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Indiana Law Journal

Volume 71 | Issue 4 Article 8

Fall 1996

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Recommended Citation

Cosner, Krista L. (1996) "Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court," *Indiana Law Journal*: Vol. 71: Iss. 4, Article 8.
Available at: https://www.repository.law.indiana.edu/ilj/vol71/iss4/8

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Affirmative Action in Higher Education: Lessons and Directions from the Supreme Court

KRISTA L. COSNER*

INTRODUCTION

Affirmative action remains a volatile issue both inside and outside the courts. In the political realm, the issue is sure to be a central point of controversy in the 1996 presidential election. Senate Majority Leader Bob Dole of Kansas has expressed strong opposition to such programs.[1] By contrast, President Bill Clinton has proclaimed that affirmative action has been "good for America" and recommended mending it as opposed to ending it.[2] Voters in California have proposed a voter initiative, the California Civil Rights Initiative ("Initiative"), which would prohibit using racial, ethnic, or gender preferences in state contracting, hiring, and admissions programs. In the November, 1996 election, California citizens may have the opportunity to vote on this measure.[3] As a result of the Initiative and pressure from the governor, the state's colleges and universities have already banned racial, ethnic, or gender considerations in their admissions programs.[4]

Of greater consequence is the Supreme Court's decision in its last term to limit seriously the use of racial preferences and set-asides. The Justices appear to be writing a new chapter in race and equal protection constitutional doctrine. The cases addressed racial preferences in awarding federal contracts,[5] creating congressional districts,[6] and reversing the effects of segregation.[7] Since the Court has accelerated the decline of affirmative action in these areas, how will the decisions affect affirmative action in higher education? Education has long been characterized as a "unique" sector of our society and, as such, it may provide a reason for the Court to apply the brakes before virtually eliminating affirmative action as we know it.

The legal doctrine in this area is in a precarious state. The Court's stance on the issue after its last term will undoubtedly affect the educational arena. Because affirmative action provokes volatile and nationwide controversy, higher education programs should be refined to emphasize characteristics indicative of scholastic achievement, and to

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1. Senator Dole introduced legislation which would end federal race-based affirmative action programs. S. 1085, 104th Cong., 1st Sess. (1995); Gregg Zoroya, *Against the Grain: Gary Franks' Stand on Affirmative Action Pits Him Against Other Blacks in Congress—and Leaders of His Own Party*, L.A. TIMES, Aug. 6, 1995, at E1.

2. Paul Richter, *Clinton Declares Affirmative Action Is 'Good for America'*, L.A. TIMES, July 20, 1995, at A1.

3. Max Vanzi, *Affirmative Action Opponents File Initiative with State Officials*, L.A. TIMES, Aug. 8, 1995, at A3. Supporters of the Initiative submitted it to the attorney general on August 7, 1995, for legal review. This was the first formal step in placing the measure on the November, 1996 ballot. Completion of the attorney general's review invoked a 150-day period in which supporters were required to gather approximately 700,000 signatures to qualify the measure. "'The California vote represents the most organized political effort to roll back affirmative action since its inception. It represents the drawing of a line in the sand on this issue nationally.'" Brian McGrory, *2 Californians Lead Affirmative Action Challenge*, BOSTON GLOBE, Feb. 12, 1995, at A1, (quoting Rev. Charles Stith, head of the Boston-based Organization for a New Equality).

4. James Kilpatrick, *Court Reverses Discrimination*, CINCINNATI ENQUIRER, Aug. 25, 1995, at A14.

5. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995).

6. Miller v. Johnson, 115 S. Ct. 2475 (1995).

7. Missouri v. Jenkins, 115 S. Ct. 2038 (1995).

emphasize race or ethnicity less.[8] Part I delineates the Supreme Court's stance on affirmative action prior to its last term and reveals how its most recent decisions streamline that position. Part II summarizes the polar positions surrounding this issue in general. Part III focuses on affirmative action within the educational context; in particular, it focuses on minority-based scholarships and admissions programs and analyzes the future of educational affirmative action. Finally, Part IV argues that other less controversial mechanisms can achieve the goals of affirmative action in higher education without using racial or ethnic preferences.

I. SUPREME COURT DOCTRINE

A. The Supreme Court's Stance on Affirmative Action Prior to Its Last Term

Prior to the Court's last term, it applied a dual standard in analyzing affirmative action programs. In 1989, a majority of the Court held that racial classifications used for affirmative action purposes at the state or local level must be subject to strict judicial scrutiny. To avoid invalidation, the government must have a compelling interest, and the particular program must be narrowly tailored to promote that interest.[9] *Richmond v. J.A. Croson Co.* was crucial to affirmative action doctrine because it was the first time a majority of the Court agreed on what standard of review these types of programs should receive.[10]

In *Croson*, the Court invalidated a city ordinance which required prime contractors to award thirty percent of city contracts to minority-owned subcontractors.[11] Richmond alleged that its program helped remedy past discrimination in the construction industry.[12] The city attempted to prove this discrimination by revealing the low percentage of minority-owned construction contracts in the city and across the nation.[13] In an opinion written by Justice O'Connor, five Justices joined her in declaring that the Constitution forbade such blatant racial preferences.[14] The majority also held that correcting "societal discrimination" was not a compelling interest.[15] For a remedial statute to meet the compelling threshold, there must be identified discrimination by a particular government

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8. This Note will discuss only the constitutional issues of voluntary affirmative action programs implicated by the Fifth and Fourteenth Amendments. It will not discuss involuntary programs mandated by the courts or statutory interpretations of Title VI of the Civil Rights Act.

9. Richmond v. J.A. Croson Co., 488 U.S. 469, 485-86 (1989).

10. *Id.*; *see* Metro-Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) (addressing racial preferences in federal programs in a plurality decision); United States v. Paradise, 480 U.S. 149 (1987) (addressing the use of racial quotas after proven discrimination by state employer in a plurality opinion); Wygant v. Jackson Board. of Educ., 476 U.S. 267 (1986) (addressing race-based preferences in faculty lay-off proceedings in a plurality opinion); Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986) (addressing, in a plurality opinion, the validity of a lower court's appointment of a supervisory administrator appointed to remedy petitioner's proven past discrimination); Fullilove v. Klutznick, 448 U.S. 448 (1980) (addressing racial set-asides in federal laws in a plurality opinion); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (addressing affirmative action in admissions programs in a plurality opinion).

11. *Croson*, 488 U.S. at 477.

12. *Id.* at 498.

13. *Id.* at 479-80, 500.

14. *Id.* at 498-506 (Justices Rehnquist, White, Kennedy, Scalia, and Stevens joined in the general holding); *id.* at 511-18 (Stevens J., concurring in part and concurring in the judgment) (rejecting racial preferences but disfavoring any particular level of scrutiny).

15. *Id.* at 505 (O'Connor, Rehnquist, Kennedy, White, and Stevens); *see also* Wygant v. Jackson Board. of Educ., 476 U.S. 267, 276 (1986) ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.").

entity.[16] The government must then demonstrate that its use of a racial classification is a narrowly tailored means of rectifying those past wrongs.[17]

The following year, the Court in a 5-4 vote established a lesser standard of review for federal affirmative action programs created by statute or adopted by federal agencies under a congressional mandate.[18] A federal law that used racial classifications for affirmative action purposes was subjected to intermediate scrutiny and therefore upheld if the classifications bore a substantial relationship to an important governmental interest.[19]

In *Metro Broadcasting*, the Court upheld two affirmative action policies adopted by the Federal Communications Commission ("FCC") on the grounds that the equal protection component of the Fifth Amendment was distinct from that in the Fourteenth Amendment and did not require strict scrutiny when evaluating federal programs.[20] The Court found the policies to be substantially related to the important governmental interest in promoting broadcast diversity.[21] This holding created the Court's dual standard, (*i.e.*, one standard for state programs and another for federal) for analyzing affirmative action programs that had been followed for the last five years.[22]

B. Recent Cases Which Affect the Court's Position on Affirmative Action

Last term, the Court streamlined the law on affirmative action and held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny . . . . To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled."[23] In *Adarand Constructors, Inc. v. Pena*,[24] Adarand, a general contractor, challenged the constitutionality of a federal program designed to grant highway contracts to

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16. *Croson*, 488 U.S. at 505-06.

17. *Id.* at 507.

18. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 564-65 (1990). The Court majority consisted of Justices Brennan, Marshall, Blackmun, White, and Stevens.

19. *Id.*

20. *See id.* at 576 (distinguishing *Croson* because the Court in *Croson* reviewed a state program which required analysis of the Fourteenth Amendment).

21. Justice Brennan appeared to give considerable deference to Congress in determining the substantiality of the relationship between the racial classification and the goal of increasing program diversity. *Id.* at 579.

22. Shortly after the announcement of the *Metro Broadcasting* holding, Justice Brennan retired. Since then, three other members of the *Metro Broadcasting* majority, Justices Marshall, White, and Blackmun, have also retired. Only Justice Stevens remains on the Court, and his view is the most equivocal. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.10, at 695 (4th ed. 1991).

> Justice Stevens, in his concurring opinion, described the majority approach as if it were consistent with the views that he expressed in earlier cases. [He] will vote to uphold a racial classification if, but only if, the government has proven that the law "[falls] within the extremely narrow category of government decisions for which racial or ethnic heritage may provide a [rational] basis for differential treatment [in terms of an unquestionably legitimate end of government]." Justice Stevens also joined the majority opinion that clearly adopted a standard of review requiring the federal affirmative action racial classification to be "substantially related to an important interest."

Id. (alteration in original) (quoting *Metro Broadcasting*, 497 U.S. at 601 (Stevens, J., concurring)). All the dissenting Justices, however, are still on the Court. They include Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy.

23. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995).

24. *Adarand*, 115 S. Ct. 2097.

disadvantaged business enterprises.[25] Adarand initiated this suit when the Department of Transportation awarded a guardrail contract to a minority-owned company after Adarand submitted the lowest bid. This ruling will have far-reaching implications, affecting hundreds of federal programs that have awarded thousands of contracts to minority-owned firms. It forbids all but the most carefully tailored affirmative action provisions in federal laws.

Two other cases from last term strengthen the Court's stance against using racial classifications and racial preferences. In *Miller v. Johnson*,[26] the Court invalidated Georgia's 1992 congressional redistricting plan, which used race as the "predominant, overriding factor"[27] in adding a third, majority African-American district. Even though the plan would have assured the election of African-Americans to Congress, and even though the Court found it permissible to consider racial factors when drawing the districts, the Court forbade the use of race when it functions as the only factor motivating the plan's design.[28]

In *Missouri v. Jenkins*,[29] the Court admonished the district court for exceeding its authority in attempting to eliminate the racial identifiability of certain schools after desegregation efforts.[30] The Court prevented the district court from imposing $1.4 billion in taxes on the state in order to create a "magnet" school district for the purposes of reversing the effects of "white flight"[31] from urban areas. These cases limit both the state legislature's ability to create minority districts, thereby weakening the Voting Rights Act, and the lower courts' ability to invoke desegregation remedies. All three cases increase the Court's arsenal enabling it to defend its stance against the use of racial preferences.

II. THE OPPOSING SIDES OF AFFIRMATIVE ACTION

The crux of the current affirmative action controversy surrounds the purpose for which the Fourteenth Amendment was drafted and the philosophy for which it currently stands. Opposing positions on these fundamental elements polarize the country's views on both the appropriateness of using race or ethnicity as the basis for dispensing benefits and on the standard of judicial review such affirmative action measures should receive. An overview of these polar positions surrounding the fundamental precepts of the Fourteenth Amendment lays the foundation for arguing that affirmative action should be strictly limited. The fact that affirmative action has been mired in controversy since its inception supports either revamping the old doctrine or redirecting efforts and energies into more productive, less controversial alternatives.

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25. The Small Business Act requires government agencies to establish "goals" for awarding contracts to small businesses owned by "socially and economically disadvantaged individuals." 15 U.S.C. § 644(g) (1994). These agencies are to award "[no] less than 5 percent" of all their contracts to such persons. *Id.* The Small Business Act defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice, or cultural bias because of their identity as a member of a group without regard to their individual qualities," 15 U.S.C. § 637(a)(5) (1994), including "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities." 15 U.S.C. § 637(d)(3)(C) (1994).

26. 115 S. Ct. 2475 (1995).

27. *Id.* at 2490.

28. *Id.* at 2490-91. The racial classification invoked strict scrutiny as dictated by Shaw v. Reno, 113 S. Ct. 2816 (1993). The Court found that the state had a compelling interest in complying with the Voting Right Act of 1965, but invalidated the plan because it was not required by the Voting Rights Act in this instance. *Miller*, 115 S. Ct. at 2491.

29. 115 S. Ct. 2038 (1995).

30. *Id.* at 2054-55.

31. *Id.* at 2043, 2054-56.

A. The Group-Rights Theory

The groups-rights theory argues that the interests of a group of people should be superior to the interests of an individual. As one commentator suggests, group-rights adherents believe "governmental policy should measure benefits and burdens in terms of groups and, when equality is the issue, emphasize equality between groups."[32] In other words, a group of persons—whether defined by race, gender, or ethnicity—has an interest that surpasses the interest of an individual member, and laws should be conscientious of these group interests. For example, affirmative action in university admissions programs benefits African-Americans as a whole by providing more African-Americans the opportunity for an education. This group interest trumps the interest of any individual who would have been accepted but for affirmative action.

The group-rights theory focuses on the purposes behind the adoption of the Fourteenth Amendment. The purpose of the amendment was to eradicate the legal basis for African-Americans' second-class citizenry. Laws up until the amendment's adoption perpetuated "white supremacy."[33] The Fourteenth Amendment fought such racial stratification by providing equal opportunities to all races under the laws of the United States.

This fundamental understanding of the Fourteenth Amendment's purpose molds the group-rights perspective on affirmative action. There is no denying that African-Americans as a group have suffered greatly from longstanding and widespread racial discrimination. Justice Marshall argued that "the racism of our society has been so pervasive that [no African-American], regardless of wealth or position, has managed to escape its impact."[34] Because of this history of discrimination, the group-rights believers deduce that "[i]n order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[35] They see affirmative action as a necessary means to achieve minority representation in areas from which minorities have historically been excluded, such as employment and education. In short, affirmative action attempts to create an equal citizenry. "Such remedial measures involve not a simple trade-off among individuals in different racial groups, but rather a patriotic effort by all Americans to hasten the day when we can truly say that we have become a color-blind nation."[36]

Under current equal protection jurisprudence, laws which classify people according to race receive strict scrutiny. These laws are unconstitutional unless they are the least

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32. Charles Fried, Metro Broadcasting, Inc. v. FCC: *Two Concepts of Equality*, 104 HARV. L. REV. 107, 109-110 (1990).

33. See The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), which described the effects of "black codes" after the Civil War as replacing the bonds of slavery:

> [Blacks] were forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

Id. at 70.

34. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400 (1978) (Marshall, J., dissenting in part and concurring in part).

35. *Id.* at 407 (Blackmun, J., dissenting in part and concurring in part).

36. Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J.A. Croson, 98 YALE L.J. 1711, 1712 (1989). After the Supreme Court decided *Croson*, a group of constitutional scholars issued a statement encouraging local governments not to dismantle their affirmative action programs but rather to carefully design them.

restrictive means of achieving a compelling state interest.[37] Such racial linedrawing is considered "invidious discrimination" and examples include laws which stigmatize people or perpetuate racism. Group-rights proponents, however, would evaluate affirmative action measures under a less demanding standard of judicial review because these racial classifications constitute "benign discrimination."[38] Examples of these laws include those which promote diversity or remedy the effects of past, harmful discrimination. If such "benign" goals motivate legislatures to make racial classifications, group-rights adherents believe that such classifications should receive a lower standard of review than laws motivated by "invidious purposes."

B. The Individual-Rights Theory

In contrast to the group-rights advocates are the individual-rights advocates, who believe the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[39] In fact, the individual-rights theorists believe all the fundamental rights guaranteed by the Constitution are reserved for individuals. They reject the group-rights idea that the interests of a group of people trump the interest of an individual.

This theory relies on the philosophy behind the Fourteenth Amendment as opposed to its initial purpose. Individual-rights advocates declare it morally wrong to burden or benefit an individual on the sole basis of race. To counter the group-rights argument, individual-rights theorists claim that although the initial purpose of the Fourteenth Amendment may have been to bridge the gap between blacks and whites, the drafters of the Amendment used "universal terms, without reference to color, ethnic origin, or condition of prior servitude."[40] The Fourteenth Amendment applies to all individuals equally.

Because they view all racial classifications as inherently suspect, individual-rights advocates reject using a lower standard of review for "benign," as opposed to "invidious," racial classification.[41] Any law or program using racial classifications should be subject to strict scrutiny. This standard acts as a "smoking out" mechanism by ensuring that only the most compelling interests justify the use of racial classifications. With regard to affirmative action, the mere interest of increasing the number of minority participants in a particular area is not sufficiently compelling.[42] There must be some greater purpose, such as remedying the effects of past discrimination. Individual-rights

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37. *See* NOWAK & ROTUNDA, *supra* note 22, § 14.3, at 579.

38. *See* Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990).

39. Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (quoting Shelley v. Kraemer, 334 U.S. 1, 22 (1948)). This is the view of equal protection the Court recently reaffirmed in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995), where the Court stated the "basic principle" that

> the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as "in most circumstances irrelevant and therefore prohibited" . . . —should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court's understanding of equal protection . . . .

Id. at 2112-13 (emphasis in original) (citations omitted).

40. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 293 (1978).

41. Justice Powell in *Bakke* rejected the idea that discrimination characterized as benign should be permitted against the white majority. "It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others." *Id.* at 294-95 (emphasis in original).

42. *Croson*, 488 U.S. at 507 (rejecting the City's quota system because it merely promoted "outright racial balancing").

advocates recognize that social separation exists between racial groups.[43] However, "[t]hat some degree of separation exists naturally in society is no justification for perpetuating or strengthening it through governmental policy."[44]

C. Justification for Advancing the Individual-Rights Theory Over the Group-Rights Theory and Limiting Affirmative Action

In terms of the two views of the Fourteenth Amendment, the Supreme Court recently adopted a more individual-rights-oriented approach to affirmative action. Justice O'Connor unequivocally stated this majority position in both *Richmond v. J.A. Croson Co.*[45] and in *Adarand Constructors, Inc. v. Pena.*[46] The Supreme Court limited affirmative action programs to those that can satisfy strict scrutiny, holding that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."[47]

Strong justifications exist for the hard-line position the Supreme Court recently took toward affirmative action. Without question, many have benefited from affirmative action. It has given disadvantaged minorities opportunities to advance in areas from which they have historically been excluded.[48] Affirmative action, however, causes many problems because of the inherent unfairness to those in the majority and other minorities not falling within a program's selective definitions, the stigma that affirmative action attaches to its beneficiaries, and the definitional difficulties created by the changing demographics of American society. These problems justify limiting the use of affirmative action measures by requiring courts to analyze them under strict judicial scrutiny.

1. Inherent Unfairness

The most obvious problem with affirmative action programs is that they often deprive individuals within the majority the opportunity to advance and succeed. It is fundamentally unfair to deprive an otherwise qualified individual of a scholarship, a spot in a law school class, an employment position, or a promotion because of the color of his or her skin.[49] Advocates of affirmative action trivialize this fact or try to recast it in a

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43. *See* Fried, *supra* note 32, at 108-09.

44. *Id.* at 109.

45. *Croson*, 488 U.S. at 493.

46. 115 S. Ct. 2097, 2113 (1995). In 1989, when the Court first formed a majority advancing this position, the U.S. Solicitor General sharply criticized a group of constitutional scholars for attempting to "explain *Croson* away" and for misleading people into assuming that *Croson* enunciated no significant new proposition. Charles Fried, *Affirmative Action After* City of Richmond v. J.A. Croson Co.*: A Response to the Scholars' Statement*, 99 YALE L.J. 155, 159 (1989). *But see* Joint Statement, *supra* note 36.

47. *Croson*, 488 U.S. at 494.

48. Receiving an opportunity is one thing; what one does with that opportunity is another. In no way does this Note downplay a minority member's achievements after having been given the chance to succeed. Those personal achievements deserve the utmost credit and respect.

49. Justice Powell elaborated on this idea in a footnote in *Bakke*:

> In the view of Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun, the pliable notion of "stigma" is the crucial element in analyzing racial classifications. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. *All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious. These individuals are likely

different light.[50] One commentator has criticized such advocates for ignoring this reality altogether.[51]

Proponents argue unpersuasively that affirmative action is fair to majority members. They claim that past societal discrimination has suppressed minorities while benefiting the majority by giving majority members opportunities to succeed their entire lives. Affirmative action now levels the playing field. It provides minority members with current benefits in order to rectify past oppression—that is, it remedies present effects of past discrimination.

This argument may be logically appealing, but it is amorphous and difficult to prove. Concrete law should not be built on such weak foundations. Furthermore, is it logical to use discrimination to combat discrimination? Affirmative action may provide opportunities otherwise not available to certain persons, but it fails to eradicate discrimination from our society; it fails to advance its ultimate goal. Finally, in today's society, why should an individual who has never discriminated against another human being be forced to pay for past wrongs? Why should a minority who has never been economically disadvantaged, or discriminated against by a state actor, be owed an opportunity to advance from that same state actor? When affirmative action negatively affects a person, forcing him or her to pay the consequences of acts of which she is innocent, a deep resentment may manifest into racism, the very thing affirmative action seeks to redress.[52]

Whites are not the only group of people that may be unfairly denied opportunity because of their race or ethnicity. As the Fourth Circuit case of *Podberesky v. Kirwan*[53] illustrates, other minorities not included in a particular program's definition of "minority" also shoulder the cost of exclusion. Daniel Podberesky was an Hispanic student who applied for, and was denied, a scholarship reserved only for African-Americans. In this instance, the affirmative action program benefited one historically disadvantaged minority at the expense of another.

> to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, Mr. Justice Brennan, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun offer no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere *post hoc* declarations by an isolated state entity—a medical school faculty—unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 294 n.34 (1978) (Powell, J.) (emphasis in original) (citations omitted).

50. The constitutional scholars responding to *Croson* described such a cost as a "patriotic effort" for the sake of achieving a colorblind society. *See* Joint Statement, *supra* note 36, at 1712; *see also Bakke*, 438 U.S. at 407 (Blackmun, J., dissenting in part and concurring in part) ("In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.").

51. Terry Eastland, *The Case Against Affirmative Action*, 34 WM. & MARY L. REV. 33, 38 (1992); *see also Croson*, 488 U.S. at 527 (Scalia, J., concurring) (claiming that even benign racial measures have individual victims, "whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race").

52. Justice Powell warned the Court of this phenomenon in *Bakke*: "*All* state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived and therefore may be perceived as invidious." *Bakke*, 438 U.S. at 294 n.34 (emphasis in original).

53. 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995). For a more detailed account of this case, see *infra* part III.B.2.

2. Stigma

Affirmative action may even cause distressing side effects for members of the very group it is designed to benefit. Not only do people burdened by affirmative action bear its costs, but those who have benefited also bear its costs. "Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."[54] Justice Powell noted that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[55] This could work to the extreme detriment of those whose livelihoods depend on how their peers perceive their abilities. By creating doubt as to the individual's ability in the minds of those who would be the individual's clients, patients, or customers, affirmative action can create yet another racial obstacle that members of the disadvantaged group must overcome in their quest for true equality. Even if the individual secured the opportunity on the basis of his qualifications alone, the fact that others may believe he obtained such a chance because of his race stigmatizes the minority member and perpetuates stereotypes. Unless affirmative action is curtailed, the misperception that race has been an overwhelming factor in every minority member's achievements may always be a reality.

The stigmatic harm may accrue not just from the way society views a minority member who achieves and advances. It may accrue from within minority beneficiaries themselves. Individuals who have received opportunities as a result of affirmative action may have lingering self-doubts as to their ability to compete with others.[56] This scenario unfolded in 1987 at the University of Virginia Law School, when three African-American students made the law review. The University had implemented in the previous year an affirmative action program for selecting law review members. One such student found himself unable to fully appreciate his achievements. He felt that "[a]ffirmative action was a way to dilute our personal victory. It took the victory out of our hands."[57]

3. Definitional Difficulties

Apart from the potential problems of unfairness and stigma inherent in affirmative action, one commentator argues that the changing demographics of American society causes definitional difficulties and therefore increases the hostility surrounding this issue.[58] The growing number of minorities other than African-Americans both fosters greater competition between minorities for the benefits of affirmative action and increases the exclusionary effect on nonminorities.[59] Furthermore, the increase in individuals from a multiracial heritage challenges most affirmative action measures

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54. *Croson*, 488 U.S. at 493.

55. *Bakke*, 438 U.S. at 298 (Powell, J.).

56. *See* Sonia L. Nazario, *Many Minorities Feel Torn by Experience of Affirmative Action: While Program Opens Doors, It Can Attach a Stigma That Affects Self-Esteem*, WALL ST. J., June 27, 1989, at A1.

57. William Raspberry, *Affirmative Action That Hurts Blacks*, WASH. POST, Feb. 23, 1987, at A11.

58. Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

59. *Id.* at 959-60.

because these measures rely on simplistic notions of racial groupings (*i.e.*, "African-American," "Hispanics," "Pacific-Asian," "Native-Americans," etc.).[60] Children of parents from different racial groups may classify themselves as a particular race in order to increase their chances of receiving certain benefits. For example, a law school applicant whose mother is white and whose father is Vietnamese may check the "Pacific-Asian" box on the application in order to increase her chances of admission. Many advocates of affirmative action focus on the idea that racial preferences are the *cure* to racial hostility and fail to consider that they may instead be the *cause*.

III. AFFIRMATIVE ACTION IN HIGHER EDUCATION

The Supreme Court appears to be limiting seriously affirmative action as we know it, and strong justifications exist for doing so. The Court's current position will undoubtedly penetrate affirmative action in higher education. After an overview of the history of educational discrimination in general, this Part uses two recent cases to analyze affirmative action in higher education, particularly with respect to minority-based scholarships and admissions programs. Due to the unique nature of education, redefining its goal from remedying past discrimination to advancing diversity may salvage affirmative action. Although compelling arguments for keeping the current system can be made, the Court should continue to apply the brakes on affirmative action because viable alternatives exist. These alternatives create few, if any, constitutional problems and redirect the attention of education officials away from one's race and towards characteristics more indicative of scholastic achievement.

A. The History of Educational Discrimination

Briefly canvassing this country's history of educational discrimination is important in framing the issue of race-based classifications in higher education. In 1896, the Supreme Court upheld the "separate but equal" theory in *Plessy v. Ferguson*.[61] For five decades thereafter, black and white children attended separate schools. It was in this case that Justice Harlan, the sole dissenter, claimed that the Constitution was "colorblind"[62] to matters of race.

In the early 1920's, the NAACP Legal Defense Fund launched its attack on segregation. Then-attorney Thurgood Marshall led this cause for two decades, strategically laying the foundation for the dismantling of this disgraceful doctrine.[63] In perhaps its most momentous case ever, the Court held in *Brown v. Board of Education*[64] that "[s]eparate educational facilities are inherently unequal."[65] A unanimous Court, in an opinion written by Chief Justice Warren, stated that "the importance of education to

60. *Id.* at 964-69.

61. 163 U.S. 537 (1896) (holding that the "separate but equal" idea allowed the maintenance of separate schools for black and white children so long as the education and facilities were equal).

62. *Id.* at 559 (Harlan, J., dissenting).

63. *See* McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents of the Univ. of Okla., 332 U.S. 631 (1948); Fisher v. Hurst, 333 U.S. 147 (1948); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

64. 347 U.S. 483 (1954).

65. *Id.* at 495.

our democratic society [and] the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[66]

As the cliché goes, admitting the problem is only half the battle. The Court could have ordered immediate admission of all black students to the white schools; however, the Court anticipated hostile public reaction and, instead, ordered desegregation "with all deliberate speed" in *Brown v. Board of Education II*.[67] The aftermath of these two decisions involved great resistance; consequently, the process of desegregation took decades to achieve.

In the 1970's, the issue of busing students to other schools in order to promote diversity flared the public ire.[68] Young schoolchildren were often bused from homes near neighborhood schools to schools several miles away in order to create diverse student bodies. *Swann v. Charlotte-Mecklenburg Board of Education*[69] first addressed this issue and approved a reasonable amount of busing when needed to remedy past discrimination, but the Court did not go so far as to condone busing for purposes of diversifying the student population.[70] Although busing was a source of irritation and concern for many students and parents, for many larger school districts busing was the only way to effect *Brown*'s goals.[71]

In 1978, the Court took its first look at higher education affirmative action in *Regents of University of California v. Bakke*.[72] The University set aside a specific number of places in its medical school class for disadvantaged minority students. Although this case is discussed in more detail below,[73] it is sufficient to say that this splintered decision provided little guidance and has often been misinterpreted. The Justices could not agree on the appropriate standard of review for affirmative action measures. The Court did invalidate the rigid quota system used by the University, but indicated that a person's race could be a factor in a properly devised admissions program.[74]

In another plurality decision eight years later, *Wygant v. Jackson Board of Education*,[75] the Court again quarreled over the appropriate standard of review. Nevertheless, five Justices formed a majority to invalidate a layoff program that gave preferential treatment to some minority teachers in order to maintain a racially integrated faculty.[76] It held that the program violated the Equal Protection Clause of the Fourteenth Amendment.[77]

This country has made great strides toward the goal of equality in education since the days of *Brown*, even though these strides were not taken as rapidly as some might have hoped. Efforts to quicken the pace by offering scholarships to students based on their race, or by relaxing a school's admissions standards in order to admit more minority students, have met with accusations of "reverse discrimination." Although a state of true equality has not yet been achieved, it is still noble and morally right to aspire to this goal.

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66. *Id.* at 493.

67. Brown v. Board of Educ. (Brown II), 349 U.S. 294, 301 (1955).

68. The Court's approval of busing as a remedy to discrimination sparked many federal and state efforts to restrict the use of this remedy. *See* Crawford v. Board of Educ., 458 U.S. 529 (1982); Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457 (1982); North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43 (1971).

69. 402 U.S. 1 (1971).

70. *Id.* at 29-31.

71. *Id.*

72. 438 U.S. 265 (1978).

73. *See infra* part IV.C.1.

74. *Bakke*, 438 U.S. 265.

75. 476 U.S. 267 (1986).

76. *Id.*

77. *Id.*

But is affirmative action the correct method? The Supreme Court seems to think not. In *City of Richmond v. J.A. Croson*,[78] a majority of Justices finally agreed on a standard of review and firmly held that affirmative action measures, like any other measures that classify people along racial lines, must satisfy strict scrutiny.[79] If the Court stays grounded in this position, as it appears it will,[80] its stance will affect many policies at colleges and universities across the country directed at increasing minority populations.

B. Minority-Based Scholarships

Race-based scholarships are very common in this country's institutions of higher learning.[81] Schools use these scholarships to recruit minority students into their undergraduate and graduate programs.[82] The government has an interest in bringing minorities onto campuses, particularly if these students would not have otherwise had an opportunity for further education. But, because these programs are based on race, they implicate the Equal Protection Clause of the Fourteenth Amendment.[83] The lower courts have assessed the legal implications of race-restrictive scholarships in different ways.[84]

1. The Prior Controversy over Minority-Based Scholarships

Many of the funds for minority-based scholarships are given to institutions of higher learning through charitable donations that have racially restrictive clauses. Rather than entirely voiding these donations, courts have often invoked the doctrine of cy pres.[85] This doctrine allows the courts to amend the clause to make it nondiscriminatory while still carrying out the intention of the donating party. Traditionally cy pres has been used to amend scholarship donations which discriminated against minorities. For example, in 1957, three years after *Brown*, the Supreme Court invalidated a trust which was donated

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78. 488 U.S. 469 (1990).

79. *Id.*

80. *See* Shaw v. Reno, 113 S. Ct. 2816 (1995) (reaffirming that strict scrutiny was the appropriate standard for reviewing state affirmative action programs); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) (applying strict scrutiny when evaluating federal affirmative action measures and overruling prior decisions that held otherwise); Miller v. Johnson, 115 S. Ct. 2475 (1995) (using strict scrutiny to evaluate a state's redistricting plan).

81. Jon A. Ward, Note, *Race-Exclusive Scholarships: Do They Violate the Constitution and Title VI of the Civil Rights Act of 1964?*, 18 J.C. & U.L. 73, 94 (1991); *Court Rules for Scholarships Based on Race*, N.Y. TIMES, Feb. 7, 1993, at 31.

82. *See* Jerome W.D. Stokes, Commentary, *Race-Based Scholarships and Title VI: Are They Friends of Bill?*, 82 Educ. Law Rep. 17 (1993).

83. For a detailed analysis, see Andrew H. Baida, *Not All Minority Scholarships Are Created Equal, Part II: How to Develop a Record That Passes Constitutional Scrutiny*, 21 J.C. & U.L. 307 (1994). Baida was the assistant attorney general for the State of Maryland who defended the constitutionality of a scholarship program available only to African-Americans at the University of Maryland at College Park in Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994). *See infra* part III.B.2.

84. *See, e.g.*, Flanagan v. President and Directors of Georgetown College, 417 F. Supp. 377 (D.D.C. 1976) (claiming race-based scholarships violated the Civil Rights Act of 1964, § 601); Trustees of the Univ. of Del. v. Gebelein, 420 A.2d 1191 (Del. Ch. 1980) (finding that race-based scholarships violated the Fourteenth Amendment).

85. Wachovia Bank and Trust Co., N.A. v. Buchanan, 346 F. Supp. 665 (D.D.C. 1972); Sweet Briar Inst. v. Button, 280 F. Supp. 312 (W.D.Va. 1967); Bank of Del. v. Buckson, 255 A.2d 710 (Del. 1969); Trammell v. Elliott, 199 S.E.2d 194 (Ga. 1973); Howard Sav. Inst. v. Peep, 170 A.2d 39 (N.J. 1961); *In re* Estate of Dickerson, 474 A.2d 30 (N.J. Super. Ct. Ch. Div. 1983); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966); *see also* Stuart M. Nelkin, *Cy Pres and the Fourteenth Amendment: A Discriminatory Look at Very Private Schools and Not So Charitable Trusts*, 56 GEO. L.J. 272 (1967); Richard W. Power, *The Racially Discriminatory Charitable Trust: A Suggested Treatment*, 9 ST. LOUIS U. L.J. 478 (1965).

to the City of Philadelphia to benefit "poor white male orphans" in their education.[86] The Court, citing *Brown*, held that because the City was a state actor, the trust violated the Fourteenth Amendment.

This issue did not flare up again until 1991 when Michael Williams, the Department of Education's ("DOE") Assistant Secretary for Civil Rights, announced in a press release that race-based scholarships violated Title VI of the Civil Rights Act.[87] The denouncement of race-based scholarships completely contradicted the DOE's longstanding policy. The statement took many by surprise and a storm of controversy ensued. The Secretary of the DOE ordered a review of the Department's policy, but the Bush Administration never made a final decision.[88] On February 17, 1994, the Clinton Administration announced its support of minority scholarships and maintained they were legal so long as they were narrowly tailored.[89]

2. A Recent Controversy over Minority-Based Scholarships—*Podberesky v. Kirwan*

In *City of Richmond v. J.A. Croson Co.*, the Supreme Court stated, "[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification."[90] *Podberesky v. Kirwan*[91] exemplifies this statement. *Podberesky* was a reverse discrimination case with an interesting twist. A minority man challenged a program because it benefited a different minority.[92] Daniel J. Podberesky was an Hispanic-American student who sued the University of Maryland because he was denied a scholarship offered only to African-Americans.[93] The Banneker Scholarship was a "full-ride" program for undergraduate studies, funded by the state and awarded to qualified African-Americans. Minimum eligibility was set at a 3.0 high school grade point average and a 900 SAT score. Daniel Podberesky graduated from high school with a 3.56 grade point average and scored 1340 on the SAT.[94] Notwithstanding his qualifications, Podberesky was denied the scholarship because of his race.

Last October the Fourth Circuit ruled that the scholarship program failed the strict scrutiny test.[95] The University asserted that the goal of the scholarship program was to remedy present effects of past discrimination and relied on four effects in particular: (1) the University's unfavorable reputation within the African-American community; (2) the racial tension existing on the campus; (3) the underrepresentation of African-Americans in the student body; and (4) the low retention and graduation rates of African-Americans at the University.[96]

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86. Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230, 231 (1957).

87. Stokes, *supra* note 82, at 17. This statement responded to the attempt of the promoters of the Fiesta Bowl to coax the University of Alabama and the University of Louisville back into the Bowl. The promoters offered each school $100,000 in minority-exclusive scholarships in the name of Martin Luther King, Jr. Each school had previously refused to participate in the Bowl because the State of Arizona, where the Fiesta Bowl is held, had not recognized Martin Luther King Day as a federal holiday. *Id.*

88. *Id.*

89. Mary Jordon, *Minority Scholarships Rules Relaxed*, WASH. POST, Feb. 18, 1994, at A16.

90. 488 U.S. 469, 494 (1989) (reaffirming the plurality opinion in *Wygant*).

91. 38 F.3d 147 (4th Cir. 1994) (Podberesky II), *cert. denied*, 115 S. Ct. 2001 (1995).

92. *Id.* at 152.

93. *Id.*

94. Podberesky v. Kirwan, 956 F.2d 52, 53-54 (4th Cir. 1992) (Podberesky I).

95. *Podberesky II*, 38 F.3d at161.

96. *Id.* at 152.

The court quickly dismissed the University's first assertion. Any poor reputation that the University had within the African-American community was linked "solely" to the fact that it had purposely discriminated against this minority in the past. "However, the mere knowledge of historical fact is not the kind of present effect that can justify a race-exclusive remedy."[97]

The University failed to establish that the remaining three effects were caused by past discrimination at the University as opposed to present, societal discrimination.[98] However, even assuming the University had proven this, the court of appeals still would have invalidated the scholarship program because it was not narrowly tailored.[99] Besides the fact that the University failed to clearly identify past discrimination, the University used an arbitrary reference pool to calculate the underrepresentation of African-American students.[100] The University also failed to show that it had unsuccessfully tried any race-neutral solutions to the problems.[101] In short, the University failed to prove that its past discrimination caused these present effects. Without this link, the program was not the least restrictive means of achieving its goals.

The court found that the Banneker Scholarship Program "'cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.'"[102] In the court's view, the University of Maryland's program was formulated so that the African-American student population would eventually mirror the African-American population in society at large. The program rested upon "'unsupported assumption[s]' as to the appropriate levels, if any, to remedy the present effects of past discrimination."[103] It subsequently invalidated the University's use of a race-exclusive scholarship as a remedy for past discrimination.

The granting of minority scholarships is a matter of course in many higher education settings and will remain so for the time being, except in the Fourth Circuit, because the Supreme Court refused to hear *Podberesky*.[104] Given, however, the Court's position in its cases last term, the future of similar race-based programs is far from stable.

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97. *Id.* at 154.

98. *Croson* states that remedying societal discrimination is not a task for state actors to undertake. Such "a generalized assertion . . . provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy. It 'has no logical stopping point.'" City of Richmond v. J.A. Croson Co., 488 U.S. 469, 498 (1989) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 275 (1986)).

99. *Podberesky II*, 38 F.3d at 157-62.

100. *Id.* at 159-60. The reference pool was used to calculate the disparity between eligible African-American high school graduates in the state and the number of African-Americans in the student population. It was held to be arbitrary because the University failed to account for statistics showing that eligible African-American high school graduates might voluntarily choose (1) to not attend college; (2) to postpone their education; (3) to go out of state to college; or (4) to attend a predominantly African-American college in the state of Maryland. The failure to take such considerations into account yielded a misleading disparity between the University's African-American population and the reference pool, thus making the disparity appear greater than it actually was. The court went on to say that it was necessary to factor out such variables in order to prove causation. The remaining disparity would permit an inference that past racial discrimination could have contributed to this disparity. *Id.*

101. *Id.* at 161.

102. *Id.* at 160 (quoting *Croson*, 488 U.S. at 507).

103. *Id.* (quoting *Croson*, 488 U.S. at 502).

104. Kirwan v. Podberesky, 115 S. Ct. 2001 (1995).

C. Preferential Admissions Programs in Higher Education

The affirmative action measures receiving the most attention in the higher education context have been those used in admissions programs. Most colleges and universities give minority applicants extra consideration and will often prefer a minority class member simply because of his or her race. Institutions of higher learning justify such measures as a means of rectifying past discrimination and promoting diversity among their students. Perhaps this area has received more attention because these programs affect more people, or because they are more aggravating. Nonminority members may see these measures as roadblocks that halt their personal achievements, whereas the students concerned in the scholarship cases have already been admitted to a school before they face their obstacle. Affirmative action was first brought to the country's attention seventeen years ago in *Regents of the University of California v. Bakke*,[105] a case dealing with exactly this phenomenon of race-based admissions criteria.

1. The Court's First Look at Minority-Preference Admissions Programs—*Regents of the University of California v. Bakke*

Allan Bakke applied to the Medical School of the University of California at Davis in 1973 and 1974. He was denied admission both times even though his academic qualifications were considerably higher than those of some students who were admitted.[106] In both years, the University employed a dual admissions program. If applicants indicated that they were "economically or educationally disadvantaged," or that they were part of a "minority,"[107] they were evaluated by a special admissions committee. All other applicants were evaluated under the general admissions program operated by a separate committee.

Sixteen places in the medical school class were reserved for special admissions applicants. The special admissions committee evaluated their candidates separately and independently from the candidates in the general program. The special committee members would bring their top choices to the general committee which would then make offers until sixteen minority students had accepted. Bakke was not a member of any specified minority group. Upon his second denial, Bakke sued the University and claimed that because the special admissions program used quotas which preferred minorities, the program violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.[108]

The Supreme Court issued a splintered decision within which the Justices voted 5-4 against the legality of the U.C. Davis program, but with no opinion garnering more than four votes. After mapping out the votes, the Court ordered Allan Bakke admitted and held that although race could be used as a factor in a properly devised admissions program,

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105. 438 U.S. 265 (1979).

106. *Id.* at 277.

107. The medical school viewed these as "Blacks," "Chicanos," "Asians," and "American Indians." *Id.* at 274.

108. *Id.* at 277-78. Bakke also claimed a violation of the California Constitution, but the California Supreme Court avoided ruling on this issue or the Title VI issue by ruling first that the program violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 279-80.

the rigid quota system used by the University had to be overruled.[109] Justice Powell was the swing vote in this case; thus, the ruling turned on his opinion even though a majority of the Justices did not support his analysis of the issues.[110]

The Court upheld the type of admissions programs used by most colleges and universities.[111] Many schools follow Harvard's admissions program, a type Justice Powell found to be constitutional.[112] The admissions committee considered all aspects of an individual, such as an applicant's grades, test scores, and personal background. A person's race or ethnicity is considered a "plus," similar to other nonscholastic achievements.[113] Professor Archibald Cox argued the *Bakke* case on behalf of U.C. Davis and derived three conclusions from the Court's decision: (1) quotas may not be used to reserve a fixed number of spots for minority applicants; (2) simply converting "quotas" to "goals" will not protect a particular program from constitutional challenge; and (3) separate minority admissions committees may not be used—students must be evaluated against one another by the same committee.[114]

In any case, *Bakke* left many questions open. Primarily, the Court failed to agree on the standard of review for affirmative action race classifications. It offered no constitutional guidelines for affirmative action programs outside admissions to institutions of higher education. Finally, a majority did not hold that the U.C. Davis plan violated the Fourteenth Amendment; only that the program violated Title VI.

This opinion provoked a wave of controversy and a flood of interpretations.[115] Despite Allan Bakke's personal victory, neither defenders nor opponents of affirmative action could claim success. It was not until eleven years later that the Court provided solid guidance. In *City of Richmond v. J.A. Croson Co.*,[116] a majority held that the Fourteenth Amendment required all affirmative action racial classifications to receive strict scrutiny.

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109. *Id.* at 320. This holding affirmed the decision of the California Supreme Court which held the Equal Protection Clause prohibited the government from taking cognizance of race when dispensing benefits. That court ordered the medical school to admit Bakke immediately. *Id.* at 279-80.

110. Four of the Justices—Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens—found the program violated Title VI of the Civil Rights Act of 1964 and did not reach the constitutional issue. Justice Powell found the program violated the Equal Protection Clause, and therefore Title VI. These five votes struck down the strict quota system used by the U.C. Davis Medical School.

Four other Justices—Justices Marshall, Brennan, White, and Blackmun—reached the constitutional issue and would have upheld the admissions program on the grounds that it was a remedy for past discrimination. They used an intermediate level of scrutiny. Justice Powell also reached the constitutional issue but he felt racial classifications of any kind should receive strict scrutiny. He further stated that not all racial classifications were invalidated by the Fourteenth Amendment. Thus, these five votes held that one's race could be used as a factor in a properly devised affirmative action program. *Id.*

111. LAURENCE R. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1529 (2d ed. 1988).

112. *Bakke*, 438 U.S. at 318.

113. *Id.* at 317. Justice Powell did not find this kind of race consciousness unconstitutional because an applicant who had been denied was not denied *solely* because of his race. The applicant had been considered for a spot in the class, but the committee must have concluded that "his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of [another] applicant." *Id.* at 318.

114. ARCHIBALD COX, BAKKE, WEBER, AND AFFIRMATIVE ACTION x (1979). Professor Cox also believed colleges and universities would be permitted to use the race-as-a-plus rationale put forth by Justice Powell. *Id.* at xi.

115. *See, e.g.*, Guido Calabresi, Bakke *as a Pseudo-Tragedy*, 28 CATH. U. L. REV. 427 (1979); Kent D. Lollis, *The Right to Education:* University of California v. Bakke, 6 BLACK L.J. 265 (1980); Arval A. Morris, *The* Bakke *Decision: One Holding or Two?*, 58 OR. L. REV. 311 (1979); William E. Sedlacek, *The Aftermath of* Bakke*: Should We Use Race in Admissions?*, 22 HOW. L.J. 327 (1979); R. Jean Simms-Brown, *After Caution Comes Red: The* Bakke *Decision and Its Threat to Black Educational Institutions*, 5 S.U. L. REV. 211 (1979); Julius Stone, *Equal Protection in Special Admissions Programs: Forward From* Bakke, 6 HASTINGS CONST. L.Q. 719 (1979); David M. White, *Pride, Prejudice and Prediction: From* Brown *to* Bakke *and Beyond*, 22 HOW. L.J. 375 (1979).

116. 488 U.S. 469 (1989).

2. A Current Controversy over Preferential Admissions Programs—*Hopwood v. Texas*

A recent district court case in Texas illustrates the difficulties universities and courts have in synthesizing the dictates of both *Bakke* and *Croson*. It reveals that the Supreme Court needs to clarify the issue of affirmative action in higher education. As the Court indicated in *Brown*, education plays a unique and vital role in our country, but clear and dependable rules as to how institutions of higher learning can choose their students would better serve society.

In *Hopwood v. Texas*,[117] four white plaintiffs sued the University of Texas in 1992 for using a law school admissions program that favored African-American and Mexican-American applicants, resulting in the admission of many minority students with lower academic qualifications than the four plaintiffs.[118] The Texas law school used a dual admissions process that allowed a separate committee to consider only and all the minority candidates, apart from the general pool of applicants. From that separate pool, the law school would then attempt to meet its goals of admitting into its entering class ten percent Mexican-American students and five percent African-American students.[119]

The district court judge found that the University asserted sufficiently compelling interests for preferring minority applicants, but that the program was not narrowly tailored. Most interestingly, the court found diversity in the educational context to be a compelling interest. The court ruled in this manner despite the fact that the Supreme Court has only recognized remedying present effects of past discrimination as a compelling justification for using race-based programs.[120] The court supported its position by claiming that none of the recent affirmative action cases dealt specifically with education and the unique role it plays in our society.[121] The district judge reasoned that obtaining the educational benefits that flow from a diverse student body justified using the highly suspect tool of racial classifications.

The University also maintained that, apart from attempting to diversify the student population, its admission program attempted to remedy past discrimination.[122] It argued that three present effects of past discrimination existed on campus: (1) the University's

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117. 861 F. Supp. 551 (W.D. Tex. 1994).

118. *Id.* at 564-68.

119. *Id.* at 564.

120. *Id.* at 570 n.58. Plaintiffs cited City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989): "Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility."

121. *See infra* text accompanying notes 140-46. The court used Justice Powell's assertion of the same proposition in *Bakke*. *See infra* text accompanying notes 142-44.

122. *Hopwood*, 861 F. Supp. at 570. The University of Texas Law School, however, has never discriminated against Mexican-Americans. The court circumvented this issue by claiming that the educational context is so unique that the scope of review should be broadened. "[T]he residual effects of past discrimination in a particular component of a state's educational system must be analyzed in the context of the state's educational system as a whole." The court went on to say: "[I]nstitutions of higher education are inextricably linked to the primary and secondary schools in the system." Interestingly, the court referred to the district court's analysis of this issue in *Podberesky*. *Id.* at 571.

In other words, the court would not limit its review to the discrimination committed only by the University of Texas, even over plaintiffs' objection that *Croson* prohibits an attempt to remedy societal discrimination. The court averted this argument by interpreting the Supreme Court's decision in United States v. Fordice, 112 S. Ct. 2727 (1992), to mean that the prohibition against remedying societal discrimination in the employment context extends to the educational context. *Hopwood*, 861 F. Supp. at 571. The Supreme Court in *Fordice* held that institutions of higher learning were under an affirmative duty to eliminate every vestige of discrimination and racial segregation and to reform such policies that perpetuate these vestiges. *Id.*

bad reputation among minority communities; (2) the appearance of a racially hostile environment on the University's campus; and (3) the underrepresentation of African-Americans and Mexican-Americans in the student population.[123]

The court held that the University's affirmative action measures were necessary to combat the effects of past discrimination. Efforts to recruit minorities had been frustrated by the University's bad reputation and perceived negative racial climate. Recent racial incidents, the court elaborated, had only reinforced these perceptions.[124] Lastly, the court found that effects of past discrimination were also reflected in minority underrepresentation rates.[125]

The court cited Powell's "plus" factor rationale as a means of avoiding the use of one's race as the determinative factor in admissions programs.[126] Giving an applicant a "plus" for being a minority, then comparing that applicant's entire qualifications against the entire pool of applicants was held to be constitutional. The court found this process incorporated a meaningful evaluation among all applicants while protecting the individual rights of each of them.[127]

Despite the court's approval of racial preferences, it found that the law school's admissions program was not narrowly tailored.[128] The court invalidated the law school's separate committee affirmative action program because it excessively interfered with the rights of innocent third parties. The court stated:

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123. *Hopwood*, 861 F. Supp. at 572.

124. Note that the court of appeals in *Podberesky* found these two present effects insufficiently compelling. *See supra* text accompanying notes 91-97.

125. The Office of Civil Rights ("OCR") of the Department of Education had made findings between 1978 and 1980 that Texas needed to make more efforts to desegregate. The court held that the continuous review of Texas' efforts by the OCR demonstrated the pervasive nature of the University's past discrimination. Also, many public schools had been segregated during the 1970's and 1980's, the years when current applicants attended primary and secondary schools. The court held that this discrimination "handicapped the educational achievement of many minorities." *Hopwood*, 861 F. Supp. at 573. This inferior educational opportunity combined with the lower economic status of minorities in Texas caused the smaller pool of minority applicants. *Id.*

126. As for the remedies provided, the court refused to order the plaintiffs immediately admitted because the plaintiffs did not prove they would have been admitted but for the unconstitutional program. The remedy was limited to reapplication. The judge awarded one dollar in damages because, although the school had violated their constitutional rights, the school did not unlawfully intend to do so. Also, the court refused to order a change in the law school procedure because the school had terminated its dual system after this suit was filed. They were now complying with the "plus" factor process set out in *Bakke*. *Id.* at 582-83.

127. *Id.* at 584.

128. The court looked at the four factors spelled out in *United States v. Paradise* in order to determine whether an affirmative action program was narrowly tailored. These factors are: (1) the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of the numerical goals to the percentage of minorities in the relevant population; and (4) the impact of the relief on the rights of third parties. *Id.* at 573 (citing United States v. Paradise, 480 U.S. 149, 171 (1987)). The court made several findings. The first was that evidence presented at trial proved that the alternative means of achieving diversity, specifically minority scholarships and recruiting efforts, were not by themselves effective in meeting the University's compelling interests. Diversity, the court held, was impossible to achieve without the affirmative action measures. *Id.* at 573-74. Second, the goals of the law school to admit 10% Mexican-Americans and 5% African-Americans were held to be flexible. These were not rigid percentages. The actual number admitted depended on strength of the minority pool for the particular year in question. Also, the law school only planned to use the affirmative action program temporarily. The objective was to narrow the gap in credentials between the minority and nonminority students. Evidence at trial proved the University was in fact adhering to this objective. *Id.* at 574. Finally, the court found that the University used the appropriate applicant pool when deriving the numerical goals. The set goals reflected the percentage of minorities that were college graduates in the State of Texas. *Id.* Following the dictates of *Croson*, the law school did not establish its goals from the number of minorities in the population as a whole.

Note that *Podberesky* held that the appropriate reference pool would be the percentage of *high school* graduates less certain variables such as those minorities who decided not to attend college, those who put college off for a year or more, those who went out of state, etc. *See supra* note 100. Also, *Podberesky* held that the affirmative action program at issue was not narrowly tailored because the University gave scholarships to nonresidents. This did not effect the goal of increasing the percentage of resident minority students at the University. *See supra* text accompanying notes 97-100.

> Although the past history of societal discrimination in certain institutions may justify the remedy, in the end, individuals pay the price. Therefore, it is imperative that the mechanics of any program implementing race-based preferences respect and protect the rights of individuals who, ultimately, may have to sacrifice their interests as a remedy for societal wrongs.[129]

The court recognized that affirmative action racial classifications that infringed upon the rights of an individual could actually countervail their intended goal and perpetuate, rather than eliminate, racism.[130] Essentially the court balanced the interest in affirmative action against the individual's interest and found that the dual admissions system violated the plaintiffs' constitutional rights.

D. The Future of Affirmative Action in Higher Education

Podberesky and *Hopwood* illustrate the way institutions of higher learning recruit minorities. These cases also represent how the application of strict scrutiny to these recruitment methods makes them extremely difficult to defend. Strict scrutiny, if applied to affirmative action programs, could result in far-reaching and devastating implications. Two related issues arise out of a university's attempt to meet strict scrutiny. Using the "ends/means" idea, the first issue addresses the end result of affirmative action. Could promoting diversity qualify as a sufficiently compelling interest for using affimirmative action? A strong argument can be made for the idea, but that same argument limits the diversity interest to the educational context. The second issue is whether the means chosen "fit" the desired end. It questions whether Justice Powell's "plus" factor rationale is valid. Is this not just a less offensive way of recruiting a specific percentage of minorities? Although promoting diversity could qualify as a compelling interest for educational purposes, most university affirmative action programs would still be vulnerable to strict scrutiny because the means used to implement these programs are not narrowly tailored.

1. Diversity as a Compelling Interest[131]

In analyzing whether diversity may qualify as a sufficiently compelling interest, it is necessary to look at Supreme Court decisions outside the educational context. Never has a majority of the Supreme Court recognized any interest compelling enough to justify using racial classifications, except the interest of remedying the present effects of past discrimination. In *Croson*, the Court was very clear about this, and provided little encouragement that it would find other interests sufficiently compelling.[132] Then came *Metro Broadcasting*.[133]

A majority of the Court in *Metro Broadcasting* held that federal affirmative action measures would not be subject to strict scrutiny but rather to intermediate scrutiny. The

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129. *Hopwood*, 861 F. Supp. at 575.

130. *Id.* at 577-78.

131. For a detailed analysis of the concept of diversity when used to justify affirmative action policies both inside and outside constitutional doctrine, see Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of "Diversity"*, 1993 WIS. L. REV. 105.

132. *Croson*, 488 U.S. at 493 ("Unless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility.").

133. Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990).

policies at issue were two Federal Communication Commission ("FCC") measures that preferred racial minorities when issuing broadcast licenses. These measures were aimed at increasing "broadcast diversity."[134] The majority found that this was an important governmental interest to which the FCC's policies were substantially related. Although *Adarand Constructors, Inc. v. Pena* subsequently overruled the use of this lower standard of review, the Court in *Adarand* did not address the diversity issue.[135]

As one might expect, the Court was sharply divided in *Metro Broadcasting* over the validity of broadcast diversity as a "compelling" interest. The dissent found broadcast diversity an insufficient justification for using a racial classification. Justice O'Connor's dissent emphatically stated, "Under the appropriate standard, strict scrutiny, only a compelling interest may support the Government's use of racial classifications. Modern equal protection doctrine has recognized only one such interest: remedying the effects of racial discrimination."[136] In a separate dissent, Justice Kennedy fiercely criticized the majority for "discriminat[ing] among . . . citizens on the basis of race in order to serve interests so trivial as 'broadcast diversity.'"[137] This interest, Kennedy noted, merely "increase[s] the listening pleasure of media audiences."[138]

It is important to remember that the majority only found diversity to be an important, not a compelling, interest. Another interesting quirk is that the dissenters did not say that the goal of diversity would never be sufficiently compelling; they simply stated that it was not compelling in the broadcasting context.[139] Does this mean that these Justices might validate the goal of diversity in other contexts? If so, should they?

Several arguments support the notion that diversity should be accepted as a compelling interest. The district court judge in *Hopwood* found diversity to be a compelling interest at least within the educational context. He argued that forty years ago in *Brown v. Board of Education*,[140] the Supreme Court recognized the importance and uniqueness of education in our society.[141] Education is the foundation of good citizenship. It awakens children to cultural values and prepares them to adjust to their environment throughout their lives. The district judge found that the educational benefits flowing from a racially and ethnically diverse student body elevates this interest to the compelling level.

The judge in *Hopwood* relied on Justice Powell's assertion in *Bakke*. Justice Powell argued that diversity was related to "academic freedom"[142] which in turn embraced the

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134. *Id.* at 547.

135. *See Adarand Constructors*, 115 S. Ct. 2097.

136. *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting). Justice O'Connor's position is uncertain. In her dissent in *Wygant*, she acknowledged that *Bakke* held the promotion of diversity in the context of education sufficiently compelling. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 287 (1986) (O'Connor, J., dissenting). She stated that the entire court in *Wygant* agreed that an affirmative action program may be upheld if, when implemented, it did not "impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference." *Id.* This opinion preceded her more forceful statement in *Metro Broadcasting*.

Some commentators, however, believe O'Connor's statements can be reconciled to leave open the possibility that educational diversity might be recognized as a compelling interest. They argue that her view of strict scrutiny might only prohibit "the division of government benefits by race through the use of numerical goals, quotas, or inflexible preferences." NOWAK & ROTUNDA, *supra* note 22, § 14.10, at 689. This view would not eliminate the use of racial classifications to promote diversity.

137. *Metro Broadcasting*, 497 U.S. at 633 (Kennedy, J., dissenting).

138. *Id.* at 634.

139. As of February, 1996, all four of the dissenting Justices in *Metro Broadcasting* remain on the Court (Rehnquist, O'Connor, Scalia, and Kennedy), while four out of five of the majority Justices (Brennan, White, Marshall, and Blackmun) have retired. *Metro Broadcasting*, 497 U.S. at 547 (1990).

140. 347 U.S. 483 (1954).

141. Hopwood v. Texas, 861 F. Supp. 551, 570 n.59 (W.D. Tex. 1994).

142. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-14 (1979) (Powell, J.).

"'robust exchange of ideas'"[143] guaranteed by the First Amendment. The implication of an independent constitutional value prompted Justice Powell to deem diversity a compelling interest:

> An otherwise qualified . . . student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school . . . experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity.[144]

Diversity also advances interpersonal skills by providing students with the opportunity to explore the differences among a variety of people and "communicate across the boundaries they create."[145] Another reason supporting diversity as a compelling interest is that it is a forward-looking goal. Remedying the present effects of past discrimination is a backward-looking goal. By using diversity as the goal for a particular program, administrators can mold the program around notions of how they hope their institution evolves as opposed to reminding people of past wrongs. The historical suffering of African-Americans in this country should never be ignored, but it is time to recognize the "limited benefits of making this a basis of reform."[146]

2. The Consequence of Recognizing Diversity as a Compelling Interest

If the Court recognizes diversity as a sufficiently compelling interest, then strict scrutiny will be easier to satisfy than when asserting a remedial interest. First, proving that the interest is sufficiently compelling would be less cumbersome because there would be no need to prove present discriminatory effects. When an advocate of affirmative action asserts a remedial interest, the alleged discriminatory effects are not blatant effects, such as educational segregation, but are more subtle effects, such as a racially hostile campus environment.[147] Furthermore, the Court is more apt to classify these claimed effects as the result of general societal discrimination, the remedy for which is not sufficiently compelling,[148] rather than discrimination by a specific government entity, which *is* sufficiently compelling.[149] On the other hand, if a proponent asserted diversity as the compelling interest, he or she would only need to show a disparity between minority representation in the student population and the relevant applicant pool.[150] The only obstacle to proving a sufficiently compelling interest in diversity would be proving both that the appropriate applicant pool was used when calculating the disparity and that all the competing variables were factored out.[151] Finally, the proponent of affirmative action would not need to prove causation. Proving that

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143. *Id.* at 312 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); *see also* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that there is a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

144. *Bakke*, 438 U.S. at 314 (Powell, J.).

145. Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 862 (1995).

146. Ramirez, *supra* note 58, at 990.

147. *See supra* text accompanying notes 96, 123.

148. Richmond v. J.A. Croson Co., 488 U.S. 469, 498-507 (1989).

149. *Id.*; *see supra* text accompanying note 97.

150. *See Croson*, 488 U.S. at 502-04; Podberesky v. Kirwan, 38 F.3d 150, 158-61 (4th Cir. 1994) (Podberesky II), *cert. denied*, 115 S. Ct. 2001 (1995); Hopwood v. Texas, 61 F. Supp. 551, 575 (W.D. Tex. 1994).

151. *See Croson*, 488 U.S. at 502-04 (revealing the City of Richmond did not use the appropriate applicant pool); *supra* note 100 (illustrating that the University of Maryland did not factor out competing variables when calculating the relevant applicant pool in *Podberesky*).

present effects actually flow from an institution's past discrimination is often an impossible feat when advancing a remedial interest.[152] Should a proponent pass the first hurdle of proving present discriminatory effects, he must pass the next one by proving causation. Using diversity as the compelling interest eliminates one of these hurdles.

Because the diversity interest is easier to prove, many affirmative action programs currently used at colleges and universities across the country could be upheld. This, of course, is assuming Justice Powell's "plus" rationale or some other means of implementing an affirmative action program is narrowly tailored.[153] The failure to prove narrow tailoring was fatal for the affirmative action programs in *Croson*,[154] *Podberesky*,[155] and *Hopwood*.[156] Although meeting the first prong of strict scrutiny may be easier with diversity as a compelling interest, the advocate of affirmative action would still have the difficult task of proving narrow tailoring.[157]

3. Diversity Limited to the Educational Context

Should the Supreme Court recognize diversity as a compelling interest, it should limit its use to the educational context. Being surrounded by different types of people inevitably exposes students to many kinds of diversities: diverse thought processes, economic backgrounds, religious upbringing, and cultural backgrounds. This exposure is informative, enlightening, and intellectually stimulating. *Brown* stated that an education is imperative for the success of all children today.[158] A child's education expands her mind and prepares the child to adjust to her environment. The underlying philosophy of education and diversity is the same—personal growth through exposure. Because education is unique, however, the compelling interest in diversity should be limited to that context.

Diversity should not justify the use of racial classifications in any context other than education because no other social institution has such a dramatic effect on one's life. To the extent that *Metro Broadcasting* finds diversity to be a compelling interest, it should be overruled. If there is a demand in society for diverse television and radio programming, then the market will provide it. If there is a demand for a diverse workplace, market forces will intervene and employers will promote diversity. "Increas[ing] the listening pleasure of media audiences,"[159] and increasing client bases by hiring minorities is not worth the cost of discriminating against individuals and violating their constitutional rights.

Additionally, limiting the diversity interest to the educational setting would eliminate fictitious assertions of a compelling interest in other contexts. Since satisfying strict scrutiny would be easier with diversity as a compelling interest,[160] the threat increases that proponents will assert diversity to mask their desire to prefer one race over another. Moreover, the chances that they will succeed increase. This contradicts the Court's

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152. *See Croson*, 488 U.S. at 502; *see also supra* text accompanying notes 97-98.

153. As stated earlier, most universities use some variation of this rationale in their affirmative action programs. *See supra* notes 111-14 and accompanying text.

154. *Croson*, 488 U.S. at 507-08.

155. *Podberesky*, 38 F.3d at 162.

156. *Hopwood*, 861 F. Supp. at 579.

157. *See supra* text accompanying notes 97-100.

158. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

159. Metro Broadcasting Inc. v. F.C.C., 497 U.S. 547, 632 (1978) (Kennedy, J., dissenting).

160. *See supra* part III.D.2.

objective in requiring strict scrutiny: "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool."[161] The test was designed to ensure that "there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."[162] Limiting the use of diversity to the educational context would limit the threat of its exploitation.

One criticism of advancing diversity, however, is that proportionality—that is, where the percentage of minorities at a university reflects the percentage of minorities in the population as a whole—does little to bridge the gap of qualifications between minorities and nonminorities. Shelby Steele states:

> Too often the result of [diversity] on campuses (for example) has been a democracy of colors rather than of people, an artificial diversity that gives the appearance of an educational parity between black and white students that has not been achieved in reality. . . . Racial representation is not the same thing as racial development, yet affirmative action fosters a confusion of these very different needs.[163]

In order to achieve educational parity between races, alternatives to affirmative action should be used and implemented early in the educational process.

4. The Plus Factor Rationale: Is It Valid?

Does giving an applicant a "plus" for being a member of a particular race or ethnic background really protect individuals from otherwise invalid racial discrimination? The answer depends on how big of a "plus" these applicants receive. Institutions could easily give enough weight to all minority candidates so that their overall score would be competitive with other students who were not members of the preferred race. For example, if the average academic discrepancy between minority and nonminority candidates was ten points, then a university could give minority applicants ten "pluses" to equalize the playing field. This is a subtle means of racial discrimination. It may not be as facially or immediately offensive as more blatant discrimination, such as quotas, but it has the same effect nonetheless.

Justice Powell anticipated that opponents of this "plus" factor rationale would make such a claim. He stated, however, that "good faith" on the university's part would be presumed. "[A] court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system."[164] Powell found no "facial infirmity" in a program that weighed all elements of an applicant—where race is but one—against the elements of another.[165]

The problem with this reasoning is that it contradicts the theory behind using strict scrutiny for racial classifications in the first place. In order to give a "plus" to a minority candidate, it is first necessary to classify people according to their race. However, according to *Bakke*, "[r]acial and ethnic distinctions of any sort are inherently suspect and

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

162. *Id.* In his dissent in *Metro-Broadcasting*, Justice Kennedy stated that "strict scrutiny is the surest test the Court has yet devised for holding true to the constitutional command of racial equality." *Metro-Broadcasting*, 497 U.S. at 634 (Kennedy, J., dissenting).

163. SHELBY STEELE, THE CONTENT OF OUR CHARACTER 115-16 (1990).

164. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978).

165. *Id.*

thus call for the most exacting judicial examination."[166] *Croson* identified "the most exacting judicial examination"[167] as strict scrutiny.[168] To simplify the point, strict scrutiny assumes bad faith;[169] in contrast, Justice Powell assumes good faith. Proponents of affirmative action have the burden of proving that the use of race was in furtherance of a compelling interest. Satisfaction of this step cannot just be simply assumed. It is crucial in justifying the use of this "highly suspect tool."[170] Justice Powell's "plus" factor rationale could easily camouflage a quota system, concealing the acceptance of a specific number of minority students behind an inordinately heavy "plus." Such a program does not necessarily protect individuals from invalid discrimination.

IV. ALTERNATIVE MEANS OF ACHIEVING AFFIRMATIVE ACTION GOALS IN HIGHER EDUCATION

Because of the inherent costs of affirmative action[171] and because of the controversy it provokes, programs which revamp existing affirmative action programs or race-neutral programs that achieve similar goals should be vigorously pursued. One way to revamp the current structure would be to draw the attention away from race and focus on socioeconomic disadvantage. In his concurring opinion in *Croson*, Justice Scalia suggested: "Since blacks have been disproportionately disadvantaged by racial discrimination, any *race-neutral remedial program aimed at the disadvantaged* as such will have a disproportionately beneficial impact on blacks."[172] The thrust of Justice Scalia's argument can be extended to encompass all disadvantaged minorities as well as disadvantaged whites. Dispensing benefits on the basis of disadvantage, rather than race, would alleviate much of the controversy surrounding affirmative action and would be "in accord with the letter and the spirit of our Constitution."[173]

In the context of higher education, all the effort, energy, and resources used to debate the validity of affirmative action should be redirected to developing the minds of disadvantaged children through enrichment programs, such as Head Start. Also, programs tailored solely to economic need rather than race, such as scholarships and financial aid, give the economically deprived student a chance at development, a chance to overcome a social handicap. "[P]referential treatment [based on race] does not teach skills, or educate, or instill motivation,"[174] but developmental programs do. Developmental programs, however, need to be implemented at the elementary and secondary school level. For example, in 1991, the city of Milwaukee pioneered a noteworthy voucher program whereby low-income public school students could qualify to have the state pay

166. *Id.* at 291; *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986).

167. *Wygant*, 476 U.S. at 273.

168. *Croson*, 488 U.S. at 493.

169. *Id.* (holding that strict scrutiny would be used for any racial classification because "determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics [is impossible]").

170. *Id.*

171. *See supra* part II.C.

172. *Croson*, 488 U.S. at 528 (Scalia, J., concurring) (emphasis added). Several authors have advanced this idea. *See* Steven A. Holmes, *Mulling the Idea of Affirmative Action for Poor Whites*, N.Y. TIMES, Aug. 18, 1991, § 4 (Week in Review), at 3; William Raspberry, *The Black Underclass—Two Strategies*, WASH. POST, Aug. 5, 1991, at A9; *see also* WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 121-24 (1987).

173. *Croson*, 488 U.S. at 528 (Scalia, J., concurring).

174. STEELE, *supra* note 163, at 121.

for private school education.[175] Children need to reap the benefits early in their educational career so that, at the higher levels, they can compete on the basis of merit alone. This would eliminate the stigma and self-doubting left from the residue of affirmative action.[176]

As for minority-based scholarships, the controversy they provoke far outweighs the benefits they provide. Of the 1.3 million minority students attending undergraduate universities, only four percent receive race-exclusive financial assistance.[177] The cost of phasing out these programs would be minimal, particularly if scholarship programs targeting the financially needy replace them. Economically disadvantaged minorities would automatically qualify for these scholarships, while those minorities who have never been economically disadvantaged—but are often the recipients of such benefits nevertheless—would not.

Admissions programs at institutions of higher learning could give an applicant a "plus" for economic disadvantage as opposed to race. A truly diverse student body, not one that is just proportionately representative,[178] could still be achieved if admissions committees give additional weight to other qualifications such as those spelled out by Justice Powell in *Bakke*. These qualifications include: "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage [and/or] ability to communicate with the poor."[179] Eliminating racial preference would alleviate the daunting task of proving to a court of law that the program is a narrowly tailored means of promoting a compelling interest.

If diversity is the educational institution's goal, it is not necessary to implement a complete ban on racial considerations. However, race should not be used as a proxy for diversity. While it is a reality "that people of different races and ethnicities often have different life experiences that affect their relations with members of other groups and influence their views,"[180] it is also true that commonalities exist between people of different races and ethnicities. In her article, *Multicultural Empowerment: It's Not Just Black and White Anymore*,[181] Deborah Ramirez encourages replacing race-based affirmative action measures with open-ended questions on admissions or scholarship applications. Rather than assuming a minority member has come from a disadvantaged background, the applicant could address the issue himself by answering the question: "Are you from a disadvantaged background or have you overcome significant obstacles in your life? If so, please explain."[182] This type of approach empowers the individual, not the courts or legislature, to determine whether race matters. Perhaps more importantly, it allows decisions to be made based on facts rather than stereotypes.

The emphasis on objective tests by admissions committees should also be eliminated. Standardized tests have been criticized for statistically preferring whites over blacks,[183]

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175. Nanette Asimov, *Lessons for California/ How Vouchers Work in Milwaukee*, S.F. CHRON., Sept. 27, 1993, at A1.

176. *See supra* part II.C.2.

177. Stokes, *supra* note 82, at 115-16.

178. *See supra* text accompanying notes 160-62.

179. *Bakke*, 438 U.S. at 317 (Powell, J.).

180. Brest & Oshige, *supra* note 145, at 862.

181. Ramirez, *supra* note 58.

182. *Id.* at 979.

183. *See* John Elson, *The Test That Everyone Fears: A Major Revision Shakes Up the All-Important SATs*, TIME, Nov. 12, 1990, at 93-94; Paul Glastris, *The Thin White Line: City Agencies Struggle To Mix Standardized Testing and Racial Balance*, U.S. NEWS & WORLD REP., Aug. 15, 1994, at 53-54; Noe J. Medina & Monty Neil, *Standardized Testing: Helpful?...or Harmful?*, PTA TODAY, Mar. 1989, at 28, 29-30.

and for having a built-in cultural bias.[184] Many university admissions programs use objective test scores as a major factor when deciding whom to admit and whom to reject.[185] It is an easy way quickly to reduce the number of applications for committee review.[186] Just as *Croson* held that administrative convenience could not justify using racial preferences, neither should administrative convenience be allowed to justify the use of standardized tests when they have been proven to prefer one race over another. The emphasis on these standardized tests should be greatly diminished, or alternatively, the test creators should reconstruct the exams to eliminate bias.

Curtailing affirmative action in higher education would change the status quo of admissions programs at most universities and colleges across the country. Phasing it out and implementing the suggested alternatives would be expensive both in terms of money and resources. It would take great patience. The advantages, however, would include students across America enrolled in university classes based solely on their merit and characteristics which allow them to excel.

CONCLUSION

On August 28, 1963, in front of a crowd of 200,000 people, a great American expressed his dream. He hoped that some day his four little children would "live in a nation where they will not be judged by the color of their skin but by the content of their character."[187] This is not just the dream of one man but of many people, a dream affirmative action fails to fulfill. Affirmative action provokes so much controversy that it is counterproductive, causing division between the races as opposed to cohesion among them. This division stems from the way the opposing sides of the issue—the group-rights theorists and the individual-rights theorists—interpret the fundamental precepts of the Fourteenth Amendment. Unless affirmative action is limited, the hopes and visions of this great American dream will never become a reality. The bitterness that affirmative action provokes in the majority and the stigma that it imposes on minorities will cause people continually to focus on race instead of on character. The Supreme Court's most recent decision to apply strict scrutiny to affirmative action cases outside the educational context will surely affect the race-based scholarship and admissions programs used by most colleges and universities. The precedent on educational affirmative action is old and unstable. Although diversity could arguably be deemed a compelling interest within the educational context, the means chosen to advance diversity are not narrowly tailored. The application of strict scrutiny threatens the affirmative action status quo at many universities. Alternative programs which do not draw racial or ethnic distinctions, do exist, however, and advance goals similar to affirmative action; they advance development and equality. The current debate surrounding this volatile issue suggests that these other methods should be explored.

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184. *See* Elson, *supra* note 183, at 93-94; Medina & Neil, *supra* note 183, at 28-30.

185. *See, e.g.*, Hopwood v. Texas, 861 F. Supp. 551, 557-63 (W.D. Tex. 1984) (describing the admissions process at the University of Texas Law School).

186. *See* Medina & Neil, *supra* note 183, at 30.

187. Martin Luther King, Jr., "I Have a Dream" (Aug. 28, 1963), *reprinted in* ADAM FAIRCLOUGH, MARTIN LUTHER KING, JR. 90 (1995).