

A CURRENT PERSPECTIVE: THE EROSION OF AFFIRMATIVE ACTION IN UNIVERSITY ADMISSIONS

“A generation ago, we did it right. We passed civil rights law to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. . . .

That’s just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination!”¹

I. INTRODUCTION

Perhaps no subject generates as much controversy today as that of affirmative action.² Affirmative action has been described as “a phrase that conjures up images of everything from set-asides for government contractors to diversity programs for college students.”³ Connotations of “quotas” and “preferences” that are inherent in the

¹ SECRETARY OF STATE, CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION 30 (1996) (ANALYSIS BY THE LEGISLATIVE ANALYST) [hereinafter CALIFORNIA BALLOT PAMPHLET], reprinted in Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, app. 1397-98 (Argument in Favor of Proposition 209) (1997).

² To appreciate the current controversial nature of affirmative action, see Jean Stefancic, *Affirmative Action: Diversity of Opinions--An Overview of the Colorado Law Review Symposium*, 68 U. COLO. L. REV. 833, 833 (1997):

Three decades after enactment of the Civil Rights Act of 1964, affirmative action has become once again a lightning rod--the focus of attention by legislators, university governing boards, newspaper editors, and courts. Debate about affirmative action addresses questions of legality, fairness, and the various rationales put forth to justify or condemn it. As controversial as the issue itself are the questions of who should be able to put affirmative action programs and policies into effect, and on what kind of showing.

Id.

³ Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1745 (1996). The authors suggest that government set-asides and diversity programs for college students are two very different affirmative action scenarios which should be analyzed separately, including applicable case law. *Id.* While government set-asides guarantee minority firms a chance to participate in government business, college diversity programs bring “young adults from diverse backgrounds together into a democratic dialogue . . .” *Id.* Another definition of affirmative action includes “a policy or program for correcting the effects of discrimination in the employment or education of members of certain groups, as women, blacks, etc.” WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY 33 (2nd ed. 1983); cf. Nicolaus Mills, *Introduction*, in DEBATING AFFIRMATIVE ACTION 1, 2-3 (Nicolaus Mills, ed., 1994) (commenting on Harvard law professor Randall Kennedy’s description of affirmative action as ‘policies that provide preferences based explicitly on membership in a designated group’).

administration of affirmative action programs have led to increasingly negative sentiment from many sectors of society.⁴ Indeed, the very future of affirmative action may be threatened.⁵

Twenty years ago, the United States Supreme Court decided the landmark university admissions affirmative action case of *Regents of University of California v. Bakke*.⁶ In *Bakke*, the Court struck down a two-track race-based admissions program at the Medical School of the University of California at Davis.⁷ In a sharply divided opinion,⁸

Affirmative action is certainly that, but in practice it raises a series of additional issues, whether it is “soft” affirmative action that limits itself to special recruitment efforts or the kind of “hard” affirmative action that sets hiring goals. . . . In the 1990s it is not simply the damage--psychological, social, economic--done by past discrimination that affirmative action seeks to remedy. It also seeks to remedy practices that even if they do not intentionally discriminate have a disparate or adverse impact--that is, result in minorities or women being underrepresented.

Id. at 3.

⁴ Lincoln Caplan et al., *The Hopwood Effect Kicks in on Campus*, U.S. NEWS & WORLD REPORT, Dec. 23, 1996, at 28. In a poll by the magazine on problems concerning Americans, affirmative action ranked “surprisingly low”; it tied for 30th place on a list of major issues, after tax code reform and abolition of the IRS. *Id.* “But references to ‘quotas’ or ‘preferences’ tap into economic worry and racial resentment and tip opinion to the negative.” *Id.*; cf. Larry Reibstein, *What Color is an A?*, NEWSWEEK, Dec. 29, 1997, at 76. “Polls show that Americans are as ambivalent as ever about affirmative action. Most people tend to favor the idea of racial diversity in the workplace and on campus yet don’t especially like giving preferences to minorities. Instead, Americans favor special programs for poor people, of whatever race.” *Id.*

⁵ See Gabriel J. Chin, *Bakke to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 881 (1996). Chin writes:

Affirmative action is in full retreat: the Supreme Court is increasingly hostile to it; Republican presidential candidates denounce it; and even the Regents of the University of California, the inventors of the plan attacked in *Board of Regents v. Bakke*, recently voted to end race consciousness in hiring and admissions.

Id. at 882 (footnotes omitted).

⁶ 438 U.S. 265 (1978). Bakke was a white male who was rejected twice for admission to the Medical School of the University of California at Davis. *Id.* at 276. He challenged the medical school’s admissions program, which reserved sixteen of its one hundred places in the entry class for minorities, claiming Constitutional violations under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. *Id.* at 278-79.

⁷ *Id.* at 320 (opinion of Powell, J.). The medical school maintained a regular admissions program and a special admissions program for minorities. *Id.* at 265. The special admissions program was operated by a separate committee. *Id.* Special admissions candidates did not have to meet the same academic criteria as the general admissions group nor were they ranked against candidates in the general admissions group. *Id.* Bakke contended that the special admissions program “was a rigid quota that excluded him on the basis of his race.” Amar & Katyal, *supra* note 3, at 1747.

⁸ *Hopwood v. Texas (Hopwood II)*, 78 F.3d 932, 941 (5th Cir. 1996), *reh’g en banc denied*,

1999]

THE EROSION OF AFFIRMATIVE ACTION

Justice Powell wrote that while quotas based solely on race or ethnicity were unconstitutional,⁹ an admissions program may consider racial and ethnic diversity as a “plus” factor; racial and ethnic diversity “is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body.”¹⁰ “[A]ttainment of a diverse student body. . . . clearly is a constitutionally permissible goal for an institution of higher education.”¹¹ After *Bakke*, educational institutions struggled to design affirmative action programs that complied with the decision’s diversity rationale and often adopted preferential admissions policies.¹²

The *Bakke* case marks the one and only time the Supreme Court has considered the constitutionality of affirmative action programs in university admissions.¹³ However,

84 F.3d 720 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996) (writing on *Bakke* that “[t]he Court reached no consensus on a justification for its result Six Justices filed opinions, none of which garnered more than four votes . . .”).

⁹ *Bakke*, 438 U.S. at 315 (opinion of Powell, J.). Powell wrote that because the medical school’s special admissions program focused solely on race, it hindered rather than promoted genuine diversity. *Id.*

¹⁰ *Id.* at 314. Other factors could include “exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, [and] ability to communicate with the poor . . .” *Id.* at 317.

¹¹ *Id.* at 311-12.

¹² Chin, *supra* note 5, at 881. The author asserts that *Bakke* has a weak legal effect due to its failure to define diversity as either cultural diversity or racial diversity. *Id.* As a result, many law schools, for example, base their affirmative action programs on such non-diversity grounds as “remedying societal discrimination or increasing the numbers of minority professionals” *Id.*; cf. Mills, *Introduction*, in *DEBATING AFFIRMATIVE ACTION*, *supra* note 3, at 3 (“In higher education, where a commitment to diversity has sanctioned the downplaying of grades and test scores for minority students, affirmative action can mean the difference between acceptance or rejection by an elite university.”).

¹³ Other plaintiffs challenging affirmative action admissions in higher education have petitioned the Supreme Court for writs of certiorari, but the Court has denied the petitions on mootness grounds. *See* *Defunis v. Odegaard*, 416 U.S. 312, 319 (1974) (deeming an Equal Protection challenge to the admissions process at University of Washington School of Law moot because *Defunis* was due to graduate from law school). *See also* *Hopwood v. Texas (Hopwood IV)*, 116 S. Ct. 2581 (1996) (declining to hear a constitutional challenge to the admissions process at the University of Texas Law School). In an opinion by Justice Ginsburg and joined by Justice Souter, the Court acknowledged that the constitutional issue of using race or ethnicity in a public higher education admissions process “is an issue of great national importance.” *Id.* However, the Court noted that the objectionable admissions process had already been discontinued for some time, making the issue moot. *Id.* In addition, the petitioners were challenging the Court of Appeal’s rationale. *Id.* “[T]his Court,’ however, ‘reviews judgments, not opinions.’” *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)).

recent developments in Texas,¹⁴ California,¹⁵ and Michigan¹⁶ signal an erosion of the *Bakke* doctrine¹⁷ and a trend towards anti-affirmative action.¹⁸ The Supreme Court may not be able to avoid the issue much longer.

This comment examines the recent trend towards anti-affirmative action in the context of university admissions policies.¹⁹ First, the comment will trace some of the formative history of affirmative action, including the *Bakke* decision.²⁰ It will then review and analyze specific judicial and legislative events which suggest a trend towards anti-affirmative action.²¹ Finally, the comment will explore the different rationales for affirmative action and suggest some alternatives to racial preferences in admissions

¹⁴ In *Hopwood v. Texas (Hopwood II)*, 78 F.3d 932, 962 (5th Cir. 1996), the Fifth Circuit Court of Appeals struck down an admissions program at the University of Texas Law School which gave racial preferences to minority applicants through lower admissions criteria and a different admissions process. The court held that the government had not shown any compelling interests to justify the racially discriminatory admissions program. *Id.* at 955. Most significantly, the Fifth Circuit expressly rejected *Bakke's* diversity rationale by holding that the law school "may not use race . . . in deciding which applicants to admit in order to achieve a diverse student body . . ." *Id.* at 962.

¹⁵ On November 5, 1996, Californians passed Proposition 209, a constitutional amendment which prohibits discrimination and racial and gender preferences in the areas of public employment, education, and contracting. Darnell Weeden, *Affirmative Action California Style--Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 SEATTLE U. L. REV. 281, 282 (1997).

¹⁶ A group of white students rejected by the University of Michigan challenged the school's admissions policies which apparently incorporated racial preferences and lower academic standards for minorities. Adam Cohen, *The Next Great Battle Over Affirmative Action*, TIME, Nov. 10, 1997, at 52.

¹⁷ Amar & Katyal, *supra* note 3, at 1745 ("*Bakke*, it seems, now hangs by a thread."); see Chin, *supra* note 5, at 881-82 (writing that "there is real doubt" whether Powell's diversity rationale for affirmative action admissions "will survive much longer").

¹⁸ See Mills, *Introduction*, in DEBATING AFFIRMATIVE ACTION *supra* note 3, at 4. The author writes:

Unlike the debate over political correctness or multiculturalism, the debate over affirmative action is one in which a broad cross section of the population believes it has a personal stake in the outcome. For middle-class and working-class whites, who see themselves facing downward mobility in the 1990s, the great fear is that affirmative action will hasten their slide into poverty by closing off opportunities they would have had a generation earlier. For these whites, affirmative action, despite its emphasis on inclusion rather than exclusion, often seems tantamount to reverse discrimination.

Id. at 4-5.

¹⁹ While this comment is primarily limited to racial preferences in university admissions programs, there is a necessarily overlap into other applications of affirmative action as well.

²⁰ *Infra* PART II.

²¹ *Infra* PART III.

II. BACKGROUND

A. *History of Affirmative Action*

Notions of affirmative action originated in the passage of the Fourteenth Amendment²³ of the United States Constitution.²⁴ In *Strauder v. West Virginia*,²⁵ the Supreme Court wrote that the Fourteenth Amendment was “one of a series of constitutional provisions²⁶ having a common purpose; namely, securing to a race

²² *Infra* PART IV.

²³ GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 684-85 (3rd ed. 1996) (“[T]he original impetus for passage of the amendment was a desire to expand the scope of congressional power to enact the nineteenth-century analogue of affirmative action measures.”).

²⁴ The text reads:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

²⁵ 100 U.S. 303 (1879) (holding that a West Virginia statute limiting jurors to white males violated the Equal Protection Clause of the Fourteenth Amendment).

²⁶ The constitutional amendments securing civil rights to all races are the Thirteenth, Fourteenth, and Fifteenth Amendments. Justice Harlan wrote about this series of amendments in his dissent in *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting) (establishing the “separate but equal” doctrine in racial segregation cases):

The thirteenth amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the fourteenth amendment, which added greatly to the dignity and glory of American citizenship, and to the security or personal liberty These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the fifteenth amendment that “the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.”

Id.

recently emancipated, a race that through many generations had been held in slavery, all the civil rights that the superior race enjoy.”²⁷ The pertinent section of the Fourteenth Amendment for affirmative action is the Equal Protection Clause.²⁸ The Equal Protection Clause provides that “No State shall . . . deny to any person . . . the equal protection of the laws.”²⁹ The underlying policy of the Equal Protection Clause is that state government must treat similarly situated persons in a similar manner.³⁰

²⁷ *Strauder*, 100 U.S. at 306.

²⁸ U.S. CONST. amend. XIV, § 1. The Equal Protection Clause of the Fourteenth Amendment applies to state action only. *Id.* Equal Protection claims based on federal action are derived from the Fifth Amendment of the United States Constitution which provides, in pertinent part, that “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. V. Despite the fact that the language of the Fifth Amendment “is not as explicit a guarantee of equal treatment as the Fourteenth Amendment,” the Supreme Court has held that there is no distinction between claims brought under either of the two Amendments. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213-14 (1995).

²⁹ U.S. CONST. amend. XIV, § 1. For the full text of Section 1 of the Fourteenth Amendment, see *supra* note 24. See Weeden, *supra* note 15, at 285 (maintaining that “the Equal Protection Clause must be properly understood as a general requirement of equality for all persons without exception”). The author acknowledges the paradox of demanding equality while allowing laws which classify. “In tackling this paradox the Court has neither abandoned the demand for equality nor denied the legislative right to classify. It has taken a middle course. It has resolved the contradictory demands of legislative specialization and constitutional generality by a doctrine of reasonable classification.” *Id.*; see also *Romer v. Evans*, 517 U.S. 620 (1996) (striking down an amendment to Colorado’s Constitution which prohibited the state or any of its agencies from enacting legislation which gave homosexuals minority status, preferences, protected status, or claim to discrimination). The Supreme Court wrote:

The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons. (citations omitted) We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

Id. at 631. This compromise between equal protection of the laws and legislative classification reflects the rational basis test discussed *infra* note 30.

³⁰ This policy reflects the *Yick Wo* principle which originated in *Yick Wo v. Hopkins*, 118 U.S. 356 (1885) (holding that a facially neutral statute requiring permits for laundry operators violated the Equal Protection Clause of the Fourteenth Amendment when all Chinese applicants were denied permits).

Though the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74; *see* Weeden, *supra* note 15, at 286 (“Similarly situated is defined not by the nature of the classification but the reasonable nexus of the classification scheme to the purpose of the law.”). Thus, a critical element in Equal Protection analysis is a finding that a government actor intended to discriminate by treating a particular group differently. *See* McCleskey v. Kemp, 481 U.S. 279 (1987) (rejecting a statistical study as insufficient proof of racial discrimination in a capital sentencing scheme).

Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving “the existence of purposeful discrimination.” A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination “had a discriminatory effect” on him. Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the decisionmakers in his case acted with discriminatory purpose.

Id. at 292 (citations omitted). Intent to discriminate generally arises in one of three types of cases. First, the state action is discriminatory on its face. *See* Strauder, 100 U.S. at 308 (holding that a West Virginia statute limiting jurors to white males violated the Equal Protection Clause).

The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

Id. In the second type of case, the state action is neutral on its face but discriminatory in its enforcement. *See* *Yick Wo*, 118 U.S. at 373-74. Third, the state action is facially neutral, and although a disproportionate impact is expected, “the decisionmaker . . . selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group.” *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law considering veterans for state civil service positions ahead of nonveterans because the purpose of the law was not to exclude women); *see also* *Washington v. Davis*, 426 U.S. 229 (1976) (upholding a qualifying test measuring the verbal skills of job applicants for police officer positions in the District of Columbia Police Department). The Supreme Court wrote:

This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law’s disproportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race.

Id. at 241. For a discussion of the “intent test” and the “effects test” in determining racially discriminatory intent, *see* Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, in *DEBATING AFFIRMATIVE ACTION* 108-10 (Nicolaus Mills ed., 1994). If there is an intent to discriminate on the part of the state actor, the next inquiry is whether the state action was directed at a suspect class or classification (or whether a fundamental right involved). *Id.* Definition of the suspect class or classification will determine the appropriate level of judicial review—strict scrutiny, intermediate scrutiny, or rational basis test—and thus, can dramatically affect the outcome of

a case. *Id.*; e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (striking down a Texas statute authorizing local school districts to deny free public education to children of illegal aliens).

In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose [rational basis test].

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those classifications that disadvantage a “suspect class,” or that impinge upon the exercise of a “fundamental right.” With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to service a compelling governmental interest [strict scrutiny]. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State [intermediate scrutiny].

Id. at 216-18 (footnoted omitted). To determine whether a particular group is a suspect class or classification, courts generally look to six factors: (1) history of discrimination, (2) immutable traits, (3) politically powerless, (4) subject to a legal disability, (5) stigmatization or archaic stereotypes, and (6) whether there is a trait unrelated to legitimate government objectives. *See* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that a federal law which automatically allowed a male uniformed services member to claim his spouse as a dependent but required a female uniformed services member to show that her spouse was dependent on her for over half his support violated the equal protection component of the Fifth Amendment). The Supreme Court wrote:

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. . . .

As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed . . . the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right . . . until adoption of the Nineteenth Amendment half a century later.

. . . .

Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .” And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to

The Fourteenth Amendment laid a constitutional framework in two different ways.³¹ First, it set the stage for the passage of additional legislation which would protect the rights of newly freed slaves.³² Second, the Fourteenth Amendment limited the power of the judiciary.³³ Against this historical backdrop, African Americans were the intended beneficiaries of the earliest forms of affirmative action.³⁴

The modern era of affirmative action began in 1961³⁵ when President John F. Kennedy first coined the term “affirmative action”³⁶ in Executive Order 10,925.³⁷ The

perform or contribute to society.

Id. at 684-87 (citation omitted). Challenges to affirmative action plans in university admissions frequently involve racial classifications. The Supreme Court has held that all governmental racial classifications must be examined under a strict scrutiny standard of review. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Gender classifications are examined under an intermediate scrutiny standard of review. “[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976) (deeming unconstitutional an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of 21 and females under the age of 18).

³¹ STONE ET AL., *supra* note 23, at 685.

³² *Id.*

³³ *Id.* The authors write that the Fourteenth Amendment was adopted, in part, to allay Congress’ fears that the Supreme Court would invalidate the 1866 Civil Rights Act. *Id.*

³⁴ See Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 899-900 (1995).

African Americans are the paradigmatic group for affirmative action, an extraordinary remedy which was designed to ameliorate the legacy of a history of slavery and pervasive discrimination against them based on their race—a legacy that persists today. Other groups also have suffered from widespread prejudice and mistreatment . . . [and] other groups have populations that are seriously disadvantaged—some, perhaps, intractably so; and many other groups certainly are salient to contemporary American life. But no other group compares to African Americans in the confluence of the characteristics that argue for inclusion in affirmative action programs.

Id.

³⁵ Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 33 (1992).

³⁶ Georgiana Verdugo, *Edited Comment on Defining Affirmative Action by Reference to History*, 95 ANN. SURV. AM. L. 383, 383 (1995); see Mills, *Introduction*, in DEBATING AFFIRMATIVE ACTION, *supra* note 3, at 5 (writing that President Kennedy only used the term “affirmative action” once in the executive order, and he used it in the context of the traditional goal of nondiscrimination). Mills writes that President Kennedy issued the order because he did not believe he had the power at the time to effect civil rights legislation through Congress.

Id. at 5-6.

³⁷ Exec. Order No. 10,925, 3 C.F.R. 448 (1961). Executive Order 10,925 was superseded by

order forbade federal government contractors from discriminating on the basis of “race, creed, color, or national origin,”³⁸ and required contractors “to take affirmative action” to prevent discrimination to both applicants and employees.³⁹ In 1964, Congress passed the Civil Rights Act.⁴⁰ This legislation prohibited “race . . . [and ethnicity] discrimination by private employers, agencies, and educational institutions receiving federal funds.”⁴¹ The scope of affirmative action expanded considerably when President Lyndon B. Johnson issued Executive Order 11,246 in 1965 which provided for “equal opportunity in Federal employment for all qualified persons . . . [and] prohibit[ed] discrimination in employment because of race, creed, color, or national origin.”⁴² Creation of the Equal Employment Opportunity Commission by Congress⁴³ followed as a vehicle for reviewing federal affirmative action policies.⁴⁴ “By the 1970’s, federal agencies began enforcing regulations calling for timetables and goals to

Executive Order 11,246. *Infra* note 42.

³⁸ Eastland, *supra* note 35, at 33.

³⁹ Executive Order 10,925 reads in pertinent part: “The contractor will take affirmative action to ensure that applicants are employed, and employees treated during employment, without regard to their race, creed, color, or national origin.” 3 C.F.R. 448.

⁴⁰ 42 U.S.C.A. § 2000 (West 1994).

⁴¹ Stefancic, *supra* note 3, at 833. 42 U.S.C.A. § 2000d of the Civil Rights Act of 1964 provides: “No 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.” See Tanya Y. Murphy, *An Argument for Diversity Based Affirmative Action in Higher Education*, 95 ANN. SURV. AM. L. 515, 515 (1995) (“With the passage of the Civil Rights Act of 1964, the American people renewed their century-old commitment to removing the bonds of slavery that imprisoned United States citizens of African descent for nearly four centuries.”); cf. Mills, *Introduction*, in DEBATING AFFIRMATIVE ACTION, *supra* note 3, at 6 (writing that the language of the Civil Rights Act of 1964 was deliberately cautious, because in order to overcome a Southern filibuster, the “Senate sponsors had to promise that the bill would not legalize preferences.”).

⁴² Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted as amended in* 42 U.S.C.A. § 2000e (West 1994). Section 101 provides:

It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

3 C.F.R. 339; see Mills, *Introduction*, in DEBATING AFFIRMATIVE ACTION, *supra* note 3, at 7 (writing that the Johnson administration and Executive Order 11,246 dramatically redefined the scope of affirmative action by acknowledging that “equalizing the rules of competition was insufficient” and that “[s]pecial help was also needed”).

⁴³ Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972).

⁴⁴ Stefancic, *supra* note 3, at 833.

1999] THE EROSION OF AFFIRMATIVE ACTION
implement affirmative action.”⁴⁵

While the initial efforts of affirmative action seemed to be directed primarily at employment, affirmative action extended to other areas as well, including admissions programs in higher education.⁴⁶ As the application of affirmative action expanded, so did the group of intended beneficiaries.⁴⁷

Thirty-seven years have passed since President Kennedy issued Executive Order 10,925. Today, the original goals of promoting equality and eliminating discrimination are clouded over by “an increasing number of Americans . . . declar[ing] war on policies giving ‘preferential’ treatment to specified racial and ethnic groups.”⁴⁸

B. *The Bakke Era*

Until the last few years, the 1978 *Bakke* decision reigned supreme in the area of affirmative action admissions programs in higher education. In *Bakke*, Allan Bakke was rejected twice for admission to the Medical College of the University of California at

⁴⁵ *Id.* The author writes that opponents began to use the term “quotas” to describe the federal agencies’ affirmative action plans. *Id.*

⁴⁶ *Id.*

In due course, lawmakers stitched affirmative action into a series of federal laws and regulations affecting all public employers and all but the smallest private employers. Affirmative action, however, was not limited to the employment context. Most notably, it extended to the admissions offices of colleges, universities, and professional and graduate schools.

Id. (footnote omitted).

⁴⁷ Eastland, *supra* note 35, at 33 (“Those whom affirmative action was intended to benefit came to include not only blacks, the original focus of Executive Order 10,925, but also, in most cases, Hispanics, Asian-Pacific Americans, and Native Americans.”).

⁴⁸ Murphy, *supra* note 41, at 516.

The Equal Protection Clause of the Fourteenth Amendment, created to reinforce the Thirteenth Amendment’s promise of freedom and equality to the emancipated slave, has become the primary weapon in the effort to end affirmative action policies in employment and education. Similarly, Title VI of the Civil Rights Act of 1964, which once provided an incentive to promote equal educational opportunities, is now used as a tool to force public and private universities to limit the reach of their affirmative action policies.

Id. at 516-17 (footnotes omitted); see Trisha Lacey, *All in the Name of Diversity: Preferential Admissions in Higher Education*, 6 KAN. J. L. & PUB. POL’Y 107, 111 (1997) (writing that “[c]urrent admission practices are in danger of being considered unconstitutional on two fronts”: (1) They attempt to attain diversity by mirroring society minority representation with fixed admissions percentages, and (2) many admissions policies give rise to multi-tracked admissions programs to compensate for the disparity in minority academic credentials).

Davis.⁴⁹ Bakke, a white male, challenged the two-track admissions program⁵⁰ which he claimed violated his rights under the Equal Protection Clause of the Fourteenth Amendment by excluding him on the basis of his race.⁵¹

In a fractured decision, the Supreme Court separated into two groups with sharply different opinions. The Stevens Group⁵², comprised of Justice Stevens, Chief Justice Burger, and Justices Stewart and Rehnquist, concluded that the special admissions program violated Bakke's rights under Title VI of the Civil Rights Act of 1964.⁵³ Thus, the Stevens Group never reached the constitutional issue; on a statutory basis alone, the Stevens group would have admitted Bakke to the medical school.⁵⁴

The Brennan Group, comprised of Justices Brennan, White, Marshall, and Blackmun, found the medical school's special admissions program constitutional.⁵⁵ In concluding that the program was constitutional, the Brennan Group applied an intermediate scrutiny standard of review.⁵⁶ The Brennan Group found that the medical

⁴⁹ *Regents of University of California v. Bakke*, 438 U.S. 265, 276 (1978).

⁵⁰ Bakke applied to the medical school in 1973 and 1974. *Id.* At issue was the medical school's two-track admissions program which had a general admissions program and a special admissions program. *Id.* at 272. The special admissions program was directed at minorities and was designed to "increase the representation of 'disadvantaged' students in each medical school class." *Id.* at 272-73. Sixteen out of one hundred places in the entry class were reserved for minorities in the special admissions program. *Id.* at 275. Unlike candidates in the general admissions program, candidates in the special admissions program did not have to meet the 2.5 grade point average cut-off nor were they ever compared to candidates in the general admissions program. *Id.* In each of the two years that Bakke was rejected, applicants in the special admissions program were admitted with significantly lower grade point averages, MCAT scores, and benchmark scores than Bakke. *Id.* at 277.

⁵¹ Bakke also claimed violations of his rights under the Equal Protection Clause of the California Constitution and under Title VI of the Civil Rights Act of 1964. *Id.* at 278.

⁵² The two contrary opinions in *Bakke* are often referred to as the Stevens Group and the Brennan Group.

⁵³ *Id.* at 412 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part).

⁵⁴ *Id.* at 417-18. The Stevens Group concluded that the language of Title VI alone was sufficient to sustain Bakke's claim. *Id.* at 417 (Stevens, J., Burger, C.J., Stewart, and Rehnquist, JJ., concurring in part and dissenting in part). "[W]e need not decide the congruence--or lack of congruence--of the controlling statute and the Constitution since the meaning of the Title VI ban on exclusion is crystal clear: Race cannot be the basis of excluding anyone from participation in a federally funded program." *Id.* at 417-18.

⁵⁵ *Id.* at 362. The Brennan Group concluded that Title VI was violated only if the Constitution was violated; "Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution." *Id.* at 340. Thus, their decision was based on constitutional grounds. *Id.*

⁵⁶ The Brennan Group rejected a strict scrutiny standard of review which applies to

1999]

THE EROSION OF AFFIRMATIVE ACTION

school's purpose of remedying the effects of past societal discrimination was "sufficiently important" to support the use of its special admissions program "where there is a sound basis for concluding that minority underrepresentation is substantial and chronic"⁵⁷

Justice Powell cast the swing vote in *Bakke*.⁵⁸ He joined the Stevens Group in concluding that the medical school's special admissions program could not be upheld.⁵⁹

Contrary to the Brennan Group,⁶⁰ Justice Powell applied a strict scrutiny standard of review.⁶¹ After identifying the medical school's four asserted interests for maintaining

government action that infringes on a fundamental right or contains suspect classifications. *Id.* at 357. Under strict scrutiny, the government action "can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available [that is, it must be narrowly tailored to achieve the compelling government purpose]." *Id.* In this case, the Brennan Group found neither a fundamental right nor a suspect class. *Id.* On the subject of whites as a suspect class, Justice Brennan wrote:

[W]hites as a class [do not] have any of the "traditional indicia of suspectness: the class is not 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. (quoting *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)). Thus, the Brennan Group applied intermediate scrutiny. *Id.* at 361. "[T]o justify such a classification an important and articulated purpose for its use must be shown." *Id.*

⁵⁷ *Id.* at 362.

⁵⁸ See Scott L. Olson, Comment, *The Case Against Affirmative Action in the Admissions Process*, 59 U. PITT. L. REV. 991, 993 (1997) ("Despite the lack of a single opinion in *Bakke*, Justice Powell's opinion has generally been regarded as the Court's primary viewpoint.").

⁵⁹ *Bakke*, 438 U.S. 265, 320 (opinion of Powell, J.). Justice Powell, however, based his decision on constitutional grounds. *Id.* "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment." *Id.*

⁶⁰ See Victor V. Wright, Note, *Hopwood v. Texas: The Fifth Circuit Engages in Suspect Compelling Interest Analysis in Striking Down an Affirmative Action Admissions Program*, 34 HOUS. L. REV. 871, 890 (1997) (writing that while the Brennan Group did not explicitly adopt Justice Powell's diversity rationale, they did join the part of Justice Powell's opinion that concluded "a State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.") (quoting *Bakke*, 438 U.S. at 320).

⁶¹ For the elements of strict scrutiny analysis, see *supra* note 56. The issue of what level of review applies to racial classifications was unequivocally resolved in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (remanding for strict scrutiny analysis an action challenging financial incentives given to federal government contractors to hire subcontractors controlled by "socially and economically disadvantaged individuals"). "[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Id.* at 227. For a critique of strict scrutiny in affirmative action, see Jed Rubenfeld, *Affirmative Action*,

the special admissions program,⁶² Justice Powell found that the goal of an “ethnically diverse student body” was a permissible justification.⁶³ In furthering that goal, a university admissions program could properly consider race and ethnicity as a “plus” factor along with other pertinent factors aimed at creating a diverse student body.⁶⁴

III. RECENT TREND TOWARDS ANTI-AFFIRMATIVE ACTION

107 YALE L.J. 427 (1997). The author writes that “the Court’s recent affirmative action decisions have consummated a remarkable but unremarked-upon transformation in the entire analytic structure of heightened scrutiny doctrine.” *Id.* at 428. The author asserts that there has been a shift from using strict scrutiny to “smoke out” invidious purposes to a cost/benefit analysis whereby a law violating the Equal Protection Clause is “justified by the specially important social gains that it will achieve.” *Id.*

Throughout Fourteenth Amendment jurisprudence, inadvertent harm to minorities, without more, is rejected as a basis of constitutional invalidity or even of heightened scrutiny. Equal protection jurisprudence, outside the arena of affirmative action, generally does not engage in cost-benefit analysis. It does not purport to measure up and balance the social gains and losses a law will produce. The constitutional question is instead whether a law embodies an invidious or otherwise constitutionally impermissible purpose. And this must be the constitutional question with respect to affirmative action as well.

Id. at 428-29.

⁶² According to Justice Powell:

The special admissions program purports to serve the purposes of: (i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession;’ [] (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body.

Bakke, 438 U.S. at 305-06 (opinion of Powell, J.) (footnote omitted).

⁶³ *Id.* at 311-312. Justice Powell also acknowledged academic freedom as a “special concern of the First Amendment.” *Id.* at 312. That freedom includes a university’s judgment in selecting its student body. *Id.*

⁶⁴ *Id.* at 317. Justice Powell wrote:

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a “plus” on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment.

Id. at 318; *see Amar & Katyal, supra* note 3, at 1750 (“This vision of university diversity, we submit, is the heart and soul of *Bakke*.”).

After *Bakke*, Justice Powell's diversity rationale generally guided universities in formulating their affirmative action admissions programs.⁶⁶ In 1996, however, the Fifth Circuit Court of Appeals flatly rejected *Bakke*'s diversity rationale in *Hopwood v. Texas*.⁶⁷ The court held that "the use of race to achieve a diverse student body . . . simply cannot be a state interest compelling enough to meet the steep standard of strict scrutiny. . . . [T]he key is that race itself shall not be taken into account."⁶⁸

1. The Facts

Cheryl Hopwood, Douglas Carvell, Kenneth Elliott, and David Rogers were white residents of Texas who applied for admission to the University of Texas Law School in 1992.⁶⁹ All four were rejected, and they brought suit against the law school claiming violations of their rights under the Equal Protection Clause of the Fourteenth Amendment.⁷⁰ The crux of their complaint was that the law school's affirmative action admissions program⁷¹ subjected them to unconstitutional racial discrimination.⁷²

⁶⁵ *Hopwood II*, 78 F.3d 932 (5th Cir. 1996).

⁶⁶ See Wright, *supra* note 60, at 891 (writing that several law school deans testified at the district court level in *Hopwood* in support of a diverse student body, and that "moreover, a large majority of state colleges and universities operate admissions programs aimed at creating diversity in their student bodies").

⁶⁷ *Hopwood II*, 78 F.3d at 948.

⁶⁸ *Id.*

⁶⁹ *Id.* at 938.

⁷⁰ *Id.* The plaintiffs also claimed statutory violations of Title VI of the Civil Rights Act of 1964. *Id.*

⁷¹ At the time of plaintiffs' applications, the law school employed the following admissions program: The initial admissions decisions were based upon an applicant's Texas Index ("TI") number which was comprised of the applicant's undergraduate grade point average and LSAT score. *Id.* at 935. Although subjective factors were considered as well, the TI scores placed applicants initially into one of three categories: "presumptive admit," "presumptive deny," or a middle range, referred to as "discretionary zone." *Id.* Generally, the applications in the "discretionary zone" received the most attention from admissions personnel. *Id.* The school maintained separate and significantly lower TI ranges for African Americans and Mexican Americans ostensibly to meet targeted admissions goals of 5% African Americans and 10% Mexican Americans. *Id.* at 936-37. The law school also maintained a separate minority admissions committee to review these "discretionary zone" candidates. *Id.* at 937. In addition, each application was color-coded by race upon receipt, and the law school maintained segregated waiting lists. *Id.* at 937-38. The plaintiffs fell into the non-minority "discretionary zone." *Id.* at 938.

⁷² *Id.* The plaintiffs sought injunctive and declaratory relief as well as compensatory and punitive damages. *Id.*

2. The District Court Decision

The district court analyzed the law school's admissions program under a strict scrutiny standard of review.⁷³ Of the five reasons the law school offered for maintaining its admissions program,⁷⁴ the court held that two of the reasons qualified as compelling government interests: "obtaining the educational benefits that flow from a racially and ethnically diverse student body" and "overcoming the past effects of discrimination."⁷⁵ In considering the scope of past discrimination, the court rejected the plaintiffs' argument that past discrimination be limited to the law school's history only; instead, the court held that Texas' "institutions of higher education are inextricably

⁷³ *Hopwood v. Texas (Hopwood I)*, 861 F. Supp. 551, 569 (W.D. Tex. 1994), *rev'd*, 78 F.3d 932 (5th Cir. 1996), *reh'g en banc denied*, 84 F.3d 720 (5th Cir. 1996), *cert. denied*, 518 U.S. 1033 (1996). Since the law school clearly treated applicants differently based upon their race, the proper inquiry was whether the law school's admissions program served both a compelling state interest and was narrowly tailored to achieve that interest. *Id.*

⁷⁴ The five reasons offered by the law school as compelling interests follow:

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

To achieve the diversity of background and experience in its student population essential to prepare student for the real world functioning of the law in our diverse nation;

To assist in redressing the decades of educational discrimination to which African Americans and Mexican Americans have been subjected in the public school systems of the State of Texas;

To achieve compliance with the 1983 consent decree entered with the Office of Civil Rights of the Department of Education imposing specific requirement[s] for increased efforts to recruit African American and Mexican American students;

To achieve compliance with the American Bar Association and the American Association of Law Schools standards of commitment to pluralist diversity in the law school's student population.

Id. at 570.

⁷⁵ *Id.* at 571. The district court rejected the plaintiffs' argument that under recent Supreme Court decisions, the only compelling government interest for race-based programs was remedying the past effects of racial discrimination. *Id.* at 570. "However, none of the recent opinions is factually based in the education context and, therefore, none focuses on the unique role of education in our society." *Id.* Thus, the court found that diversity would have been a sufficient compelling government interest to pass a strict scrutiny analysis by itself, but that remedying the past effects of discrimination was "an equally important goal." *Id.* at 571. The Fifth Circuit wrote that with the goals of remedying the effects of past discrimination and attaining student body diversity, "[t]he district court found both a compelling remedial and a non-remedial justification . . .", respectively, for the law school's use of race in its admissions program. *Hopwood II*, 78 F.3d at 941.

1999]

THE EROSION OF AFFIRMATIVE ACTION

linked to the primary and secondary schools in the system.”⁷⁶ As a result, Texas’ history of racial discrimination in public schools contributed to the law school’s reputation among minorities as both a “white school” and a hostile environment.⁷⁷

The court then analyzed whether the law school’s admissions program was narrowly tailored to achieve the compelling government interests.⁷⁸ The district court upheld that part of the admissions program which gave minorities a “plus” by treating their TI scores⁷⁹ differently based upon race.⁸⁰ However, the court struck down the part of the admissions program which used separate admissions committees and never compared candidates of different races.⁸¹

3. The Fifth Circuit Decision

Like the district court, the Fifth Circuit applied a strict scrutiny standard of review to determine whether the law school’s use of race in its admissions program violated the

⁷⁶ *Hopwood I*, 861 F. Supp. at 571. The court noted that even if past discrimination was limited to the University of Texas alone, there would still be a strong basis for concluding that remedial action was warranted. *Id.* at 572.

⁷⁷ *Id.* There was no evidence of “overt officially sanctioned discrimination” at the University of Texas. *Id.* The school had expended considerable effort in recruiting minorities and minimizing racial discrimination. *Id.* However, the court found that the school’s “legacy of the past” still persisted into the present. *Id.* The district court wrote that “during the 1950s, and into the 1960s, the University of Texas continued to implement discriminatory policies against both black and Mexican American students.” *Id.* at 555. Between 1978 and 1980, the Department of Health, Education and Welfare Office for Civil Rights (“OCR”) investigated Texas’ public higher education system and found that it was not in compliance with Title VI and still maintained vestiges of de jure segregation. *Id.* at 556. It was not until 1983 that Texas submitted an acceptable plan to OCR to remedy its deficiencies. *Id.* “To date, OCR has not completed its evaluation to determine if Texas is in compliance with Title VI.” *Id.* at 557.

⁷⁸ *Id.* at 572.

⁷⁹ The initial admissions decisions were based upon an applicant’s Texas Index (“TI”) number which was comprised of the applicant’s undergraduate grade point average and LSAT score. *Id.* at 557.

⁸⁰ *Id.* at 578. For a description of the law school’s admissions program, see *supra* note 71.

⁸¹ *Id.* at 578-79. The court wrote:

Under the 1992 procedure, the possibility existed that the law school could select a minority, who, even with a “plus” factor, was not as qualified to be a part of the entering class as a nonminority denied admission. Thus, the admission of the nonminority candidate would be solely on the basis of race or ethnicity and not based on individual comparison and evaluation. This is the aspect of the procedure that is flawed and must be eliminated.

Id. The fatal flaw existed primarily with the separate admissions committees which were used for “discretionary zone” candidates. For a description of the law school’s admissions program, see *supra* note 71.

Equal Protection Clause.⁸² However, the three-judge panel reached a much different conclusion when it examined the two compelling government interests relied on by the district court. The court found that neither attaining a diverse student body nor remedying the effects of past discrimination were compelling government interests sufficient to justify the law school's race-based admissions program.⁸³ As a result, the Fifth Circuit reversed the district court decision and remanded it for further proceedings.⁸⁴

The Fifth Circuit held that use of race or ethnicity to achieve a diverse student body is not a compelling interest under Fourteenth Amendment analysis.⁸⁵ Judge Smith supported his holding on three different bases.⁸⁶ First,⁸⁷ Judge Smith wrote that Justice Powell's diversity rationale in *Bakke* "is not binding precedent on this issue."⁸⁸ Second,⁸⁹ "[n]o case since *Bakke* has accepted diversity as a compelling state interest under a strict scrutiny analysis; subsequent Supreme Court decisions indicate that the only compelling state interest to justify racial classifications is remedying the effects of past discrimination."⁹⁰ Third, Judge Smith opposed the use of race as a means of

⁸² *Hopwood II*, 78 F.3d at 940.

⁸³ *Id.* at 962.

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

Id.

⁸⁴ *Id.*

⁸⁵ *Id.* at 944.

⁸⁶ David Schimmel, *Is Bakke Still Good Law? The Fifth Circuit Says No and Outlaws Affirmative Action Admissions*, 113 ED. LAW. REP. 1052, 1055-56 (1996) (writing that Judge Smith justified his denial of race as a factor in achieving student body diversity on three grounds). First, Justice Powell's diversity rationale in *Bakke* never received the support of any other justices. *Id.* at 1055. Second, subsequent Supreme Court precedent supported the proposition that the only compelling interest to justify racial classifications is remedying past discrimination. *Id.* Third, "there are strong policy arguments against the use of race to promote diversity." *Id.* at 1056 (quoting *Hopwood II*, 78 F.3d at 945).

⁸⁷ *See id.* at 1055.

⁸⁸ *Hopwood II*, 78 F.3d at 944. Judge Smith wrote that the word "diversity" was mentioned only in Justice Powell's single-Justice opinion, and that when he "announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale." *Id.*

⁸⁹ *See Schimmel, supra* note 86, at 1055.

⁹⁰ *Hopwood II*, 78 F.3d at 944. Judge Smith wrote: "In short, there has been no indication from the Supreme Court, other than Justice Powell's lonely opinion in *Bakke*, that the state's interest in diversity constitutes a compelling justification for governmental race-based discrimination. Subsequent Supreme Court caselaw strongly suggests, in fact, that it is not."

1999]

THE EROSION OF AFFIRMATIVE ACTION

achieving student body diversity on policy grounds.⁹¹ He wrote that the use of race in higher education admissions “contradicts, rather than furthers, the aims of equal protection.”⁹² It “simply achieves a student body that looks different. Such a criterion is no more rational on its own terms than would be choices based upon the physical size or blood type of applicants.”⁹³

The Fifth Circuit next turned to an evaluation of the compelling government interest of remedying the effects of past discrimination.⁹⁴ The court began by noting that a state actor “must ensure . . . it has convincing evidence that remedial action is warranted.”⁹⁵ In addition, the “use of racial remedies must be carefully limited” and a “state’s use of remedial racial classification is limited to the harm caused by a specific

Id. at 945. Judge Smith relied on Supreme Court decisions outside the higher education context to conclude that “the Court appears to have decided that there is essentially only one compelling state interest to justify racial classifications: remedying past wrongs.” *Id.* at 944. “As the plurality in *Croson* warned, ‘[c]lassifications based on race carry the danger of stigmatic harm. Unless they are reserved for remedial setting, they may in fact promote notions of racial inferiority and lead to the politics of racial hostility.’ ” *Id.* at 947 (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 493 (1989)); *see infra*, text accompanying note 97.

⁹¹ *See* Schimmel, *supra* note 86, at 1056.

⁹² *Hopwood II*, 78 F.3d at 945.

⁹³ *Id.* Judge Smith wrote further: “Diversity fosters, rather than minimizes, the use of race. It treats minorities as a group, rather than as individuals. It may further remedial purposes but, just as likely, may promote improper racial stereotypes, thus fueling racial hostility.” *Id.* Judge Smith stressed that a school could reasonably consider many other factors outside of race in making its admissions decisions, including those “which may have some correlation with race.” *Id.* at 946.

A university may properly favor one applicant over another because of his ability to play the cello, make a downfield tackle, or understand chaos theory. An admissions process may also consider an applicant’s home state or relationship to school alumni. Law schools specifically may look at things such as unusual or substantial extracurricular activities in college, which may be atypical factors affecting undergraduate grades. Schools may even consider factors such as whether an applicant’s parents attended college or the applicant’s economic and social background.

Id. The court observed that diversity “can take many forms;” however, applicants must be evaluated individually, “rather than resorting to the dangerous proxy of race.” *Id.* at 947.

⁹⁴ *Id.* at 948. The school identified three effects of past discrimination: A hostile environment for minorities at the law school, the school’s poor reputation among minorities, and underrepresentation of minorities in the student body. *Id.* at 952. The plaintiffs argued that these were examples of generalized societal discrimination which the Supreme Court has held to be an invalid remedial basis. *Id.*; *see also infra* notes 97, 98 and accompanying text.

⁹⁵ *Id.* at 950 (quoting *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)); *infra* note 98.

state actor.”⁹⁶ After reviewing the Supreme Court decisions of *City of Richmond v. J.A. Croson*⁹⁷ and *Wygant v. Jackson Board of Education*,⁹⁸ the court concluded that the law school, not the State of Texas’ educational system, was the “appropriate governmental unit for measuring a constitutional remedy.”⁹⁹ The court then considered the three present effects of past discrimination put forth by the law school to justify its remedial admissions program: A hostile environment for minorities, the school’s poor reputation among minorities, and underrepresentation of minorities; the court rejected each one.¹⁰⁰ The Fifth Circuit held that the law school had not shown a compelling

⁹⁶ *Id.*

⁹⁷ 488 U.S. 469 (1989) (striking down the City of Richmond’s minority business set-aside program which was justified on remedial grounds). The Court held that a “generalized assertion that there had been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.” *Id.* at 498. In this case, there was no proof of past discrimination in the Richmond construction industry, and the city’s program was not narrowly tailored to achieve its goal of remedying past discrimination. *Id.* at 505, 508. The Fifth Circuit placed particular emphasis on the *Croson* Court’s analogy of the employer contractor situation to that of higher education which noted that “[l]ike claims that discrimination in primary and secondary schooling justifies a rigid racial preference in medical school admissions, an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota.” *Hopwood II*, 78 F.3d at 950 (quoting *City of Richmond v. J. A. Croson*, 488 U.S. 469, 499 (1989)).

⁹⁸ 476 U.S. 267 (1986) (rejecting a minority “role model” justification for a collective bargaining agreement between a school board and a teachers’ union that gave minorities preferential treatment in layoffs). The Court found that (1) no remedial purpose was served by the preferential treatment because there was no logical cut-off period under the “role model” theory, (2) there was no evidence of prior discrimination requiring remedial action, and (3) generalized, past “societal” discrimination was never considered a sufficient compelling government purpose. Olson, *supra* note 58, at 993-94.

⁹⁹ *Hopwood II*, 78 F.3d at 950. The court noted that the law school functioned as a separate unit within the University of Texas system with control over its own admissions program and personnel hiring. *Id.* The University of Texas System was “too expansive an entity to scrutinize for past discrimination.” *Id.*

¹⁰⁰ In rejecting the law school’s present effects arguments of a hostile environment and a poor reputation among minorities, the court relied on *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *reh’g en banc denied*, 46 F.3d 5 (4th Cir. 1994), *cert. denied*, 514 U.S. 1128 (1995) (striking down the use of a race-based scholarship program for African Americans at the University of Maryland). The court agreed with the Fourth Circuit that the poor reputation was due to “historical fact” which was not the kind of present effect that could justify current racial classifications. *Hopwood II*, 78 F.3d at 952-53. In addition, the court wrote that “one cannot conclude that the law school’s past discrimination has created any current hostile environment for minorities.” *Id.* at 953. Rather, any racial tensions were the result of present societal discrimination. *Id.* Finally, the court rejected the underrepresentation of minorities as a present effect of past discrimination. *Id.* The fact that Texas had a history of racial discrimination in education was insufficient; the relevant state actor was the University of

1999]

THE EROSION OF AFFIRMATIVE ACTION

state interest in remedial discrimination sufficient to justify its use of a race-based admissions program.¹⁰¹

Judge Wiener wrote a concurring opinion.¹⁰² Although he agreed with the result, he disagreed that “diversity can never be a compelling governmental interest in a public graduate school.”¹⁰³ Judge Wiener would have found the admissions program unconstitutional on grounds that it was not narrowly tailored.¹⁰⁴ “I follow the solitary path of narrow tailoring rather than the primrose path of compelling interest to reach our common holding.”¹⁰⁵ Judge Wiener was also uncomfortable with the majority’s outright rejection of Justice Powell’s opinion in *Bakke*. He wrote: “[I]f *Bakke* is to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement.”¹⁰⁶

Subsequently, a suggestion for rehearing en banc initiated by a member of the court was denied when a majority of the Fifth Circuit’s sixteen regular active judges declined to rehear the issue.¹⁰⁷ Seven judges dissented from the denial with sharp criticism.¹⁰⁸ The dissent wrote that the “far-reaching importance” of the *Hopwood* decision “demand[ed] the attention of more than a divided panel.”¹⁰⁹ The dissent also criticized

Texas, and there was no showing of “overt officially sanctioned discrimination.” *Id.* at 954 (quoting *Hopwood I*, 861 F. Supp. at 572).

¹⁰¹ *Hopwood II*, 78 F. 3d at 955. Because there was no showing of a compelling state interest, the Fifth Circuit did not have to consider whether the admissions program was narrowly tailored to achieve the state interest.

¹⁰² *Id.* at 962 (Wiener, J., specially concurring).

¹⁰³ *Id.*

¹⁰⁴ *Id.* On addressing whether diversity is a compelling government interest, Judge Wiener wrote:

Rather than attempt to decide that issue, I would take a considerably narrower path—and, I believe, a more appropriate one—to reach an equally narrow result: I would assume *arguendo* that diversity can be a compelling interest but conclude that the admissions process here under scrutiny was not narrowly tailored to achieve diversity.

Id. Judge Wiener would have concluded that the admissions program was not narrowly tailored to achieve diversity because it limited minorities to African Americans and Mexican Americans only. *Id.* at 965.

¹⁰⁵ *Id.* at 966.

¹⁰⁶ *Id.* at 963.

¹⁰⁷ *Hopwood v. Texas (Hopwood III)*, 84 F.3d 720,720 (1996), *cert. denied*, 116 S. Ct. 2581 (1996).

¹⁰⁸ *Id.* at 722 (Politz, J., dissenting from failure to grant rehearing en banc) (“We respectfully but emphatically dissent from the denial of rehearing en banc.”).

¹⁰⁹ *Id.* The dissent wrote further:

When the occasional case of such far-reaching importance to this court, to public higher education, and to this nation comes down the pike, we have a duty to

the panel's overruling of the Supreme Court's decision in *Bakke* as a form of "judicial activism."¹¹⁰ In the opinion of the dissenting judges, even if the panel members were totally convinced that the Supreme Court would overrule *Bakke*, "in the absence of an express overruling, they had no option but to grin, follow *Bakke*, bear it, and patiently await the Supreme Court's reconsideration."¹¹¹

A petition for a writ of certiorari to the Supreme Court was denied as moot.¹¹² Although Justices Ginsburg and Souter acknowledged that the constitutional issue of race- or ethnicity-based admissions programs in higher education "is an issue of great national importance," the law school's objectionable admissions program had already been discontinued for some time, making the issue moot.¹¹³

4. Analysis

The Fifth Circuit's decision demonstrated a lack of judicial restraint.¹¹⁴ While racial

address it and to do the best possible job that our whole court is capable of, regardless of the tactical decisions of the litigants. To decline to rehear a case of this magnitude because the parties have not suggested that we do bespeaks an abdication of duty--the ducking of a tough questions by judges who we know first-hand are made of sterner stuff.

Id.

¹¹⁰ *Id.*

By tenuously stringing together pieces and shards of recent Supreme Court opinions that have dealt with race in such diverse settings as minority set asides for government contractors, broadcast licenses, redistricting, and the like, the panel creates a gossamer chain which it proffers as a justification for overruling *Bakke*. We are persuaded that this alone makes the instant case not just en banc-worthy but en banc mandatory.

Id.

¹¹¹ *Id.* at 724.

¹¹² *Hopwood IV*, 116 S. Ct. 2581, 2581 (1996).

¹¹³ *Id.* Justice Ginsburg also wrote that the petitioners were challenging the Fifth Circuit's rationale. " '[T]his court,' however, 'reviews judgments, not opinions.' " *Id.* (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984)). *But cf.* Schimmel, *supra* note 86, at 1062 (writing that another interpretation of Justice Ginsburg's opinion is that the Supreme Court was not ready to rule on such a controversial issue). The Court may have wanted other courts to wrestle with similar issues first and also give universities an opportunity to reexamine their admissions policies and related affirmative action programs. *Id.*

¹¹⁴ See Robert A. Lauer, *Hopwood v. Texas: A Victory for "Equality" That Denies Reality*, 28 ST. MARY'S L.J. 109, 133-34 (1996).

While many laud Judge Smith's aggressive judicial activism as a positive move toward establishing a true meritocracy in law school admissions, others cringe at the thought of possible resegregation and what amounts to mass confusion not only in

1999]

THE EROSION OF AFFIRMATIVE ACTION

preferences should ultimately be eliminated, the *Hopwood* decision on diversity was premature.¹¹⁵ The court's blatant disregard for Justice Powell's diversity rationale in *Bakke* has elicited perhaps the most criticism.¹¹⁶ Even if *Bakke*'s divided opinion weakened the weight of its legal authority,¹¹⁷ "[f]ew would dispute that, before the Fifth Circuit's decision in *Hopwood*, Justice Powell's diversity rationale was widely accepted as the law of the land."¹¹⁸ As Judge Wiener correctly noted in his concurring opinion, the Supreme Court is the appropriate judicial body to overrule *Bakke*.¹¹⁹

In overruling *Bakke* and relying on Supreme Court cases outside the education arena,¹²⁰ the Fifth Circuit ignored the special consideration the Supreme Court has traditionally accorded education.¹²¹ Beginning with *Brown v. Board of Education*,¹²²

those jurisdictions that must abide by his cryptic opinion but also throughout the rest of the country. Thus, *Hopwood* is a perfect example of the quagmire that can result when policy, law, and reality clash.

Id. (footnotes omitted).

¹¹⁵ This author takes the position that racial preferences should ultimately be eliminated in higher education admissions, but only in conjunction with other measures designed to preserve the benefits of student body diversity. *Infra* PART IV.

¹¹⁶ See Lauer, *supra* note 114, at 132 (writing that Judge Smith ignored both judicial restraint and deference to Supreme Court precedent). "In deciding *Hopwood*, the three-judge panel of the United States Court of Appeals for the Fifth Circuit took it upon itself to effectively overrule *Bakke*'s holding that racial diversity is a compelling interest and thus alter the face of education in Texas and the United States." *Id.* at 132-33; Wright, *supra* note 60, at 906 ("The fundamental flaw in the *Hopwood* panel majority's opinion is its failure to exercise judicial restraint in analyzing the sensitive area of constitutional interpretation.").

¹¹⁷ See Laura C. Scanlan, Note, *Hopwood v. Texas: A Backward Look at Affirmative Action in Education*, 71 N.Y.U. L. REV. 1580, 1587 (1996). The author points out that while it is important to remember for precedential value that Justice Powell's opinion was not fully joined by any other Justice, "[n]evertheless, no Justice argued that the use of race was wholly inappropriate in Davis Medical School's admissions process." *Id.*; cf. Robert J. Donahue, Note, *Racial Diversity as a Compelling Government Interest*, 30 IND. L. REV. 523, 531 (1997). The author contends that because the *Bakke* Court lacked consensus on a justification for its result, "[a]uthoritatively, it stands for very little as a whole" and "it did not set widely recognized precedent." *Id.*

¹¹⁸ Wright, *supra* note 60, at 891; *supra* notes 58, 60 and accompanying text.

¹¹⁹ *Hopwood II*, 78 F.3d at 964 (Wiener, J., specially concurring). In *Rodriguez de Quigas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), the Supreme Court spoke directly to judicial restraint. "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (emphasis added).

¹²⁰ *Supra* notes 97, 98, and accompanying text.

¹²¹ See Schimmel, *supra* note 86, at 1060 (writing that "[h]igher education is a unique context. Therefore, even if more recent decisions have struck down racial preferences in minority business set asides or redistricting, such cases can be distinguished from higher

the Supreme Court has frequently recognized the uniqueness of the educational setting in Equal Protection cases.¹²³ Specifically, the Court has acknowledged “those qualities which are incapable of objective measurement,” and the importance of providing an educational environment conducive to “the interplay of ideas and the exchange of views.”¹²⁴ Thus, the Supreme Court has embraced diversity in higher education; based

education in view of its unique goals and methods.”). The author also writes that universities enjoy the special protections of the First Amendment and academic freedom. *Id.*; see also Scanlan, *supra* note 117, at 1605 (distinguishing education from employment cases in that “[e]ducation, unlike employment, is a process in which the treatment a student receives at each level has a continuing impact . . .”). Also, when “the Supreme Court has struck down affirmative action programs in contexts other than education, it has consistently emphasized that diversity has not been at issue.” *Id.* at 1614; Wright, *supra* note 60, at 894 (“Diversity in higher education is certainly different from diversity in the contracting and employment cases relied upon by the *Hopwood* court to ‘overrule’ *Bakke*.”).

¹²² 347 U.S. 483, 495 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896) by concluding “that in the field of public education the doctrine of ‘separate but equal’ has no place”). The Court wrote: “[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship.” *Id.* at 493.

¹²³ For example, in *Sweatt v. Painter*, 339 U.S. 629 (1950), the Court ordered a black student to be admitted to the University of Texas Law School after finding that a parallel black school was not equal. The Court wrote:

What is more important, the University of Texas Law School possesses to a far greater degree *those qualities which are incapable of objective measurement* but which make for greatness in a law school. Such qualities, to name a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. *Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned . . .* *Id.* at 634 (emphasis added). In *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950), a black student admitted to the University of Oklahoma Department of Education was subjected to a designated desk in a separate room adjoining the classroom, a designated desk in the library, and an assigned table in the cafeteria where he ate at a different time than the other students. The Court held that the physical restrictions, while technically equal, were unconstitutional because they “*impair[ed] and inhibit[ed] his ability to study, to engage in discussions and exchange views with other students, and in general, to learn his profession.*” *Id.* at 641 (emphasis added).

¹²⁴ *Sweatt v. Painter*, 339 U.S. 629, 634 (1950). See Murphy, *supra* note 41, at 539-40:

The Supreme Court has repeatedly noted the importance of education in American society. . . .

1999]

THE EROSION OF AFFIRMATIVE ACTION

on *Bakke*, diversity has been interpreted by the Court primarily as racial diversity.¹²⁵

The Fifth Circuit should have avoided the controversial “primrose path” of *Bakkean* diversity and chosen the “solitary path” of Judge Wiener’s “narrowly tailored” reasoning instead.¹²⁶ Accepting that racial diversity is a compelling government interest in higher education admissions, the law school’s program simply was not narrowly tailored to achieve that purpose because it focused only on African Americans and Mexican Americans.¹²⁷

The Fifth Circuit’s analysis of the compelling government interest of remedying the effects of past discrimination also was problematic. One commentator wrote: “It is ironic, given its racially troubled history, that an affirmative action program at the University of Texas School of Law would place such a stumbling block in the path of affirmative action at the nation’s institutions of higher learning.”¹²⁸ Indeed, this is the very same law school that was ordered to admit an African American student in the 1950’s.¹²⁹

By denying the law school’s remedial interest because there was “no [recent]

In order to protect the unique role of education as a tool for shaping the views, values, and ideals of present and future generations, the Court has afforded wide deference to academic institutions and the state governments that control these institutions when reviewing cases affecting education.

Id.

¹²⁵ See Scanlan, *supra* note 117, at 1612. The author writes that when the Supreme Court has spoken of diversity, it has emphasized diversity of experience. *Id.* According to this author, diversity of experience cannot be ensured without considering race. *Id.*

¹²⁶ *Hopwood II*, 78 F.3d at 962 (Wiener, J., specially concurring); see *supra* note 104.

¹²⁷ *Id.* Judge Wiener wrote:

Focusing as it does on blacks and Mexican Americans only, the law school’s 1992 admissions process misconceived the concept of diversity

[. . . yet] blacks and Mexican Americans are but two among any number of racial or ethnic groups that could and presumably should contribute to genuine diversity.

By singling out only those two ethnic groups, the initial stage of the law school’s 1992 admissions process ignored altogether non-Mexican Hispanic Americans, Asian Americans, and Native Americans, to name but a few.

Id. at 965-66; cf. Wright, *supra* note 60, at 896 (writing that the Fifth Circuit could have found the law school’s admissions program unconstitutional on grounds that it was not narrowly tailored because “the law school’s use of separate admissions committees for minorities and nonminorities ‘insulated’ minority applicants from being considered with nonminority applicants”).

¹²⁸ Lauer, *supra* note 114, at 123.

¹²⁹ *Sweatt v. Painter*, 329 U.S. 629 (1950) (finding that a parallel black law school was not “equal” to the University of Texas Law School). For more discussion of the case, see *supra* note 123.

evidence of overt officially sanctioned discrimination at the University of Texas,”¹³⁰ the Fifth Circuit misinterpreted and narrowed the Supreme Court’s position. The Court has held that “remedying specific acts of prior discrimination” is a compelling government interest provided the remedy is “narrowly tailored”.¹³¹ Hence, it was not necessary for the law school’s current administration to engage in discriminatory practices.¹³² The court should have found that remedying the effects of past discrimination was a compelling government interest for the law school and upheld that part of the admissions process which used race as one of many factors in reaching an admissions decision.¹³³

5. After *Hopwood*

There is little doubt that the *Hopwood* decision has refueled the debate over preferential admissions policies.¹³⁴ However, the negative sentiment surrounding the

¹³⁰ *Hopwood II*, 78 F.3d at 953 (“While the school once did practice de jure discrimination in denying admission to blacks, the Court in *Sweatt v. Painter* struck down the law school’s program. Any other discrimination by the law school ended in the 1960’s.”).

¹³¹ STONE ET AL., *supra* note 23, at 691. The authors write: “So long as a jurisdiction can point to specific prior acts of discrimination, whether public or private, for which it is in some sense responsible, ‘narrowly tailored’ race-conscious remedies are permissible.” *Id.*

¹³² By relying on *Podberesky*, the Fifth Circuit appears to have focused unduly on the *present* effects of past discrimination asserted by the law school. *Hopwood II*, 78 F.3d at 952 (“Next, the relevant governmental discriminator must prove that there are present effects of past discrimination of the type that justify the racial classifications at issue.”).

Under the *Hopwood* appellate court’s formulation, affirmative action would only be permitted where the Law School’s practice of discrimination directly harmed the applicant by previously refusing that same applicant admission based on her race. . .

. . . In order for such a plan to have any practical application whatsoever, the institution employing the affirmative action plan would have to continue, in blatant violation of the law, to discriminate against the groups that it also intended to benefit through its plan.

See Scanlan, *supra* note 117, at 1605-06. (footnotes omitted).

¹³³ The long history of racial discrimination at the University of Texas would have been enough to support a remedial justification. *See Hopwood I*, 861 F. Supp. at 555-57 and *supra* note 77. However, even given a remedial justification for the law school’s admissions program, this author agrees with the district court that part of the admissions process was constitutionally impermissible because it “fail[ed] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant’s own race.” *Id.* at 579.

¹³⁴ *See* Wright, *supra* note 60, at 903. “In sum, the general consensus among many commentators is that *Hopwood* has marked the beginning of the demise of affirmative action as it is currently being applied by colleges and universities nationwide.” *Id.*; *cf.* Caplan et al., *supra* note 4, at 26-27. “The *Hopwood* effect has at some institutions redoubled support for affirmative action. . . . But in other institutions, *Hopwood* is changing policies through what

1999]

THE EROSION OF AFFIRMATIVE ACTION

decision's underlying reasoning may limit its legal impact.¹³⁵ *Hopwood* is binding precedent on the Fifth Circuit states of Texas, Louisiana, and Mississippi only, and at least one education case outside the Fifth Circuit has declined to follow *Hopwood*.¹³⁶

lawyers describe as 'prudential' actions taken to protect against the inevitable copycat suits." *Id.*

¹³⁵ See Barbara Bader Aldave, *Hopwood v. Texas: Much Ado About Nothing?*, TEX. LAW., Nov. 11, 1996, at 43 (writing as dean of St. Mary's University School of Law in San Antonio).

I can promise you this: Unless and until my superiors order me to stop, we at St. Mary's University School of Law are going to ignore the *Hopwood* decision and adhere to the guidelines of *Bakke*. I am immensely proud that 41 percent of the students in our first year class are members of minority groups, and that our school now has a higher percentage of Mexican-American students than any other law school in the United States. At least as long as I am dean, St. Mary's University School of Law will continue to turn out highly qualified lawyers, judges, legislators and public servants, and they will continue to come from all of the diverse racial and ethnic groups that make up our society.

Id. Aldave wrote further that "I hope many of you will join me in according to the Supreme Court the respect that it deserves, and in spreading the good news that the *Bakke* decision is still the law of the land." *Id.* Aldave has been an outspoken critic of the *Hopwood* decision; in October 1997, the president of St. Mary's declined to reappoint Aldave, who was law school dean for nine years. Susan S. Richardson, *Diversity Advocate Speaks Truth, Loses Job*, AUSTIN AMERICAN-STATESMAN, Oct. 31, 1997, at A15, available in 1997 WL 2844547.

¹³⁶ In *Hunter v. Regents of the University of California*, 971 F.Supp. 1316 (C.D. Cal. 1997), a mother brought an Equal Protection claim (among others) on behalf of her daughter who was denied admission to the four-year-old class of a UCLA laboratory school. *Id.* at 1319. The school engaged in educational research in an attempt to develop a more effective education system for urban elementary students. *Id.* The admissions process admittedly treated applicants disparately by initially separating the applicants according to race and ethnicity. *Id.* at 1323. Applying strict scrutiny, the district court declined to follow *Hopwood* and other circuit courts which concluded that remedying past discrimination was the only permissible justification for racial classifications. *Id.* at 3127. The court wrote:

The Court does not have an "abiding conviction" in the "reasonableness" of the Third, Fourth, Fifth, and Seventh Circuits' judgments, all of which base their holdings on an interpretation of *Croson* previously rejected by this Court. In reliance upon the Supreme Court's affirmation that strict scrutiny is not "strict in theory, but fatal in fact," this Court cannot conclude that the only constitutional form of face-conscious decisionmaking must remedy past discrimination.

Id. Instead, the court recognized a compelling government interest in "maintaining and improving the public education system." *Id.* at 1328. Due to the school's innovative techniques and studies, "without a racially and ethnically diverse student population, the benefits to be gained by these innovations and studies would be lost." *Id.* at 1329. The district court then concluded that the admissions process was narrowly tailored to meet the compelling government interest; thus, the school's admissions process was constitutional. *Id.* at 1332.

Within the Fifth Circuit, *Messer v. Meno*¹³⁷ extended *Hopwood* to the employment context, prompting one judge to express his reservations in a concurring opinion.¹³⁸

B. Proposition 209 - The California Civil Rights Initiative

While the *Hopwood* case was being decided in Texas, there was a movement underway in California to garner support for a state constitutional amendment. On November 5, 1996, fifty-four percent of Californians voted to adopt Proposition 209,¹³⁹ otherwise known as the California Civil Rights Initiative.¹⁴⁰ Proposition 209 prohibits discrimination and racial and gender preferences in public employment, public education, and public contracting.¹⁴¹ While supporters of the amendment touted the

¹³⁷ 130 F.3d 130 (5th Cir. 1997). In *Messer*, a white woman challenged the Texas Education Agency's ("TEA") affirmative action plans. *Id.* at 133. She alleged that during her employment at TEA, she had been "unconstitutionally discriminated against in salary and promotion opportunities" because "the agency aspired to 'balance' its workforce according to the gender and racial balance of the state." *Id.* Citing *Hopwood*, the court found that there was a genuine issue of material fact as to whether TEA employees considered race or gender in employment decisions. *Id.* at 136, 139. As a result, the court reversed in large part TEA's favorable summary judgment. *Id.* at 133.

¹³⁸ *Id.* at 140 (Garza, J., specially concurring). Judge Garza wrote:

The majority is attempting to prove a bit too much in this case, with its rather sweeping dicta regarding the constitutionality and standards of review for affirmative action policies. In doing so, it appears to me that the majority is attempting to quietly expand *Hopwood's* empire into the realm of employment law with this decision, a move which is both hasty and unnecessary

. . . I fear that the tone of the majority's decision, coupled with its invocation of *Hopwood*, will send the message out that affirmative action is, for all intents and purposes, dead in the Fifth Circuit. Such an interpretation would be incorrect under Supreme Court precedent and the precedent of this Circuit, and I write separately to make that point clear.

Id. at 141.

¹³⁹ *Coalition for Economic Equity v. Wilson (Wilson II)*, 122 F.3d 692, 697 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997). This case represented an appeal from a preliminary injunction handed down by the district court in response to a constitutional challenge to Proposition 209. *Id.* at 697; *see infra* discussion in PART III(B)(2).

¹⁴⁰ CAL. CONST. art. I, § 31; *see CALIFORNIA BALLOT PAMPHLET, reprinted in Volokh, supra* note 1, at 1397 (Argument in Favor of Proposition 209), where proponents of the constitutional amendment wrote that the name "California Civil Rights Initiative" was chosen because "it restates the historic Civil Rights Act" *Id.* Proponents reiterated that "[a]nyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act." *Id.* at 1402 (Rebuttal to Argument Against Proposition 209).

¹⁴¹ CAL. CONST. art. I, § 31, cl. a. The text provides:

The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

1999]

THE EROSION OF AFFIRMATIVE ACTION

benefits of returning to the nondiscrimination goals of earlier civil rights laws,¹⁴² opponents claimed that “Proposition 209 highjacks civil rights language and uses legal lingo to gut protections against discrimination.”¹⁴³

1. Proposition 209 Foreshadowed

The passage of Proposition 209 was foreshadowed by an earlier affirmative action decision in California. In July 1995, the Board of Regents of the University of California voted to discontinue the use of ethnicity and gender factors in admissions decisions beginning 1997.¹⁴⁴ While it is still too early to gauge the effects of that

In *Coalition for Economic Equity v. Wilson (Wilson I)*, 946 F. Supp. 1480, 1488 (N.D. Cal. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 397 (1997), the district court wrote: “It is important to note at the outset that much of this language simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act.” *Id.* *Wilson I* represented a constitutional challenge to Proposition 209 which was filed one day after voters approved the initiative. *Wilson II*, 122 F.3d at 697. *Infra* discussion in PART III(B)(2).

¹⁴² See CALIFORNIA BALLOT PAMPHLET, *reprinted in* Volokh, *supra* note 1, at 1398 (Argument in Favor of Proposition 209) (“Let’s not perpetuate the myth that ‘minorities’ and women cannot compete without special preferences. Let’s instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and zero tolerance for discrimination against—or for—any individual.”) (emphasis omitted).

¹⁴³ *Id.* at 1399 (Rebuttal to Argument in Favor of Proposition 209). Opponents claimed that “Proposition 209’s real purpose is to eliminate affirmative action equal opportunity programs for qualified women and minorities including tutoring, outreach, and mentoring.” *Id.* Opponents also claimed that politicians who supported Proposition 209 were using it as an opportunistic vehicle “for their own personal gain.” *Id.* Perhaps Proposition 209 should be given a narrow construction. See Eugene Volokh, *The California Civil Rights Initiative: An Interpretive Guide*, 44 UCLA L. REV. 1335, 1336 (1997). As such, it “does not ban ethnic studies majors, or repeal existing bans on sex discrimination, or prohibit all ‘affirmative action’ programs.” *Id.* at 1337. For example, an outreach program which recruits university applicants from schools which have historically had few applicants (regardless of ethnicity) would be permissible under Proposition 209; however, if the schools were targeted *because* they had more students of one particular group, the program would be discriminatory. *Id.* at 1352-53.

¹⁴⁴ See Thomas Glenn Martin, Jr., Comment, *UCLA School of Law Admissions in the Aftermath of the U.C. Regents’ Resolution to Eliminate Affirmative Action: An Admissions Policy Survey and Proposal*, 18 CHICANO-LATINO L. REV. 150, 152 (writing that “[o]n July 20, 1995, the history of affirmative action at the [University of California] took a dramatic and controversial turn”). The Board of Regents’ decision came “[a]fter a turbulent twelve-hour meeting marked by a bomb threat, political grandstanding, and student demonstrations” *Id.* See also Arleen Jacobius, *Affirmative Action on Way Out in California*, 81-SEP.A.B.A.J. 22, 22 (1995) (“The regents’ action rings a death knell for affirmative action in state-supported law schools beginning January 1997 when the new policy takes effect, say deans and professors who opposed the change.”).

decision, the number of African Americans admitted to the University of California's three law schools declined seventy-two percent last year.¹⁴⁵ In response to the Board of Regents' decision, supporters of affirmative action have developed new methods of ensuring minority representation.¹⁴⁶

2. Judicial Challenge to Proposition 209

The victory for supporters of Proposition 209 has been bittersweet. One day after Proposition 209 was passed, the constitutionality of the initiative was challenged in *Coalition for Economic Equity v. Wilson*.¹⁴⁷ In a suit brought in United States District Court, the plaintiffs asserted that Proposition 209 interfered with their equal protection guarantee under the Fourteenth Amendment of "the right to full participation in the political life of the community"¹⁴⁸ by "restructur[ing] the political process in a nonneutral manner."¹⁴⁹ The plaintiffs sought a preliminary injunction enjoining state

¹⁴⁵ Reibstein, *supra* note 4, at 77. Only fifty-nine African Americans were admitted to the three law schools. *Id.* Of that number, only sixteen decided to attend as compared to forty-three the previous year. *Id.* At the University of California at Berkeley's Boalt Hall, there is only one African American in the first-year class. *Id.*

¹⁴⁶ See Jeffrey B. Wolff, Comment, *Affirmative Action in College and Graduate School Admissions--The Effects of Hopwood and the Actions of the U.C. Board of Regents on its Continued Existence*, 50 SMU L. REV. 627, 655 (1997). Because the Board of Regents' action was limited to university admissions, the schools still could target minorities at lower levels. At the University of California at Berkeley, a program called the Berkeley Pledge has been developed. *Id.* The Pledge is committed to identifying minority and low income elementary and high school students who may have potential to attend Berkeley. *Id.* The students will be offered such assistance as summer programs, professor mentoring, and recruiting in hopes that they will become eligible for admission to the University of California system. *Id.* at 655-56. After the passage of Proposition 209, this program will have to use race- and gender-neutral means of identifying potential students. In addition, Berkeley has revamped its admissions guidelines to both comply with the Board of Regent's decision and still pursue a diverse student body through race- and gender-neutral means. *Id.* at 656; For a discussion of alternative admissions policies which would comply with the Board of Regents' action see Martin, *supra* note 144. The author favors a hybrid Diversity/Disadvantage admissions policy which addresses the concerns of race-based affirmative action without using race as a proxy. *Id.* at 183. "Diversity" refers to those subjective factors which "mold an individual's character," while "disadvantage" considers objective factors such as family and economic environment and education. *Id.* at 181-82.

¹⁴⁷ *Wilson I*, 946 F. Supp. 1480 (N.D. Cal. 1996).

¹⁴⁸ *Id.* at 1489 (quoting *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982)). The plaintiffs also argued that under the Supremacy Clause of the United States Constitution, Proposition 209 was preempted by Titles VI and VII of the Civil Rights Act of 1964 and Title XI of the Education Amendments of 1972. *Id.* at 1490.

¹⁴⁹ *Id.* The plaintiffs' specific allegation was that after Proposition 209, the only political means available for groups seeking legislation to benefit women or minorities was a

1999] THE EROSION OF AFFIRMATIVE ACTION
officials from implementing the amendment.¹⁵⁰

The District Court Decision

The district court began by noting that much of the language contained in Proposition 209 “simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act.”¹⁵¹ At issue was that Californians clearly meant to do “something more” when they passed Proposition 209 than “simply restate existing law.”¹⁵² Relying on the plaintiffs’ political participation argument, the district court framed the issue in narrow terms: “[W]hether the particular method chosen by Proposition 209 to curtail affirmative action is unlawful because it . . . violates the rights of women and minorities to fully participate in our political system . . . ?”¹⁵³

constitutional amendment. *Id.* The California Constitution could be amended in one of two ways: (1) By initiative constitutional amendment or (2) by legislative constitutional amendment. *Id.* at 1498. The district court noted that “[e]ither method places a heavy burden on those seeking to advocate the use of constitutionally-permissible affirmative action programs in their local communities.” *Id.* “In either case, substantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval.” *Id.* at 1499.

¹⁵⁰ *Id.* at 1491. In order to obtain a preliminary injunction in the Ninth Circuit, the plaintiffs were required to show “either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the movant.” *Id.* at 1492. The district court had to evaluate the merits of the constitutional claim before it could address the irreparability and imminence of any harm. *Id.* at 1493.

¹⁵¹ *Id.* at 1488. The court wrote that “[t]his aspect of Proposition 209--which creates no change in existing law--is not at issue in this case. Indeed, it could hardly be more clear that a law that merely affirms the non-discrimination principles in our Constitution is, itself, constitutional.” *Id.*

¹⁵² *Id.* at 1489. The district court saw its role as determining the “outer boundaries” of the “something more.” *Id.* The challenge was not to the entire initiative, but only to “that slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race- and gender-conscious affirmative action programs.” *Id.*

¹⁵³ *Id.* at 1490. The court wrote:

It also cannot be overemphasized that this case does not call upon this Court to adjudicate whether affirmative action is right or wrong, or whether it is no longer an appropriate policy for addressing the continuing effects of past and present discrimination against racial minorities and women. Such questions, while they are most certainly of vital public policy interest, lie beyond the purview of this Court. Nor does this case implicate the ability of governmental entities to voluntarily repeal affirmative action policies, as the Regents of the University of California did earlier this year.

The plaintiffs supported their equal protection claim with the Supreme Court cases of *Hunter v. Erickson*¹⁵⁴ and *Washington v. Seattle School District No. 1*.¹⁵⁵ These cases essentially held that an otherwise facially-neutral initiative is unconstitutional when it uses racial classifications to allocate government power non-neutrally.¹⁵⁶ While the

Id.

¹⁵⁴ 393 U.S. 385 (1969). In *Hunter*, the city council in Akron, Ohio enacted a fair housing ordinance which the citizens subsequently amended by referendum. *Id.* at 386-87. The amendment provided that ordinances regulating real estate transactions “on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said ordinance shall be effective.” *Id.* at 387. The effect of the amendment was that ordinances prohibiting racial or religious discrimination required *both* city council approval and a majority vote by the city’s citizens, whereas ordinances prohibiting discrimination on other grounds required only city council approval. *Id.* at 390. The Supreme Court struck down the charter amendment. *Id.* at 393. The Court wrote:

[A]lthough the law on its face treats Negro and white, Jew and gentile in an identical manner, the reality is that the law’s impact falls on the minority. The majority need no protection against discrimination and if it did, a referendum might be bothersome but no more than that. . . .

. . . .

. . . . [T]he State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person’s vote or give any group a smaller representation than another of comparable size.

Id. at 391-93. Thus, “the confluence of the two factors--the targeting of a racial issue and the reordering of the political process--constituted a racial classification that required the most exacting judicial scrutiny.” *Wilson I*, 946 F. Supp. at 1500.

¹⁵⁵ 458 U.S. 457 (1982). The Supreme Court applied the *Hunter* rationale in *Seattle* to strike down a statewide initiative. *Id.* at 470. In *Seattle*, the Seattle School Board challenged the constitutionality of statewide Initiative 350 which prohibited school boards from requiring “any student to attend a school other than the school which is geographically nearest or next nearest the student’s place of residence” *Id.* at 462. The initiative contained a number of exceptions which permitted student reassignments for overcrowding, special education needs, and racial reasons if constitutionally mandated. *Id.* at 462-63. The effect of the initiative was to derail the Seattle School Board’s voluntary desegregation busing plan. *Id.* at 464. The Supreme Court found that even though the initiative contained facially neutral language, in reality it barred only those busing plans aimed at racial desegregation. *Id.* at 474. In addition, the initiative reallocated political power in a non-neutral way. *Id.* “The initiative removes the authority to address a racial problem--and only a racial problem--from the existing decisionmaking body, in such a way to burden minority interests.” *Id.*

¹⁵⁶ *Id.* at 483. The *Seattle* Court wrote:

Initiative 350, however, works something more than the “mere repeal” of a desegregation law by the political entity that created it. It burdens all future attempts to integrate Washington schools in districts throughout the state, by lodging decision making authority over the question at a new and remote level of

1999]

THE EROSION OF AFFIRMATIVE ACTION

“political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of government action,”¹⁵⁷ the racially-based initiatives in *Hunter* and *Seattle* failed because they did “not attempt[] to allocate government power on the basis of any general principle.”¹⁵⁸

The defendants maintained that *Crawford v. Board of Education*¹⁵⁹ controlled.¹⁶⁰ *Crawford* involved an equal protection challenge to an amendment to the California Constitution which prohibited state court-ordered busing for desegregation unless a federal court would do so to remedy a Fourteenth Amendment violation.¹⁶¹ The Supreme Court upheld the amendment by writing that “the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place.”¹⁶² The Court found that the amendment did not intend to discriminate on the basis of race nor did it distort the political process in a discriminatory manner.¹⁶³ “In short, having gone beyond the

government.

Id.

¹⁵⁷ *Id.* at 470 (“But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process.”).

¹⁵⁸ *Hunter*, 393 U.S. at 563 (Harlan, J., concurring) (writing that “the city of Akron has not attempted to allocate governmental power on the basis on any general principle,” but rather the “provision . . . has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest”).

¹⁵⁹ 458 U.S. 527 (1982).

¹⁶⁰ *Wilson I*, 946 F. Supp. at 1508. The defendants distinguished Proposition 209 from *Hunter* and *Seattle* in several ways. *Id.* at 1502-03. One argument was that while *Hunter* and *Seattle* burdened the equal protection rights of minorities, Proposition 209, by contrast, “only interferes with ‘zero-sum’ antidiscrimination efforts--those that help minorities, but do so at the expense of nonminorities.” *Id.* at 1502. The district court rejected the arguments. *Id.* at 1502-03.

¹⁶¹ *Crawford*, 458 U.S. at 527. Previously, the California Supreme Court had interpreted the state constitution’s Equal Protection Clause as prohibiting both de jure and de facto segregation and ordered state school boards to take “reasonable steps to alleviate segregation in the public schools.” *Id.* at 530. Efforts for the constitutional amendment were motivated, in part, by dissatisfaction with the California Supreme Court’s decision. *Id.* at 531-32. It was in this context that the United States Supreme Court found the amendment to be a “mere repeal.” *Id.* at 538.

¹⁶² *Id.* at 538. The Court wrote: “Were we to hold that the mere repeal of race-related legislation is unconstitutional, we would limit seriously the authority of States to deal with the problems of our heterogeneous population. State would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice.” *Id.* at 539.

¹⁶³ *Id.* at 537. The Court found that the amendment “neither says nor implies that persons are to be treated differently on account of their race.” *Id.* The chief benefit of the amendment, neighborhood schooling, was a legitimate, nondiscriminatory objective. *Id.* at 545. In

requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States.”¹⁶⁴

The district court rejected *Crawford* as controlling in this case; “Proposition 209 [could not] be characterized as a mere repeal.”¹⁶⁵ Instead, the court applied the *Hunter-Seattle* rationale¹⁶⁶ to find that Proposition 209 had both a racial focus¹⁶⁷ and restructured the political process “to the detriment of the interests of minorities and women.”¹⁶⁸ Consequently, the district court granted the preliminary injunction.¹⁶⁹

addition, the Court found no discriminatory reallocation of political power. *Id.* at 541. The Court wrote the “[r]emedies appropriate in one area of legislation may not be desirable in another” and “ ‘the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.’ ” *Id.* at 541-42 (quoting *Tigner v. Texas*, 310 U.S. 141 (1940)).

¹⁶⁴ *Id.* at 542. The Court rejected the notion that once a state chooses to do more than constitutionally required under the Fourteenth Amendment, “it may never recede.” *Id.* at 535. “We reject an interpretation of the Fourteenth Amendment so destructive of a State’s democratic processes and of its ability to experiment.” *Id.*

¹⁶⁵ *Wilson I*, 946 F. Supp. at 1508 (“Proposition 209 . . . not only repeals all existing state and local affirmative action programs, but also prohibits the adoption of such programs in the future.”).

¹⁶⁶ *Id.* at 1504. From the outset, the district court noted three similarities between Proposition 209 and the initiatives struck down in *Seattle* and *Hunter*:

All three initiatives are facially neutral. All three grew from controversial efforts aimed at rolling back legislative gains that were intended as remedies for historical discrimination suffered by particular groups. Perhaps most importantly, in the wake of all three measures, those seeking to reenact such remedies could no longer use the same political mechanisms that had been available prior to the passage of the enactments.

Id. at 1501.

¹⁶⁷ *Id.* at 1504. The court relied on both Proposition 209’s campaign and its practical effect to conclude that despite its facial neutrality, Proposition 209 singled out race- and gender-conscious affirmative action programs. *Id.* The initiative was repeatedly characterized as a “referendum on race- and gender- conscious affirmative action,” and its practical effect “would eliminate existing state and local race- and gender-conscious affirmative action efforts in contracting, employment, and education.” *Id.*

¹⁶⁸ *Id.* at 1506. While both racial and gender classifications were at issue in Proposition 209, the district court did not apply strict scrutiny, because it concluded that the initiative failed to satisfy even the lesser intermediate scrutiny triggered by the gender classification. *Id.* at 1508. Under intermediate scrutiny, the state has the burden of showing that the challenged classification serves an “important government purpose” and that the means are “substantially related” to the achievement of that purpose. *Id.* at 1509. After subjecting the “reordering of the political process” to intermediate scrutiny, the court held that Proposition 209 as a means of eliminating discrimination on the basis of race and gender could not survive intermediate scrutiny. *Id.* “Defendants have not identified any feature of the prior political process that was discriminatory, and thus their invocation of a state interest in eliminating

The Ninth Circuit Decision

The Ninth Circuit began by defining the court's role as reviewing whether the district court relied on any erroneous legal premises in terms of "conventional" equal protection analysis or "political structure" equal protection analysis.¹⁷⁰ The court concluded that under "conventional" equal protection analysis, "there is simply no doubt that Proposition 209 is constitutional."¹⁷¹ The court then addressed the "political structure" analysis by reviewing the district court's reliance on the *Hunter-Seattle* rationale.¹⁷² The Ninth Circuit distinguished Proposition 209 from *Hunter* and *Seattle* by finding that the initiative addressed race-related and gender-related matters in a "neutral-fashion."¹⁷³ In addition, the court wrote: "Impediments to preferential

discrimination cannot justify the nonneutral reordering of that process." *Id.*

¹⁶⁹ *Id.* at 1520. Thus, the plaintiffs demonstrated that a preliminary injunction was necessary to protect them from irreparable injury. *Id.* The district court also concluded that Proposition 209 was invalid because it was preempted by Title VII of the Civil Rights Act of 1964. *Wilson II*, 122 F.3d at 709.

¹⁷⁰ *Wilson II*, 122 F.3d at 701. The court defined "conventional" equal protection analysis as "look[ing] to the substance of the law at issue" and "political structure" equal protection analysis as "look[ing] to the level of government at which the law was enacted." *Id.*

¹⁷¹ *Id.* The court wrote: "The first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws." *Id.* at 702. The court concluded that "[a] law that *prohibits* the State from classifying individuals by race or gender a fortiori does not classify individuals by race or gender." *Id.* (emphasis added). Thus, the Ninth Circuit concluded, "as a matter of law and logic," that Proposition 209 did not violate "conventional" equal protection analysis. *Id.*

¹⁷² *Id.* at 704. The State advanced two arguments to contend that the district court erroneously relied on *Hunter* and *Seattle*. *Id.* First, unlike *Hunter* and *Seattle*, Proposition 209 "does not reallocate political authority in a discriminatory manner." *Id.* Second, "a majority of the electorate cannot restructure the political process to discriminate against itself." *Id.* Addressing the second argument first, the court accepted the district court's findings that Proposition 209 would indeed burden members of minority groups within the majority who enacted the initiative by making race- or gender-based preferential treatment unavailable at the local entity level. *Id.* at 705. The court wrote: "The legal question for us to decide is whether a burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws." *Id.*

¹⁷³ *Id.* at 709. The court wrote that *Hunter* and *Seattle* "relied expressly on the states' existing . . . processes to find that they had reallocated authority in a racially discriminatory manner." *Id.* at 706.

When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does

treatment do not deny equal protection. . . . While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.”¹⁷⁴ Thus, the Ninth Circuit concluded that “as a matter of law, Proposition 209 does not violate the United States Constitution.”¹⁷⁵

Subsequently, the plaintiffs’ petition for rehearing was denied and a suggestion for rehearing en banc was rejected.¹⁷⁶ On November 3, 1997, the United States Supreme Court denied a petition for a writ of certiorari in a memorandum.¹⁷⁷

Analysis

Wilson I and *Wilson II* are perfect examples of how the framing of an issue can greatly affect the outcome of a case. *Wilson I* framed the issue in terms of Proposition 209 interfering with the plaintiffs’ equal protection rights of access to the political process.¹⁷⁸ When the *Wilson II* court reviewed the district court’s decision, it focused on the political access burden in the context of interfering with preferential treatment.¹⁷⁹

it treat race and gender antidiscrimination laws in one area differently from race and gender antidiscrimination laws in another. Rather, it prohibits all race and gender preferences by state entities.

Id. at 707.

¹⁷⁴ *Id.* at 708. The court distinguished equal treatment from preferential treatment. *Id.* “It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment.” *Id.*

¹⁷⁵ *Id.* at 710. The court wrote: “[W]e are persuaded that the district court relied on an erroneous legal premise when it concluded that plaintiffs have demonstrated a likelihood of success on their equal protection claim.” *Id.* at 709. The court reached the same conclusion when it reviewed the district court’s decision that “plaintiffs are likely to succeed on the merits of their pre-emption claims.” *Id.* at 710.

¹⁷⁶ *Id.* at 711. Circuit Judge Schroeder, joined by three members of the court, wrote a dissent in which he contended that “[e]n banc review was warranted in this case for two reasons.” *Id.* (Schroeder, J., dissenting from denial of rehearing en banc). “First, the case is extraordinarily important.” *Id.* He maintained that the Ninth Circuit’s decision “put equal protection law in a state of turmoil.” *Id.* “Second, the decision is contrary to controlling Supreme Court precedent.” *Id.* Judge Schroeder wrote that *Hunter* and *Seattle* applied to Proposition 209. *Id.* “The Supreme Court has squarely held that a state violates the Constitution when it attempts to put legislative remedies which benefit minorities at a remote level of government beyond the ordinary legislative process.” *Id.*

¹⁷⁷ *Coalition for Economic Equity v. Wilson (Wilson III)*, 118 S. Ct. 397 (1997).

¹⁷⁸ *Wilson I*, 946 F. Supp. at 1489. *See also* Weeden, *supra* note 15, at 304 (“The most serious flaw in *Wilson [I]*’s analysis is the failure to treat Proposition 209 as an affirmative action remedy based on race and gender, but instead treating it as a case about access to the political process.”).

¹⁷⁹ *Wilson II*, 122 F.3d at 705. The *Wilson II* court wrote: “The legal question for us to

Therefore, “Proposition 209 is constitutional because it prevents racial and gender discrimination by denying preferences not otherwise allowed under the Equal Protection Clause.”¹⁸⁰

Under the *Wilson I* formulation, Proposition 209 clearly impedes the right of access to the political process by permitting race- and gender-based remedies only through a constitutional mechanism.¹⁸¹ However, Proposition 209 is only unconstitutional if there is the necessary “intent to discriminate.”¹⁸² In this case, the initiative was facially neutral, and even though it had a disproportionate impact on women and minorities, it would be unconstitutional only if it were enacted “because of,” not merely “in spite of,” its adverse effects on women and minorities.¹⁸³ The district court erred in finding the requisite discriminatory purpose.¹⁸⁴ Even though Proposition 209 removes

decide is whether a burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws.” *Id.*

¹⁸⁰ Weeden, *supra* note 15, at 304. The Ninth Circuit wrote that the plaintiffs challenge Proposition 209 “not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment.” *Wilson II*, 122 F. 3d at 709. This critical distinction enabled the *Wilson II* court to find that “[t]he alleged ‘equal protection’ burden that Proposition 209 imposes on those who would seek race and gender preferences is a burden that the Constitution itself imposes.” *Id.* at 708.

¹⁸¹ *Wilson I*, 946 F. Supp. at 1490. The district court found that either of the two ways of amending the California Constitution imposed a “heavy burden” on groups seeking legislation to benefit women or minorities. *Id.* at 1498.

¹⁸² Intent to discriminate, defined as intent to treat a particular group differently, is a critical element in equal protection analysis. For a discussion of equal protection analysis, see *supra* note 30.

¹⁸³ *Personnel Administrator v. Feeney*, 442 U.S. 256, 279 (1979) (upholding a Massachusetts law considering veterans who qualified for state civil service positions ahead of qualifying nonveterans because the purpose of the law was not to exclude women). For a discussion of equal protection analysis, see *supra* note 30.

¹⁸⁴ The district court relied on Proposition 209’s campaign and its practical effect to conclude that Proposition 209 singled out race- and gender-conscious affirmative action programs. *Wilson I*, 946 F. Supp. at 1504. But the court did not take the inquiry far enough to ask whether the initiative, despite its disproportionate impact to women and minorities, was enacted “because of,” and not merely “in spite of” its disproportionate impact. If it had, the district court would not have applied a heightened scrutiny standard of review. See Weeden, *supra* note 15, at 316 (“A state remains free to restructure the political process, in the absence of an illicit state action through a neutral method, even where such change incidentally burdens the political participation of women and minorities”). Like the *Wilson II* court, the author distinguishes Proposition 209 from *Hunter* and *Seattle*. *Id.* at 312. “Proposition 209 is neither an obvious nor subtle pretext for gender . . . discrimination.” *Id.* “[I]t was enacted in spite of its impact on race and gender.” *Id.* at 313. For a discussion of equal protection analysis, see *supra* note 30.

decisionmaking authority to “a new and remote level of government,”¹⁸⁵ the initiative was enacted to return to the core values of treating all persons equally under the Equal Protection Clause, not to treat women and minorities differently.¹⁸⁶ As the *Wilson II* court noted, “Every statewide policy has the ‘procedural’ effect of denying someone an inconsistent outcome at the local level.”¹⁸⁷

The Ninth Circuit reached the correct decision by relying on *Crawford* and distinguishing Proposition 209 from *Hunter* and *Seattle*. “Like *Crawford*, California voters in adopting Proposition 209 merely repealed state laws passed by state and local entities granting race- or gender-based preferences which exceeded the minimum protection required under federal law.”¹⁸⁸

C. *Gratz v. Michigan*

¹⁸⁵ *Seattle*, 458 U.S. at 483.

¹⁸⁶ Weeden, *supra* note 15, at 305.

Proposition 209 does not inhibit enforcement of any federal law or constitutional requirement for race or gender-based affirmative action. To the contrary, the real focus of Proposition 209 is to embrace the requirements of the Equal Protection Clause with respect to gender- and race-based governmental affirmative action policies.

Id. (footnote omitted).

¹⁸⁷ *Wilson II*, 122 F.3d at 706. Justice Scalia makes a similar observation in his dissenting opinion in *Romer v. Evans*, 116 S. Ct. 1620, 1630-31 (1996) (striking down an amendment to Colorado’s Constitution which prohibited the state or any of its agencies from enacting legislation which gave homosexuals minority status, preferences, protected status, or claim to discrimination).

The central thesis of the Court’s reasoning is that any group is denied equal protection when, to obtain advantage (or, presumably, to avoid disadvantage), it must have recourse to a more general and hence more difficult level of political decisionmaking than others. The world has never heard of such a principle, which is why the Court’s opinion is so long on emotive utterance and so short on relevant legal citation. And it seems to me most unlikely that any multilevel democracy can function under such a principle. For whenever a disadvantage is imposed, or conferral of a benefit is prohibited, at one of the higher levels of democratic decisionmaking (i.e., by the state legislature rather than local government, or by the people at large in the state constitution rather than the legislature), the affected group has (under this theory) been denied equal protection. . . . It is ridiculous to consider this a denial of equal protection, which is why the Court’s theory is unheard-of.

Id. (Scalia, J., dissenting).

¹⁸⁸ Weeden, *supra* note 15, at 298. The author writes: “Because there is no illicit governmental motive behind the passage of Proposition 209, and because voters were seemingly motivated by a desire to govern impartially, Proposition 209 passes the rational basis test.” *Id.*

In the aftermath of *Hopwood*, fears of copycat lawsuits seem to have been realized in the latest challenge to university admissions policies.¹⁸⁹ In Michigan, two white applicants rejected by the University of Michigan are challenging the school's apparent use of different and lower admissions criteria for minorities.¹⁹⁰ Supporting the plaintiffs' claims are university documents obtained by a University of Michigan philosophy professor through the Freedom of Information Act.¹⁹¹ The school responded that race is just one of a number of factors it considers in its admissions decisions.¹⁹² Opponents of affirmative action are hoping that *Gratz* will be "The Case" which makes it to the Supreme Court.¹⁹³ Many of the critics still favor student body diversity, but they favor alternative means of accomplishing that goal.¹⁹⁴

IV. THE AFFIRMATIVE ACTION DEBATE

Hopwood, Proposition 209, and *Gratz* are examples of the continuing debate over

¹⁸⁹ Caplan et al., *supra* note 4, at 27 (writing that after *Hopwood*, some universities changed their admissions policies "through what lawyers describe as 'prudential' actions taken to protect against the inevitable copycat suits").

¹⁹⁰ Cohen, *supra* note 16, at 52. The lawsuit was initiated by Center for Individual Rights ("CIR"), a Washington-based public-interest organization "which litigates on behalf of a variety of conservative causes." *Id.* With some help from four Republican state legislators, CIR assembled a pool of white applicants who were rejected from the University of Michigan, and the two named plaintiffs were chosen. *Id.* at 53. This is a description of lead plaintiff Jennifer Gratz:

The lead plaintiff, Jennifer Gratz, is the kind of student any college would want to admit. A policeman's daughter who attended public school in a working-class Detroit suburb, Gratz had a 3.76 GPA in high school and scored a 25 on the ACT, the college-admissions test that serves as an alternative to the SAT. She was a math tutor, a blood-drive organizer, a volunteer at her school's "senior citizens' prom," a cheerleader and homecoming queen. Gratz had once hoped to become a doctor, but when she was turned down at Ann Arbor and forced to attend a less selective state school, she gave it up.

Id. The plaintiffs contend that the admissions policy unconstitutionally discriminated against them on racial grounds. Reibstein, *supra* note 4, at 76.

¹⁹¹ Cohen, *supra* note 16, at 52. The professor, Carl Cohen, obtained copies of the university's charts and grids which are used in making admissions decisions. *Id.* There are "[f]requent references to the race of applicants, and apparent use of different and lower selection criteria . . ." *Id.*

¹⁹² Cohen, *supra* note 16, at 54. Among the other factors considered by the university are high school grades, test scores, in-state residency, rural location, and whether parents are school alumni. *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* Critics favor alternatives which don't create different standards for different races such as outreach programs. *Id.*

affirmative action and preferential admissions policies. The two principal justifications offered for affirmative action in university admissions are remedying the effects of past discrimination and achieving student body diversity.¹⁹⁵ Underlying both these justifications is the notion of “leveling the playing field” for minorities; the difficulty arises in deciding how to go about this task.¹⁹⁶ While one group vehemently believes that race and ethnicity must be taken into account,¹⁹⁷ another group believes a “color-

¹⁹⁵ See Richard A. Epstein, *Affirmative Action in Law Schools: The Uneasy Truce*, 2 KAN. J.L. & PUB. POL’Y 33, 39 (1992) (finding that “two general classes of justifications can be used for affirmative action,” but that each one “is incomplete”).

The first of these classes regards affirmative action as a system of rectification for past systematic wrongs, and thereby employs the language of corrective justice for the redress of grievances. The second of these classes puts aside the issue of past wrongs, and argues on a forward-looking basis that affirmative action, now labeled diversity, is necessary for the good of the institution at large.

Id.; cf. Richard D. Kahlenberg, *Getting Beyond Racial Preferences: The Class-Based Compromise*, 45 AM. U. L. REV. 721, 726 (1996) (writing that “in response to the political and legal assaults on affirmative action, proponents of preference programs have developed two new sets of arguments to supplement the old compensatory justification”). First, proponents claim racial preferences “are necessary to prevent ongoing racial discrimination,” and second, “preferences are necessary to promote diversity.” *Id.* The author finds neither justification entirely satisfactory, preferring instead a class-based system which gives consideration to economic disadvantage. *Id.* at 728. *But see* Rubinfeld, *supra* note 61, at 472 (“In fact, the true, core objective of race-based affirmative action is nothing other than helping blacks. Friends of affirmative action, if there are any left, should acknowledge this objective, and they should embrace it—in the name of justice.”).

¹⁹⁶ See Martin, *supra* note 144, at 154 (illustrating the opposing views on affirmative action with a relay race example).

In the race for degrees of higher education, opponents and proponents of affirmative action have contrary opinions as to where the sprinters should place their starting blocks. Opponents of affirmative action believe that all the starting blocks should be placed along a straight line, giving each sprinter an equal chance at victory. . . .

Proponents of affirmative action disagree, noting that whites have had the inside track for many years.

Id.; cf. Mills, *Introduction*, in DEBATING AFFIRMATIVE ACTION, *supra* note 3, at 7 (writing about President Lyndon Johnson’s commencement speech at Howard University in June 1965).

Johnson began his speech by celebrating the degree to which racial barriers were being knocked down. Quickly, however, the President changed his tone. “But freedom is not enough,” he told his Howard audience. “You do not take a person who, for years, has been hobbled by chains and liberate him, bring him to the starting line of a race and then say, ‘You are free to compete with all others’ and still justly believe you have been completely fair.”

Id.

¹⁹⁷ In *Bakke*, Justice Blackmun wrote: “In order to get beyond racism, we must first take

1999] THE EROSION OF AFFIRMATIVE ACTION
blind” approach is the only acceptable path to equality.¹⁹⁸

A. *For and Against the Diversity Rationale*

In the context of preferential admissions policies, the diversity rationale receives perhaps the most attention. Proponents of racial diversity extol the virtues of interacting and sharing viewpoints with individuals of diverse backgrounds and cultures.¹⁹⁹ They claim diversity beneficiaries can serve as role models and sources of

account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.” *Bakke*, 438 U.S. at 407 (opinion of Blackmun, J.).

Regardless of which varieties of affirmative action we might personally favor or disfavor, no discussion of the alternatives is likely to prove fruitful unless we agree at the outset that race and ethnicity must be taken into account . . . if we are to achieve genuine diversity in our universities and law schools.

See Barbara Bader Aldave, *Affirmative Action: Reminiscences, Reflections, and Ruminations*, 23 S.U. L. REV. 121, 126 (1996).

¹⁹⁸ See Kahlenberg, *supra* note 195, at 723 (“Publicly, both sides of the mainstream affirmative action debate profess to want color-blindness in the end; there is disagreement, however, over the means to achieving that agreed upon goal.”); see also Jody David Armour, *Hype and Reality in Affirmative Action*, 68 U. COLO. L. REV. 1173, 1174 (1997) (“Conservatives have enjoyed spectacular success in portraying post-civil rights America as practically color-blind. . . . The problem with both the color-blind America and reverse discrimination contentions is that their proponents fail to support them empirically, opting instead for groundless pronouncements and naked assertions.”). Proponents of color-blindness trace the concept back to Justice Harlan’s dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (“Our constitution is color-blind, and neither knows nor tolerates classes among citizens.”). *But see* John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313, 316 (1994) (writing that what Justice Harlan meant by color-blind is not entirely clear “given the extremely color-conscious language that precedes his statement”). Justice Harlan wrote:

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 principles of constitutional liberty.

Id. (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)). The author writes that “[n]ot surprisingly, advocates of colorblindness usually exclude this language when they quote Justice Harlan.” *Id.* The author asserts that Justice Harlan’s dissenting opinion contains an implicit ambiguity of race such as how to group individuals into races and which groups affirmative action programs should help. *Id.* at 317. Proponents of a color-blind society attempt to dispel this ambiguity of race by “forget[ing] the existence of race.” *Id.* at 319.

¹⁹⁹ See Lacey, *supra* note 48, at 112 (“The cornerstone of diversity is the idea that an individual’s background affects how he will perceive issues and ideas. Only by insuring that the student body is comprised of diverse individuals can a university achieve its ‘intellectual mission’ of ‘a multiplicity of intellectual perspectives.’”); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity”*, 1993 WIS. L. REV. 105, 138-39

inspiration for the next generation of potential students; in addition, the minority community as a whole may benefit.²⁰⁰ Other individuals support racial diversity from a purely moral perspective simply because they feel it is the “right” thing to do.²⁰¹

Opponents of preferential admissions policies as a means to diversity cite the negative effects of a “bifurcated student body,” stigmatization of minority students, and resentment among different races.²⁰² Some opponents argue that the benefits of preferential admissions policies have run their course and are no longer necessary.²⁰³

(1993):

In educational settings, the diversity principle has been developed as a means to promote educational excellence through exposure to a wide variety of viewpoints and ideas in the classroom and in scholarship. . . .

. . . Moreover, the benefits of such diversity are deemed to extend not only to members of those under-represented minority groups who benefit from the policies at issue, but also to the majority recipients of such viewpoints.

Id.; Aldave, *supra* note 197, at 128 (writing that beneficiaries of diversity “will be largely immune to the stereotyping that can poison our attitudes toward each other and our relationships with each other.”).

²⁰⁰ See Lacey, *supra* note 48, at 112-13.

The benefits of diversity are not limited to creating an atmosphere comprised of diverse intellectual perspectives. . . . The success of an individual minority member has the potential of creating a “multiplier effect” which can extend benefits to an entire minority group. . . . An individual’s success can create an infusion of capital for minority businesses and organizations. A successful member of a minority community may have the opportunity to start or invest in a new business, which in turn may employ other minorities living in the community. . . . The net result is that a success of one member of the community can be multiplied throughout the entire neighborhood.

Id. (footnotes omitted).

²⁰¹ See Aldave, *supra* note 197, at 130 (“I now find myself quite satisfied with the diversity rationale for affirmative action. But, at bottom, my instincts still tell me that we ought to support affirmative action because it is right.”).

²⁰² Wolff, *supra* note 146, at 637 (writing that a bifurcated student body often results when law schools use lower and different admissions criteria for minorities). This, in turn, negates the benefits of diversity and causes resentment and stigmatization of minorities by others questioning their credentials. *Id.*; see Lacey, *supra* note 48, at 118 (“The problem is not preferential admissions per se, but rather, those programs which, in an effort to admit certain minorities, have lowered academic standards to the point where students who are admitted are not academically prepared to compete.”). The author writes that the stigma created by admitting minority students with significantly lower academic credentials often leads to “the best black syndrome.” *Id.* at 114. This is the idea that the best black applicant is still not as smart as the best white applicant, and therefore, can only compete with other blacks. *Id.* “Instead of being simply the best, she is the best black or other minority person.”

Id.

²⁰³ See Lacey, *supra* note 48, at 108 (writing in response to critics’ predictions that the end

1999]

THE EROSION OF AFFIRMATIVE ACTION

Others reject the idea that diversity can be achieved by assuming a minority group can be “lumped into a single ‘viewpoint’” or that every successful minority is qualified to speak on behalf of an entire group of people.²⁰⁴

B. Alternatives to Racial Diversity

Some critics of the diversity rationale believe that admissions decisions should be based exclusively on merit.²⁰⁵ Under a merit principle, “people get what they ‘deserve’ -

of preferential admissions will also mean the end of university diversity).

[P]erhaps the time has come when we as a nation must trust that the lessons of the past have been learned and that institutions of higher learning will continue to seek diversity in their student body . . . without mandatory affirmative action policies. To argue that bigotry and racial discrimination no longer exist is clearly no one’s contention; but like thievery and other crimes, one can never totally eradicate it despite laws against it.

Id.; cf. Kahlenberg, *supra* note 195, at 726 (“There can be no doubt that racial discrimination remains a continuing tragedy in our society. . . . The continued existence of racism, however, does not and cannot justify broad-based racial preference schemes.”); see also *Racial Chasm Continues to Grow Wider, Report Says*, THE VINDICATOR, March 1, 1998, at A1 (writing that a report released by a private urban policy group, the Milton S. Eisenhower Foundation, concludes that “the economic and racial divide in the United States not only has materialized, it’s getting wider.”).

²⁰⁴ Lacey, *supra* note 48, at 112.

The foundation upon which diversity has been built is also the very behavior that diversity is designed to eliminate, the stereotyping of an individual by his race. The cornerstone of diversity has always been the idea that minority groups can be pigeonholed, with experiences and ideas that are predictably different from the majority, and because of an individual’s minority identity he necessarily will view things differently than the white majority. But when the views of minority groups turn out to be the same as the majority then the argument for race as a proxy for diversity collapses.

Id. (footnotes omitted).

²⁰⁵ But see Derrick A. Bell, Jr., Address at Loyola Law School (Jan. 17, 1997), in 30 LOY. L.A. L. REV. 1447, 1459 (1997) (discussing the word “merit” in affirmative action).

Let’s face it. The much-extolled word “merit” has only a serendipitous connection with making it. If we as a society truly valued merit, you would not have the governor you have, we would not have the President we have, and the make-up of our leadership in every area would be far different--and certainly far better--than it is.

Indeed, outside the affirmative action debate, you virtually never hear the word. . . .

In short, the phony pennant of merit serves as the false banner of color-blindness, used as justification for opposition to affirmative action.

Id. The lecturer maintains that society is always willing to sacrifice the rights of African Americans to protect either economic or political interests of whites. *Id.* at 1452. Likewise, the only time that society and law do recognize the rights of minorities is when it “serves some economic or political interests of greater importance to whites.” *Id.* For example, “[i]n

-no more, no less” as determined by accurate, neutral standards.²⁰⁶ In higher education, this standard is often standardized test scores.²⁰⁷ The merit principle presents at least two difficulties: 1) Minorities consistently underperform on standardized tests,²⁰⁸ and 2) the pervasiveness of legacy admissions (children of alumni) is in direct conflict with a meritocracy concept.²⁰⁹

the early 1970s, a great many corporations, government agencies, and educational institutions decided that affirmative action programs were a relatively inexpensive response to the urban rebellions, particularly those sparked by Martin Luther King’s assassination.” *Id.* at 1453. However, as the job market tightened, whites became anxious about their own well-being and began to oppose affirmative action programs. *Id.* Likewise, politicians evaded economic problems by putting the blame on affirmative action programs. *Id.*; *cf.* Aldave, *supra* note 197, at 127 (writing that the arguments of those who support a merit system “are not frivolous. But neither do they establish that affirmative action is misguided, unlawful, or immoral. Rather, they suggest that affirmative action must be justified”).

²⁰⁶ Armour, *supra* note 198, at 1186. The author terms the merit principle the “just deserts model” writing that “[a] person’s deserts . . . are supposedly determined on the basis of certain standards and approaches carefully calculated to gauge deserts.” *Id.*

²⁰⁷ *Id.* The standardized score, in turn, “serve as a primary basis for allocating educational positions and other scarce opportunities.” *Id.*; *cf.* Epstein, *supra* note 195, at 37 (writing that traditional merit variables include grades, boards [standardized test scores], letters of recommendation, and interviews).

²⁰⁸ Aldave, *supra* note 197, at 126 (“The sad truth is that the members of some racial and ethnic groups earn much lower scores on standardized tests, on the average, than do the members of other racial and ethnic groups.”); *see* Armour, *supra* note 198, at 1186-87. The author writes about the psychological phenomenon of “stereotype vulnerability” which tends to diminish the performance of African American test takers. *Id.* Claude Steele, a Stanford social psychologist, gave two groups of African American and white Stanford students the same test containing difficult verbal skills questions from the Graduate Record Exam. *Id.* at 1187. One group was told that the purpose of the test was just to explore different psychological factors entailed in solving verbal problems, while the other group was told that the test was a measure of their true verbal abilities. *Id.* Whites performed equally in both situations. *Id.* The African Americans who thought they were merely solving verbal problems performed as well as the whites. *Id.* However, the group of African Americans “saddled with the extra burden of believing that the test measured their intelligence scored significantly below all the other students.” *Id.* Steele theorizes that the group performed poorly because they worked too quickly or inefficiently while trying to avoid a negative stereotype. *Id.*

²⁰⁹ *See* Schimmel, *supra* note 86, at 1066 (writing about prohibiting racial preferences in admissions policies while allowing preferences for children of alumni, donors, or politicians).

A narrow, legalistic answer is that the Fourteenth Amendment usually has been interpreted to prohibit discrimination based on race, but not to prohibit discrimination in favor of children of wealthy or well-connected parents. This, of course, only illustrates the fact that a customary practice can be both legal and unfair.

Id. The author states that universities should seriously consider banning alumni and similar

Another alternative to race-based preferential admissions policies is class-based preferences based on economic disadvantage. Proponents of class-based preferences believe this response provides a remedy for past discrimination²¹⁰ but avoids the “divisive potential of racial preferences.”²¹¹ Opponents question the efficacy of a class-based admissions process²¹² and dismiss the notion as just another example of Americans denying the impact of race.²¹³

preferences to avoid the appearance of a double standard. *Id.*

Alumni preferences, like racial preferences, are genetically determined, having nothing to do with the individual effort or character of the applicant, and should be abolished. It is a sign of the decline of the moral authority of the civil rights movement when one of its arguments for racial preferences is that they are no worse than alumni preferences.

Kahlenberg, *supra* note 195, at 728.

²¹⁰ *Id.* at 724.

Providing preferences to disadvantaged people generally is at once color-blind and cognizant of our nation’s history. As a result of slavery and segregation, blacks remain disproportionately poor and would disproportionately benefit from a class-based preference to the extent that the economic legacy of the past remains. The means themselves, however, would be color-blind, thereby obviating the legitimate argument of many whites that there is not a scientific causal link between past discrimination against a group and the provision of a preference to individual members of that group some time later.

Id.

²¹¹ Kahlenberg, *supra* note 195, at 726. *But see* Chapin Cimino, Comment, *Class-Based Preferences in Affirmative Action Programs After Miller v. Johnson: A Race-Neutral Option, or Subterfuge?*, 64 U. CHI. L. REV. 1289, 1309 (1997) (“[T]o the extent that any preference system includes some groups and excludes others, all preferences can be expected to have divisive effects on society as a whole.”). The author writes that “policymakers have disguised racially motivated preferences by substituting socioeconomic disadvantage for racial identity as the basis for the preference.” *Id.* at 1293.

²¹² *See* Schimmel, *supra* note 86, at 1065 (writing that if Justice Brennan’s statistics in *Bakke* are similar today, a class-based preference alternative would be ineffective because “whites outnumber minorities at every socioeconomic level,” and economic disadvantage does not correlate with differences in standardized test scores). The author points out, however, that the ineffectiveness of a class-based preference could be mitigated by universities decreasing their emphasis on standardized test scores and grade point averages while giving more weight to economic disadvantage. *Id.*

²¹³ Frederick A. Morton, Jr., Note, *Class-Based Affirmative Action: Another Illustration of America Denying the Impact of Race*, 45 RUTGERS L. REV. 1089, 1092 (1993) (writing that “America continues to find ways to avoid dealing with the questions of race” and class-based affirmative action is but one example of this avoidance). The author opposes class-based affirmative action, in part, from an original intent viewpoint in “that there is simply no basis for arguing that affirmative action was designed to combat indigence.” *Id.* at 1125.

C. *Where Do We Go From Here?*

1. The Ultimate Goal

Student body diversity²¹⁴ is undeniably a positive force in any university environment. However, student body diversity should not focus primarily on racial diversity.²¹⁵ While not currently mandated by the Supreme Court, universities should ultimately eliminate racial preferences as a means to achieving diversity.²¹⁶ The focus on racial diversity simply reinforces the stereotype that all members of a minority group think the same, and the resulting resentment among other students is too high a price to pay towards the goal of equality.²¹⁷

2. The Immediate Task

The immediate task of universities should be to adhere more closely to the spirit of *Bakke*.²¹⁸ Universities which utilize multi-track admissions processes with lower and

²¹⁴ The term “diversity” gives rise to varied images of what constitutes diversity. See Chin, *supra* note 5, at 881 (writing that “*Bakke* is incoherent because it does not explain whether the diversity it tries to foster is cultural or racial”); Scanlan, *supra* note 117, at 1612 (“Achieving a diverse student body depends on two discrete but overlapping sets of contributors. One set brings diversity of viewpoints and beliefs, while the other brings diversity of experience.”).

²¹⁵ While racial diversity is widely embraced by academicians, this author favors a more general concept of student body diversity which does not focus on the racial component. *But see* Scanlan, *supra* note 117, at 1609.

Diversity in America’s education systems is essential in today’s increasingly multicultural society. While adding racial diversity alone may not create a completely heterogeneous educational environment, it is an essential part of fostering an atmosphere in which many different viewpoints are expressed freely.

Id.

²¹⁶ See Epstein, *supra* note 195, at 40 (“To speak of diversity is an effective way to get around the questions of differential standards that are so troublesome with affirmative action programs.”); Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination in Employment*, in *DEBATING AFFIRMATIVE ACTION*, *supra* note 30, at 113 (“I do not believe that racial preferences . . . can ever be made acceptable to the vast majority of the American people.”).

²¹⁷ See Kahlenberg, *supra* note 195, at 728 (“It is time to get beyond racial preferences, however, and all their toxic side effects.”).

²¹⁸ Chin, *supra* note 5, at 881 (writing that a university refusal to follow *Bakke* by relying on non-diversity grounds in developing their affirmative action programs “ultimately may lead the Supreme Court to implement a strict colorblind rule”); see Schimmel, *supra* note 86, at 1067 (“University attorneys and administrators should revisit *Bakke* and follow it more closely. In most cases, they should end separate minority admissions committees, waiting lists, and scholarships, and avoid dramatic differences in standards used to admit minority

1999]

THE EROSION OF AFFIRMATIVE ACTION

different academic standards for minorities should eliminate them immediately; indeed, these are the affirmative action plans which generate the most hostility among the races.²¹⁹ In addition, they often do minorities a disservice by setting them up for academic failure.²²⁰ To alleviate the immediate negative impact in terms of qualified minorities, universities should continue to use race as a “plus” factor while they develop new race-neutral means of ensuring student body diversity.²²¹

One place for universities to start is to reconsider their selection criteria. With some careful attention to the content and weight of admissions factors, including standardized test scores, grade point averages, and economic disadvantage, schools will be able to minimize the effects of eliminating lower and different academic standards for minorities.²²² An added benefit is that by experimenting now, they will also be paving

applicants.”).

²¹⁹ See Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 100-01 (1992) (writing about the use of lower selection criteria for minorities).

The result of race norming in law school admissions is to produce an entering class with two separate student bodies, identifiable by race, essentially in different academic ballparks. Everyone realizes that if the blacks were the academic equals of the whites, they would not require lower admission standards, and that if they are not the academic equals of the whites, they cannot be expected to compete with them academically. A racially preferential admissions policy is therefore a prescription for a loss rather than a gain for blacks in self-respect and the respect of others. Inevitable effects are heightened racial consciousness and frustration, resentment, and self-segregation on the part of the blacks.

Id. The author contends that economic and educational background would be a better proxy than race. *Id.* at 101.

²²⁰ See Lacey, *supra* note 48, at 115. The author writes that preferential admissions policies have resulted in minorities “being admitted to schools where they just do not have the academic training necessary to succeed.” *Id.* “They are simply going to the wrong schools.” *Id.* As a result, “three-fourths of minority students are failing to graduate.” *Id.*

²²¹ After *Hopwood* and Proposition 209, race cannot be used as a “plus” factor in higher education admissions in the Fifth Circuit or in California.

²²² See John Cloud, *What Does SAT Stand For?*, TIME, Nov. 10, 1997, at 54. The author writes that one way public universities in Texas and California have found to remain racially diverse is to “scrap SATs.” *Id.*

The University of California is considering a proposal by its Latino Eligibility Task Force to eliminate SATs from admissions decisions in order to boost Latino enrollment. Public universities in Texas have already dropped standardized tests for many applicants in order to comply with a state law passed earlier this year automatically admitting those who finish in the top 10% of their high school—no questions asked, no SATs required.

Id. But see Lacey, *supra* note 48, at 118 (“When universities lower their academic standards in the name of diversity, no one benefits. Universities are hurting themselves by sacrificing quality for quantity, but more importantly, they are hurting minority students.”).

the way for the elimination of racial preferences in the future.

3. Early Intervention

Preferential admissions policies in higher education only serve to mask the true cause of educational underachievement by minorities. The source of minority underachievement is deficiencies in the education process.²²³ Consequently, the greatest resources should be allocated to early intervention measures designed to improve the quality of education at the lower levels. Universities can assist greatly by reallocating some of the funds currently used for academic support programs²²⁴ to race-neutral outreach programs.²²⁵ Universities, however, should not bear the burden alone; society as a whole must take interest in committing the appropriate funds and efforts towards improving the quality of education.²²⁶

²²³ Lacey, *supra* note 48, at 117 (footnote omitted) (“The use of affirmative action in higher education has served to mask the real problem. The real problem is the need for educational reform where it will make a difference—at the kindergarten through twelfth grade levels.”); *see* Wolff, *supra* note 146, at 627 (“To ensure that minorities have an equal chance at achieving the grades and test scores necessary to gain admittance to graduate schools, lower level education must be improved.”).

²²⁴ Lacey, *supra* note 48, at 116. The author writes that “[a] study of law schools found that over 100 of the nation’s law schools had some sort of academic support program.” *Id.* These programs were developed primarily to “compensate for the shortcomings in a minority student’s education.” *Id.* “Remedial education programs, no matter how ambitious, cannot succeed when the majority of students arrive on campus not having read Shakespeare and taken calculus.” *Id.* at 117.

²²⁵ *Id.* (“Rather than spending millions of dollars offering ineffective remedial courses and academic support programs at the college level, that money should be allocated to programs that provide support and assistance to promising young minority students.”). This author would allocate the funds on an economic disadvantage basis rather than a racial basis. Lacey cites Upward Bound as an example of a positive program. *Id.* “Students who have shown promise during junior high school are given the opportunity to attend special afterschool and weekend programs during their high school careers in the hopes of negating the effects of their disadvantaged backgrounds.” *Id.* Another author encourages the development of programs similar to one at Southern Methodist University whereby students reside in a low income neighborhood and conduct tutoring programs for children in the neighborhood. *Id.*; Wolff, *supra* note 146, at 656. “The theory is that by more effectively preparing elementary and middle school students, the diversity issue will take care of itself; students will be able to achieve the needed grades in high school and college so that they will be admitted without the need for affirmative action programs.” *Id.*

²²⁶ *See* Rubinfeld, *supra* note 61, at 471 (“If I had to choose, I would probably vote to scrap the entire patchwork of affirmative action measures in this country in favor of a massive capital infusion into inner-city day care and educational facilities.”). The author writes further, however, that this approach considers affirmative action’s costs and benefits, not its constitutionality. *Id.* From a constitutional standpoint, the author asserts that affirmative

V. CONCLUSION

Hopwood, Proposition 209, and *Gratz* signify the need for an overhaul of affirmative action as it exists today. The original goals of equality and nondiscrimination embedded in the Fourteenth Amendment and the Civil Rights Act of 1964 have become distorted in a most ironic way: Those laws enacted to prevent discrimination actually promote it in their application.²²⁷

Preferential admissions policies by universities are but one example of this distorted application of equality. While change is desperately needed, drastic action such as that mandated by *Hopwood* risks negating some of the undeniably positive effects of preferential admissions policies.²²⁸ Diversity, however, can be achieved without admissions policies which give racial preferences.²²⁹ Universities should begin

action "is not inconsistent with the commitment made by this nation when it enacted the Fourteenth Amendment." *Id.*

²²⁷ See Lino A. Graglia, *Title VII of the Civil Rights Act of 1964: From Prohibiting to Requiring Racial Discrimination*, in *DEBATING AFFIRMATIVE ACTION* 105 (Nicolaus Mills ed., 1994).

The history of the law of racial discrimination since the 1964 Act, however, is the history of a Supreme Court-led counterrevolution. The Court has converted the *Brown* nondiscrimination principle and the various provisions of the Act that embodied it into essentially their opposites: authorizations or even requirements of racial discrimination. The Court has never admitted (indeed, it has always denied) that it was making such a change, always insisting that it was merely continuing to enforce the *Brown* principle. The result is that a regime of permissible or compulsory racial discrimination has been established by the Court in the name of enforcing constitutional and statutory prohibitions against such discrimination, a judicial feat without parallel in the history of law.

Id.

²²⁸ Despite their overall negative impact, preferential admissions policies have concededly produced positive results as well. See Jacobius, *supra* note 144, at 23. For example, according to Herma Hill Kay, dean of the University of California at Berkeley's Boalt Hall School of Law, diversity in the U.S. legal profession has produced dramatic results. *Id.* While thirty years ago only 3 out of every 100 lawyers were women and less than 1 percent were African American, today the Bureau of Labor Statistics lists 24.6 percent of U.S. lawyers as women, 3.3 percent as African American, and 3.1 percent as Hispanic. *Id.* Boalt Hall's experience has mirrored this trend. *Id.* The law school went from 4 percent women and only a few minorities in the 1960's to a 1994 class composition of 48 percent women, 12 percent African American, 13 percent Hispanic, 14 percent Asians and 1 percent Native American. *Id.* (Note: These statistics were prior to the 1995 decision by the California Board of Regents to eliminate race, ethnicity, and gender factors in admissions decisions beginning 1997.)

²²⁹ See Kahlenberg, *supra* note 195, at 728. The author writes that "[r]ace conscious, but nonpreferential, civil rights statutes are necessary to address contemporary discrimination."

contemplating a phase-out of race considerations in their admissions decisions by eliminating controversial and unfair multi-track admissions programs. To mitigate the negative impact on minorities, universities should concurrently reexamine the content and weight of their decision factors and contemplate race-neutral outreach programs where they can impact a potential applicant earlier in the education process. At the same time, the political process should commit funds and resources to early intervention measures designed to improve educational quality.

Few would suggest that America has achieved racial equality.²³⁰ However, *Hopwood*, Proposition 209, and *Gratz* indicate that an increasing number of Americans believe we're moving ever closer to the equality ideal expressed by the Supreme Court back in 1883.²³¹

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen, or a man, are to be protected in the ordinary modes by which other men's rights are protected.²³²

Corinne E. Anderson

Id.

²³⁰ *Id.* (“American society is not likely to be in a position to ‘get beyond’ race any time soon.”).

²³¹ *Civil Rights Cases*, 109 U.S. 3, 25 (1883).

²³² *Id.*