners brought suit, asserting that the membership goal was unconstitutional because it resulted in extending race-conscious preferences to those who had not been identified as victims of petitioner's unlawful discrimination.[169]

Writing for a majority of the Court, Justice Brennan stated that the language of section 706(g)[170] plainly expressed congressional intent to vest the district courts with immense discretion to grant "appropriate" equitable relief in order to remedy unlawful discrimination.[171] The majority emphasized that the last sentence of this section did not say that a court was permitted to grant relief only to victims of past discrimination.[172] Indeed, Justice Brennan found that the legislative history indicated that Congress intended that the benefits from section

---

[168] *Id.* at 437.

[169] *Id.* at 440.

[170] Section 706(g) states:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . or any other equitable relief as the court deems appropriate. . . . No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination of account of race, color, religion, sex, or national origin in violation of . . . this title.

Id. at 446 (quoting 42 U.S.C. § 2000(e)-5(g)).

[171] *Id.*

[172] *Id.* at 447. Stating that the sentence on its face addressed only the circumstances where the plaintiff could demonstrate that a union or an employer had engaged in unlawful discrimination, the Court explained that the union could demonstrate that a certain individual would have been refused admission anyway, because, for example, the individual was unqualified. *Id.* In such a situation, section 706(g) confirms that a court was forbidden to order a union to admit this individual. *Id.* The Court concluded that in the case at hand the lower court's order did not require petitioners to admit individuals who had been denied admission for reasons other than discrimination. *Id.*

706(g) were not limited only to identified victims of prior discrimination.[173] Moreover, Justice Brennan maintained that the legislative policy behind Title VII disclosed Congress' intent not to prohibit courts from ordering some type of affirmative action plan where appropriate to remedy prior discrimination.[174] Reviewing its own precedent, the majority concluded that a "district court's remedial powers should be exercised both to eradicate the effects of unlawful discrimination *as well as* to make the victims of past discrimination whole."[175] Although Justice Brennan did not specify the level of applicable review, the majority did determine that the orders of the district court were narrowly tailored to further a compelling interest of

---

[173] *Id.* at 453-63. According to the opponents of Title VII, employers and labor unions would be forced to implement preferences or racial quotas to avoid any liability under the statute. *Id.* at 453. On the other hand, supporters insisted that the statute did not mandate "'racial balancing'" to correct a racial imbalance in the work force. *Id.* This Congressional debate resulted in the adoption of section 703(j), which indicated that the statute did not require a union or employer to adopt preferences or quotas simply because of a racial imbalance. Section 703(j) provided as follows:

> A new subsection 703(j) is added to deal with the problem of racial balance among employees. The proponents of this bill have carefully stated on numerous occasions that Title VII [sic] does not require an employer to achieve any sort of racial balance in the work force by giving preferential treatment to any individual or group. Since doubts have persisted, subsection (j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.

Id. (quoting 42 U.S.C. § 2000e-2(j)).

[174] *Id.* at 464-65. Such an interpretation of the remedial power of the courts is supported further by the contemporaneous interpretations of the Justice Department and the Equal Employment Opportunity Commission, the two agencies responsible for enforcement of Title VII. *Id.* at 465-66. These agencies strongly maintained that the statute authorizes race-conscious remedial action for unlawful discrimination, and both agencies, themselves, had previously sought consent decrees and court orders containing such provisions. Additionally such an interpretation of courts' remedial powers is further evidenced by the legislative background of the Equal Employment Opportunity Act of 1972, which amended Title VII through a modification of section 706(g), vesting district courts with the power to order "'any other equitable relief as the court deems appropriate.'" *Id.* at 469-70.

[175] *Id.* at 471 (emphasis added) (citations omitted).

the government in remedying prior discrimination.[176] Finding that the membership goal was a temporary measure that did not trammel the interests of any white employees,[177] the Court upheld the lower court's order.[178]

Once again, the United States Supreme Court expressed concern about the "burden" that "innocent" whites must bear so that an affirmative action program is able to flourish and achieve its intended purpose.[179] The notion of "settled expectations of nonminority workers" from *Wygant* was reverberated in *Sheet Metal Workers* as the Court explained that the preferential treatment plan "did not disadvantage *existing* union members."[180] Additionally, although noting that the plan extended benefits to non-victims of the union's "long continued and egregious racial discrimination" and "foot-dragging resistance,"[181] the Court did not specifically define "egregious racial discrimination." Furthermore, the concern of the Supreme Court was misplaced because the plurality failed to acknowledge that the settled expectations of these innocent parties were most likely formulated within the historically pervasive environment of racism.[182] As such, the expectations are exaggerated and should never operate to invalidate a program, such as preferential admissions policies, designed with remedial objectives.[183]

---

[176] *Id.* at 480.

[177] *Id.* at 479.

[178] *Id.* at 483.

[179] *See* Wygant v. Board of Educ., 476 U.S. 267 (1986) (plurality opinion). For a discussion of *Wygant*, *see supra* notes 117-137 and accompanying text.

[180] *Id.* at 483.

[181] *Id.* at 477.

[182] *See* Tribe, *supra* note 23, at 1536.

[183] *Id.* Some commentators have fervently asserted that concentrating on the remedial aspects of a preferential treatment program is entirely inappropriate and extremely dangerous. *See, e.g.*, Sullivan, *supra* note 159, at 83. Professor Sullivan postulates that *Bakke*, *Weber*, and *Fullilove* represent the Supreme Court's acceptance of affirmative action as being permissible to "'remedy,'" "'repair[],'" or "'cure'" any "past sins of discrimination." *Id.* at 83. The underrepresentation of minorities was not an evil in itself, but only in that it was a signal of specific past injury. *Id.* The perpetrators of such a result were now free to mend it themselves, with the support of both the

Analogous to the Court imposed hiring goal approved in *Sheet Metal Workers,* the United States Supreme Court upheld a court-ordered numerical promotional preference in *United States v. Paradise.*[184] Finding that for almost forty-years the Alabama Department of Public Safety had systematically excluded African-Americans from employment[185] and that it had not developed promotional policies to

---

Constitution and Title VII. *Id.*

Additionally, Professor Sullivan makes the persuasive argument that justifying preferential treatment policies on the "sins of past discrimination" will doom such policies to further challenges even while legitimating them. *Id.* at 92. For example, litigation frequently revolves around the question of how much prior discrimination is enough. *Id.* Requiring parties to ask such a question could deter the implementation of any voluntary affirmative action program because an admission of guilt conflicts with the self-interest of unions and employers and could instigate race discrimination lawsuits by minorities. *Id.*

Moreover, Professor Sullivan posits that the focus on sin, in turn, focuses on the victim status, and retributive justice on wrongdoers. *Id.* Predication on the prior sins of discrimination induces claims that neither nonsinners should pay nor nonvictims should benefit. *Id.* However, the Professor opines that instead of focusing on "past sins," the Court should have concluded that because American racism left African-Americans an underclass, they are still systematically disadvantaged as compared to whites, and no African-American is not a "'victim'" of past discrimination. *Id.* at 93. Accordingly, all African-Americans are appropriate beneficiaries of a preferential treatment plan. *Id.*

[184] 480 U.S. 149 (1987) (plurality opinion). Justices Brennan, Marshall, Blackmun, and Powell formed a plurality, with concurring Justice Stevens adding the deciding vote.

[185] In 1972, the National Association for the Advancement of Colored People ("NAACP") brought an action against the department, challenging the department's practice of excluding African-Americans from employment. *Id.* at 154. The district judge had determined the following:

> Plaintiffs have shown without contradiction that the defendants have engaged in a blatant and continuous pattern and practice of discrimination in hiring in the Alabama Department of Public Safety, both as to troopers and supporting personnel. In the thirty-seven year history of the patrol there has never been a black trooper and the only Negroes ever employed by the department have been nonmerit system laborers. This unexplained discriminatory conduct by state officials is unquestionably a violation of the Fourteenth Amendment.

Id. (citation omitted). Accordingly, the judge concluded:

> Under such circumstances . . . the courts have the authority and the duty not only to order an end to discriminatory practices, but also to correct and eliminate the present effects of past discrimination. The

rectify the situation, a district court ordered that one African-American trooper be promoted for each white trooper until each rank was 25% African-American, and until a promotional procedure lacking an adverse impact upon African-Americans was developed.[186] The United States challenged the constitutionality of the district court's order, claiming that the relief ordered by the district court violated the Equal Protection Clause of the Fourteenth Amendment of the federal Constitution.[187]

As a preliminary matter, the Supreme Court explained that even if it were to apply strict scrutiny, the relief satisfied the standard because it was narrowly tailored to serve the compelling governmental objective of remedying present and past discrimination permeating entry-level hiring and promotional practices.[188] The *Paradise* Court rebuffed the contention that since the department had only discriminated in hiring practices, promotional relief was unjustified.[189] Furthermore, the Court explained that the one-for-one requirement was the only promotional procedure which would successfully eliminate the effects of the

---

> racial discrimination in this instance has so permeated the Department['s] employment practices that both mandatory and prohibitory injunctive relief are necessary to end these discriminatory practices and to make some substantial progress toward eliminating their effects.

Id. (citations omitted).

[186] *Id.* at 163. Such a plan was also contingent upon the availability of qualified African-American troopers. *Id.*

[187] *Id.* at 166.

[188] *Id.* at 167. The plurality characterized the systematic exclusion of African-Americans in all positions as "egregious discriminatory conduct" which was "'unquestionably a violation of the Fourteenth Amendment.'" *Id.* Such conduct begot a profound need and strong justification for the race-conscious measure ordered by the district court. *Id.*

[189] Claiming that they were only found guilty of discrimination in hiring, not promotional policies, the Department argued that remedial relief was unnecessary because the intentional hiring discrimination had no effect in the upper ranks, and because the Department's promotional policies were not discriminatory. *Id.* at 168. To the contrary, the United States Supreme Court found that the hiring discrimination had profoundly affected the force's upper ranks because African-Americans were precluded in the first place from competing for promotions. *Id.* Additionally, the promotional procedure was, in and of itself, discriminatory, resulting in a totally exclusionary upper rank structure. *Id.* at 168-69.

department's pervasive and systematic exclusion of African-Americans.[190] Noting that the requirement was flexible in its application at all ranks, the Court maintained that it applied only when the department needed to make promotions, and that gratuitous promotions were not mandated.[191] Most importantly, however, the *Paradise* Court stressed that the one-for-one requirement was only a temporary remedial measure, continuing only until the department promulgated promotional procedures which did not result in a discriminatory impact on African-Americans.[192] Additionally, the one-for-one requirement was not arbitrary in comparison to the 25% minority labor pool because the 50% figure did not represent a goal, but merely the speed at which the goal should be achieved.[193] The Court added that the court order did not impermissibly burden innocent whites because of the temporary and limited nature of the program.[194] Accordingly, the Supreme Court upheld the one-for-one promotional requirement.[195]

The *Paradise* decision significantly impacts upon the issue of affirmative action in higher education for several reasons. First, the Court rejected the proposition that the consideration of race in a

---

[190] Offering alternatives, the department proposed, as a "stopgap measure," the promotion of four African-Americans and eleven whites, and the Department requested additional time in order to allow the personnel department to develop and submit some kind of nondiscriminatory procedure. *Id.* at 172. Justice Brennan rejected this alternative because the department had received enough time to develop a nondiscriminatory procedure, but had still not done so, and further delay would only exacerbate the injury already suffered by the African-American employees. *Id.* at 172-73.

[191] *Id.* at 177-78. White troopers, for example, could be promoted since there were no qualified African-American troopers. *Id.* at 177.

[192] *Id.* at 178-79. In fact, the requirement had been suspended upon the Department's timely submission of promotional procedures for sergeant and corporal. *Id.* at 179.

[193] *Id.* at 179-80.

[194] *Id.* at 182. In fact, the Court found that the program had only been used once, at the corporal rank and could not be utilized at all in the upper ranks. *Id.* Moreover, the lower court did not order an "'absolute bar'" to white advancement, and the program did not mandate the promotion of unqualified African-Americans over whites or the discharge or layoffs of whites. *Id.* at 183.

[195] *Id.* at 186.

preferential treatment program is never appropriate because all of the Justices seem to be in agreement that the consideration of race is sometimes appropriate "in the allocative process."[196] Emphasizing that the program was contingent upon the availability of *qualified* African Americans, the plurality appears to have relied upon a subliminal premise often employed in the search for the "'best candidate.'"[197] The implicit presumption in this search is that all of the applicants, regardless of race, have had equal opportunities to obtain the necessary qualifications for the particular position to be filled.[198] This premise is known as the "clone theory."[199]

Unlike an affirmative action plan in the specific context of employment, the "clone theory" does not fare well in the context of affirmative action in higher education. In fact, a plurality of the Supreme Court has, instead, embraced the concept and motivation of diversity *in support of* preferential admissions policies.[200] Maintaining that the attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education, the Supreme Court has explained that the freedom of an academic institution to make its own, individual judgments as to the educational process includes the

---

[196] *See* Robert Belton, *Reflections of Affirmative Action After Paradise and Johnson*, 23 HARV. C.R.-C.L. L. REV. 115, 116-17.

[197] *Id.* at 130.

[198] *Id.* at 130.

[199] *Id.* The clone theory was implicitly rejected by the Supreme Court in Johnson v. Santa Clara Transp. Agency, 480 U.S. 616 (1987). *See also* Belton, *supra* note 196, at 132. In *Johnson*, the Santa Clara County Transportation Agency adopted an affirmative action plan for promoting and hiring women and minorities. *Johnson*, 480 U.S. at 620. The plan provided that the sex of an applicant was a factor to be considered in making promotions to any positions within a "traditionally segregated job classification" in which women had been significantly underrepresented. *Id.* at 620-21. The plan was intended to achieve yearly improvement in promoting and hiring women and minorities in such positions, thereby reaching the long-term goal of attaining a work force reflecting the proportion of women and minorities in the labor force in the area. *Id.* at 621-22. Determining that the plan appropriately recognized the "'manifest imbalance'" representing the underrepresentation of women in "'traditionally segregated job categories,'" the Court approved of the Agency's gradual approach in eliminating the gender and racial imbalance in the work force and the Agency's long term goal. *Id.* at 628, 634-36.

[200] *See* Regents of the Univ. of Ca. of Bakke, 438 U.S. 265 (1978) (plurality opinion).

selection of its students.[201] The right of a school to make its own selection process of those students who will contribute the most to the "'robust exchange of ideas'" is guaranteed by the First Amendment.[202] Thus, in the context of education, the principle of diversity is important enough to trammel the "clone theory" and permit a racially-based affirmative action program to be a constitutionally valid, means of achieving a compelling governmental interest.[203]

The most recent addition to the jurisprudence of affirmative action in the area of employment came from the Supreme Court in *City of Richmond v. J. A. Croson Co.*,[204] in which the Court finally agreed that *strict scrutiny* was the appropriate level of scrutiny for *any* type of racially-based affirmative action measure.[205] In 1983, the Richmond City Council adopted a Minority Business Utilization Plan ("the Plan"), which mandated that prime contractors who were awarded city contracts had to subcontract, at minimum, 30% of the dollar value of the contract for at least one Minority Business Enterprise (MBE).[206] Although no

---

[201] *Id.* at 311-12. The *Bakke* Court outlined the "'four essential freedoms'" that constitute academic freedom:

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

Id. at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring)).

[202] *Id.* at 313.

[203] In *Bakke*, the only justification for a preferential admissions program that was accepted by the Supreme Court was the attainment of a diverse student body because of the First Amendment implications involved. *Id.* at 311-12.

[204] 488 U.S. 469 (1989).

[205] *Id.* at 493-95.

[206] *Id.* at 477. This set-aside was inapplicable to minority-owned contractors. *Id.* at 478-79. The term "MBE" was defined by the Plan to be a "'business at least fifty-one (51) percent of which is owned and controlled. . . by minority group members.'" *Id.* at 478. In turn, these minority group members were defined as "'[c]itizens of the United States who were Black, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.'" *Id.* According to the Plan, it was a remedial measure enacted in order to increase

evidence existed that indicated that the city, itself, had discriminated,[207] the city council possessed evidence that racial discrimination had occurred in the construction industry.[208] Contending that it was unable to find a qualified MBE who could do the job at an appropriate price, J.A. Croson, a white-owned prime contractor, requested a waiver.[209] Croson brought suit against the City of Richmond, arguing that Richmond ordinance was facially unconstitutional and unconstitutional as applied.[210]

A majority of the Court determined that the appropriate level of review for any type of governmental racially-based classification was strict scrutiny, regardless of whether the governmental action aided or harmed minority groups.[211] In implementing the MBE plan, the majority found that the city council failed to demonstrate that it had a compelling objective of remedying prior racial discrimination because

---

participation by MBEs in the construction of public projects. *Id.*

[207] *Id.* at 480.

[208] *Id.* at 479-80. For instance, a study had indicated that although the general population of Richmond was 50% African-American, MBEs had been awarded only .67% of Richmond's prime construction contracts within a five year period. *Id.* Moreover, a variety of associations of contractors had almost nonminority businesses as members. *Id.* at 480. Furthermore, there were findings of discrimination nationally in the construction industry. *Id.* at 484.

[209] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 482-83 (1989) Pursuant to the rules of the ordinance, Croson requested a waiver of the 30% requirement. *Id.* at 482. The City denied this request. *Id.* at 483.

[210] *Id.* at 483.

[211] *Id.* According to Justice O'Connor, three reasons compelled the use of strict scrutiny for any type of racial classification. First, there is no other method to determine what classifications are "'remedial'" or "'benign,'" and which classifications would have been motivated by racial politics or illegitimate ideas of racial inferiority. *Id.* at 493. In fact, the purpose of this strict standard of review is to "'smoke out'" any improper use of race by assuring that the legislature is pursuing an objective important enough to necessitate the use of such a means. *Id.* Additionally, the Justice explained that a strict standard of review is required because racial classifications bear the danger of stigmatic harm. According to the Justice, unless such classifications are reserved only for remedial settings, they could actually promote opinions of racial inferiority and result in politics of racial hostility. *Id.* Moreover, the majority explained that a lower, or "watered down level of review," only "effectively assures that race will always be relevant in American life, and the 'ultimate goal' of 'eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being's race[.]'" *Id.* at 495.

there was inadequate proof that racial discrimination in the construction industry had in fact occurred.[212]

The Court found that not only did the Richmond City Council fail to proffer a compelling governmental need to remedy the effects of past discrimination, but the council also failed to demonstrate that the 30% requirement was the most narrow means of achieving such an objective.[213] Justice O'Connor, however, did not reject all remedial action plans as failing strict scrutiny.[214] Rather, had the requisite

---

[212] *Id.* at 498-99. According to Justice O'Connor, the 30% requirement was an "unyielding racial quota," which could not be justified solely on "an amorphous claim" that in general, both public and private national, racial discrimination had contributed to a dearth of opportunities for African-American entrepreneurs. *Id.* at 499. Furthermore, Justice O'Connor argued that it was only sheer speculation the number of minority firms which would be in the city of Richmond without prior societal discrimination. *Id.* Moreover, there was no evidence of the number of qualified minority companies. *Id.* at 502. In fact, according to the Justice, where special qualifications are required, the appropriate and relevant statistical pool for the purpose of showing discriminatory exclusion, is the number of qualified minority companies. *Id.* at 502-03. Thus, with respect to the disparity between the 50% general minority population and the .67% of publicly funded prime construction contracts, Justice O'Connor concluded that there was insufficient evidence to satisfy the requisite demonstration of clear prior discrimination. *Id.* at 501-03.

In addition to the misunderstanding of the disparity, the fact that minorities constituted an extremely low percentage of membership in local contractors' associations was insufficient, standing alone, to be probative of discrimination within the local construction industry. *Id.* at 503. According to the Justice, many reasons could explain the low membership. *Id.* For example, societal discrimination in economic opportunities and education, and the possibility that African-Americans could be attracted to other industries, could explain their low membership. *Id.* Finally, Congressional findings of national racial discrimination in the construction industry were irrelevant, since only the presence of discrimination in Richmond was pertinent. *Id.* at 504.

[213] *Id.* at 507 (1989). According to Justice O'Connor, there was no consideration of any race-neutral alternatives for increasing minority business participation in the local construction industry. *Id.* Determining that most of the supposed barriers to minority participation were race neutral, Justice O'Connor maintained that race neutral programs would achieve the desired result. *Id.* Moreover, the 30% requirement itself was not narrowly tailored to any particular goal, except perhaps racial balancing. *Id.* Rather, the requirement rests upon the assumption that minorities choose trades in direct proportion to representation of them in the local population. *Id.*

[214] *Id.* at 509. If Richmond had evidence that nonminority contractors had systematically excluded MBEs from subcontracting opportunities, then, the city could have had a compelling objective to take action to stop the discriminatory exclusion. *Id.* at 509. In fact, if such were the case, "a significant statistical disparity between the qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime

evidence of specific past discrimination been demonstrated, the program would have passed constitutional muster.[215] Nevertheless, the *Croson* Court struck down the program as unconstitutional.[216]

In a vigorous dissent, Justice Marshall, joined by Justices Brennan, and Blackmun repudiated the majority's choice of strict scrutiny as the appropriate level of review for an affirmative action plan and advocated a middle tier level of review.[217] Although acknowledging that Richmond had a population that was 50% African-American and

---

contractors, an inference of discriminatory exclusion could arise." *Id.*

[215] *Id.*

[216] *Id.* at 511. In a concurring opinion, Justice Stevens agreed with the majority that strict scrutiny was appropriate, but disagreed with the holding that remedial action was only justified for a specific past wrong. *Id.* (Stevens, J., concurring). Justice Stevens asserted that the primary consideration is whether the action advanced the public interest in the education of children for the future. *Id.* at 512 n.2 (Stevens, J., concurring). Additionally, Justice Stevens said in a city of racial unrest, the development of a better relationship with the community is another constitutionally acceptable justification for a race-conscious affirmative action program. *Id.* at 512-13 n.2 (Stevens, J, concurring). The Justice also expressed a concern over the overbreadth of any remedial program that did not identify the particular victims of discrimination. *Id.* at 511-12 n.1 (Stevens, J., concurring). However, the Justice stressed that because the benefits of Richmond's race-conscious remedial measure were not limited to specific victims of discrimination, the program had to be struck down. *Id.* at 515 (Stevens, J., concurring).

[217] *Id.* at 535 (Marshall, J., dissenting). Justice Marshall asserted that in order to withstand constitutional muster, any race-conscious classifications which are designed to further remedial objectives "'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* (citations omitted). The Justice saw a "profound difference . . . [between] governmental actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of racism." *Id.* at 552 (Marshall, J., dissenting). Justice Marshall explained that racial classifications based upon the assumption of racial inferiority warrant the strictest standard of review because they imply governmental support of racial separatism and hatred. *Id.* On the other hand, those racial classifications employed for the remedial objective of eliminating the effects of past discrimination have the highly pertinent basis that pervasive discrimination against African-Americans permeated our society in the past and continues to scar our society today. *Id.* Justice Marshall warned that the majority's conclusion that all remedial classifications and "repugnant" forms of state-sponsored racism share the same level of review indicates the majority's belief that discrimination is only a phenomenon of the past. *Id.* On the contrary, the Justice believed that the Nation is not even close to the eradication of racial discrimination or its vestiges. *Id.*

held five of the nine seats of the City Council, Justice Marshall rebuked the notion that racial inferiority was the sole circumstance making a racial group "'suspect'" and, hence, entitled to strict scrutiny review.[218] Justice Marshall added, cities, such as Richmond, with minority leadership are probably the cities with the most past racial discrimination to rectify.[219] He concluded that the evidence before the City Council did demonstrate pervasive discrimination in the construction industry, thus demonstrating a compelling need for such a program.[220] He also found a substantial governmental objective was met[221] Therefore, Justice Marshall would have upheld the constitutionality of the provision under the intermediate level of scrutiny.[222]

Unlike the mandatory minority set-aside program in *Croson*, preferential treatment programs in higher education do not require that a certain number of admitted students be minorities. Furthermore, *Croson* is narrowly contained to its specific facts due to three factors. First, as the Court found, the evidence that prior racial discrimination

---

[218] *Id.* at 553 (Marshall, J., dissenting). Rather, the Justice outlined other "'traditional indicia of suspectness'· whether a group has been 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" *Id.* (citation omitted).

[219] *Id.* at 554 (Marshall, J., dissenting). According to Justice Marshall, Richmond leaders formulated the MBE policy after witnessing many years of publicly sanctioned discrimination, and this history should infer that minorities in the city of Richmond had a lot to remedy. *Id.* The MBE requirement was undertaken for only a remedial purpose and not "'simple racial politics.'" *Id.*

[220] *Id.* at 541-48 (Marshall, J., dissenting). Collectively, the statistical disparity, the low membership in construction associations, low percentage of MBEs in the industry itself, and the Congressional findings of national discrimination in the construction industry indicated strongly that racial discrimination was responsible for the lack of MBEs in the construction industry. *Id.*

[221] *Id.* at 548 (Marshall, J., dissenting). Most importantly, the Justice found that the program had a limited duration, and the program contained a waiver provision, freeing from its requirements any nonminority firms which could show an inability to comply with the provisions. *Id.* Furthermore, the program did not impact upon innocent third parties since the measure translated into three percent of Richmond's overall contracting. *Id.* at 548-89 (Marshall, J., dissenting). Finally, the MBE provision did not interfere with any vested rights of any contractor to a particular contract. *Id.* at 549 (Marshall, J., dissenting). Rather, the provision only operated prospectively, so that the settled expectations of innocent parties were not disrupted. *Id.*

[222] *Id.* at 561 (Marshall, J., dissenting).

had permeated the specific Richmond construction industry was inconclusive. Second, the 30% mandatory set-aside was a considerably high set-aside. Third, the program provided for very particular procedures that had to be followed in order to obtain a waiver. These *Croson* facts are incongruous in the higher educational context and thus, must be discounted.[223]

IV. CONCLUSION

Regents of the University of California v. Bakke[224] provides educational institutions and Constitutional scholars without an appropriate framework to determine the constitutional soundness of affirmative action in higher education. On the other hand, the United States Supreme Court has supplied us with a plethora of decisions concerning affirmative action in the employment context. These employment decisions provide assistance in foreshadowing the path that the Court will embark upon when it grants certiorari for another troublesome educational affirmative action case. Until the Court is willing to rectify the judicial quagmire known as *Bakke*, must continue to cry out by trying to clarify the jurisprudence we have been given.

---

[223] Assuming that strict scrutiny is the appropriate level for review for *any* type of governmental racially-based classification, affirmative action would still survive this level of review. For example, one of the asserted compelling justifications of preferential treatment of minorities in the application process is that this type of program redresses unwarranted deprivation and discrimination suffered by African-Americans. *See* Redish, *supra* note 14, at 379. This theory is based on two predicates. *Id.* First, that preferential programs elevate African-Americans to equality with other nonminority groups. *Id.* Moreover, affirmative action policies are supposedly a form of reparations, or compensation, to provide redress to minority groups who have been harmed by racial discrimination and to compensate the groups for rewards that nonminority groups have reaped because of the discrimination endured by minorities. *Id.*

Some commentators have noted, however, that to compensate is simply to counterbalance, and that the counterbalancing of certain disadvantages could be accomplished for motivations other than those of compensation. *See* Nickel, *supra* note 2, at 536. For instance, one such reason could be to eliminate inequities in the allocation of income. *Id.* According to Professor Nickel, the fact that various motivations possibly exist complicates the understanding and the discussion of preferential admissions programs since some people might be willing to accept certain justifications, but not others. *Id.* For example, a person could favor an affirmative action program because the individual perceives the program as providing opportunities to disadvantaged groups, but disapprove strongly of the use of such programs for compensatory justice, perhaps because such approval would require some admission of guilt which the individual does not want to make. *Id.*

[224] 438 U.S. 265 (1978).