

Pace University

DigitalCommons@Pace

---

Pace Law Faculty Publications

School of Law

---

1996

## Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century

Leslie Y. Garfield

*Elisabeth Haub School of Law at Pace University*

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [Education Law Commons](#)

---

### Recommended Citation

Leslie Yalof Garfield, Squaring Affirmative Action Admissions Policies with Federal Judicial Guidelines: A Model for the Twenty-First Century, 22 J.C. & U.L. 895 (1996), <http://digitalcommons.pace.edu/lawfaculty/878/>.

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact [dheller2@law.pace.edu](mailto:dheller2@law.pace.edu).

# SQUARING AFFIRMATIVE ACTION ADMISSIONS POLICIES WITH FEDERAL JUDICIAL GUIDELINES: A MODEL FOR THE TWENTY-FIRST CENTURY

LESLIE YALOF GARFIELD\*

## INTRODUCTION

The new debate over affirmative action threatens to severely curtail the steady increase in student diversity on campuses across the country. Beginning in 1964, when Congress enacted the Civil Rights Act,<sup>1</sup> schools of higher education, including law schools,<sup>2</sup> slowly adopted special admission policies in an attempt to assemble student bodies diverse in race and ethnicity. These policies generally permit admission committees to expand consideration of a candidate beyond the traditional objective admission criteria of grades and standardized test scores and to consider race, gender, ethnicity and past experience in admission decisions. Such "diversity admission policies"<sup>3</sup> yield classrooms with larger racial and ethnic populations than do admission programs that

---

\* Associate Professor of Law, Pace University School of Law. The author gratefully acknowledges the helpful comments of Professors Donald L. Doernberg, Bennett Gershman, Lissa Griffin, Kristine Knaplund, Stuart Madden, Michael Mushlin and Randolph Scott-McLaughlin and the research assistance of Debra Hope Willens and Stephen Berman.

1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 252, (codified at 42 U.S.C. § 2000d (1989)).

2. This article will discuss the conflict law schools face when attempting to square diversity admission policies with admission policies based on test score results and past academic performance. The scope of this article is limited to law school admissions because of the nature of the statistical analysis concerning performance on standardized "objective" tests like the Law School Admissions Test (LSAT). This article is similarly applicable to any educational selective admission program where admission based on standardized tests does not yield a diverse student body.

3. Courts, scholars and educators sometimes refer to diversity admission policies as affirmative action policies since such policies grant preferential treatment in a manner consistent with the goals of affirmative action programs. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978); *Hopwood v. Texas*, 861 F. Supp. 551 (W.D. Tex. 1994); Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1512 (1991); James E. Washburn, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115 (1994).

primarily consider objective test scores, since some minority students are less successful on standardized tests.<sup>4</sup>

Diversity admission policies are increasingly called into question as the nation evaluates race-based preference programs. Some define these programs and policies as preferential treatment, while others consider them the only viable means of supporting qualified minorities and women. Recently, two federal courts have struck down race-based preference programs at institutions of higher education,<sup>5</sup> and Senate Majority Leader Robert Dole announced his plan to eliminate preferential treatment for women and minorities.<sup>6</sup> At the same time, two federally funded commissions announced findings that women and minorities are continually under-represented in management areas and that college enrollment lags for minority applicants.<sup>7</sup>

The Supreme Court has articulated the constitutional criteria that race-based preference policies must satisfy under the Equal Protection Clause, but has not yet approved a diversity admission policy. Instead, the Court and several lower courts have rejected challenged diversity programs.<sup>8</sup> However, it is possible to construct a diversity admission policy that satisfies the equal protection criteria identified by the courts.

This article will highlight the legal limitations law schools confront when adopting diversity admission policies in light of the new judicial climate that disfavors considering non-traditional race criteria in the admission decision process. Part I highlights the difficulty law schools face when trying to admit a fully diverse class under the traditional

4. See *infra* notes 8-14 and accompanying text. Many scholars have criticized the LSAT as being culturally biased. See generally Mark Kelman, *Concepts of Discrimination in General Ability Job Testing*, 104 HARV. L. REV. 1158 (1991); Leslie Espinoza, *Empowerment and Achievement in Minority Law Student Support Programs: Constructing Affirmative Action*, 22 U. MICH. J.L. REF. 281 (1989); Portia Y.T. Hamlar, *Minority Tokenism in American Law Schools*, 26 HOW. L.J. 443 (1983); David M. White, *An Investigation into the Validity of Cultural Bias of the Law School Admissions Test*, in *TOWARDS A DIVERSIFIED LEGAL PROFESSION* 66, 81-93 (David M. White ed., 1981); Gary Peller, *Frontier of Legal Thought III: Race Consciousness*, 1990 DUKE L.J. 758 (1990); Thomas J. Ginger, *Affirmative Action: Answer for Law Schools*, 28 HOW. L.J. 701 (1985); John E. Morrison, *Colorblindness, Individuality, and Merit: An Analysis of the Rhetoric Against Affirmative Action*, 79 IOWA L. REV. 313 (1994); Stephanie Wildman, *Integration in the 1980s: the Dream of Diversity and the Cycle of Exclusion*, 64 TUL. L. REV. 1625 (1990).

5. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) (invalidating a race-based scholarship program tied to the admissions process); *Hopwood v. Texas*, 21 F.3d 603 (5th Cir. 1994) (invalidating a law school diversity admissions policy).

6. Edmund L. Andrews, *Courts Stall F.C.C. Program for Women and Minorities*, N.Y. TIMES, Mar. 16, 1995, at A22; Steven A. Holmes, *Programs Based on Sex and Race are Challenged*, N.Y. TIMES, Mar. 16, 1995, at A1, A22.

7. Peter T. Kilborn, *For Many in Work Force, "Glass Ceiling" Still Exists*, N.Y. TIMES, Mar. 16, 1995, at A22.

8. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978); *Podberesky v. Kirwan*, 956 F.2d 52 (4th Cir. 1992) [hereinafter *Podberesky I*]; *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994) [hereinafter *Podberesky II*]; *Hopwood v. Texas*, 861 F. Supp. 557 (W.D. Tex. 1994).

application process. Part II discusses the judicial response to voluntary diversity admission policies and other race-based preference policies and defines the appropriate standard for court review. Part III proposes a model diversity admission policy. Part IV analyzes this model policy under the Court's strict scrutiny test.

### I. THE NATURE OF THE PROBLEM

Conventional law school admission procedures rely heavily on an applicant's Law School Admissions Test (LSAT) and undergraduate grade point average (UGPA).<sup>9</sup> Statistics reveal that minority law applicants often do not perform as well on the LSAT as do their non-minority counterparts.<sup>10</sup> Thus, when law schools set an LSAT or UGPA

---

9. See Robert Kiltgaard, *Merit at the Right Tail: Education and Elite Law School Admissions*, 64 TEX. L. REV. 1493, 1505 (1986)(book review). All law schools accredited by the American Bar Association (ABA) are required to use the LSAT or a similar test in the admissions process. See ABA STANDARDS (1994). The LSAT is used by all accredited law schools as an admissions indicator. See Ginger, *supra* note 4, at 706.

Most law schools use an admissions index calculated by the Law School Admissions Service (LSAS), combining a student's LSAT score, UGPA and undergraduate ranking. See Ginger, *supra* note 4, at 704-05. Most law schools set a minimum index number below which non-minority students may not be admitted. The LSAT combined with the UGPA seems to be fairly predictive of Law School success. LSAC RESEARCH REPORT SERIES PREDICTIVE VALIDITY OF THE LSAT [hereinafter LSAC REPORT]. See also Hamlar, *supra* note 4, at 494 (LSAT increased school's ability to predict who would succeed in first year of law school). Although some criticize the LSAT, others contend that "the LSAT is a good predictor of the rate of completion of law Study." *Developments: Minority Attrition in Law School*, 37 J. LEGAL EDUC. 144 (1987).

At a minimum, law students with similar UGPAs and LSATs seem to perform in a similar academic range. LSAC REPORT, *supra* note 9. "The LSAT is used because it predicts first-year grades, and does so about as well for minority students as for whites." Ginger, *supra* note 4, at 706.

10. At most institutions, minority students present LSAT scores which rank below the majority students. Anthony Scanlon, *The History and Culture of Affirmative Action*, 1988 B.Y.U. L. REV. 343, 353 n.54 (1988). For example, in 1994, the average LSAT score of African American applicants was a 149 as compared to a 158 for Caucasian students. The average UGPA of African American students was 2.91 as against 3.25 for Caucasian students. Telephone Interview with Robert Carr, Director of Data Services, Law School Admissions Council (June 12, 1995). Moreover, Caucasians, as a group, comprised 86% of the applicants achieving a 160 or above on the LSAT while only 14% of all minorities achieved a 160 or above.

The average LSAT and UGPA of students registered in ABA law schools for 1988-89 and 1993-94 were:

range for admissible students, proportionally fewer minority candidates meet these standards than do their "majority" peers. These admission practices do not yield a diverse entering class.<sup>11</sup>

In response to the lack of diversity that an objective admissions standard yields, most law schools have established special admission policies to open the application process to minority students with less competitive LSATs or UGPAs.<sup>12</sup> The practice has been to deviate from the standard LSAT/UGPA formula and to consider race, ethnic heritage or national origin as an additional criterion for admission.<sup>13</sup> This has

Ethnic Classification	Number of Applicants '88-89 / '93-94		LSAT '88-89/'93-94		UGPA '88-89/'93-94	
American Indian	198	320	31.1	154	3.00	3.09
African American/Black	2,433	3432	28.1	149	2.82	2.94
Caucasian/White	35,108	33,174	35.9	158	3.19	3.25
Chicano/Mexican American	444	710	31.6	154	2.99	3.09
Hispanic	1,030	1357	32.3	154	3.06	3.13
Pacific Islander/Asian	1,445	2618	35.0	157	3.17	3.24
Puerto Rican	212	591	30.9	148	3.00	3.14

LAW SERVICES MINORITY DATA BOOK 47, Table V-I (Law School Admissions Services Inc., 1990); Telephone Interview with Robert Carr, Director of Data Services, Law School Admissions Council (June 12, 1995). Compare sources cited, *supra* note 4.

11. See *infra* notes 153-56 and accompanying text.

12. Law schools have created affirmative action admission policies since 1968. Scanlon, *supra* note 10, at 363. See *United States v. Fordice*, 505 U.S. 717, 112 S. Ct. 2727 (1992) (noting that although Title VI requires higher educational institutions to remedy prior segregation regarding admissions policies, hiring decisions remedial programs and special recruitment, it is the admissions policies that really help to diversify).

13. See Henry Ramsey, *Affirmative Action at American Bar Association Approved Law Schools: 1979-1980*, 30 J. LEGAL EDUC. 377, 411-12 (1980); Ann Kornhauser, *Success Breeds Tension; Georgetown a Pioneer in Minority Recruitment*, LEGAL TIMES p.10 (Apr. 22, 1991)(highlighting Georgetown University's decision to consider more than UGPAs and test scores in admitting students and the school's affirmative action program). In response to concerns regarding fairness, schools are experimenting with new ways to achieve diversity among their students. The University of California at Berkeley has developed a socioeconomic approach that places more emphasis on class than race. Stanford University gives special consideration to minority applicants once basic academic and personal achievement requirements have been met, as well as to athletes and children of alumni, faculty and staff.

A different standard in college athletics now has become accepted. In 1981 when Patrick Ewing, a seven foot basketball center, was admitted to Georgetown University, no significant protest resulted over the possibility he was taking another more qualified student's spot. Georgetown admitted Ewing despite an acknowledged reading and writing problem and stipulated that daily tutoring, including reading, explaining of material, and assistance in writing and proofreading papers be provided. David S. Broder, *Is this Affirmative Action?*, WASH. POST, Mar. 8, 1981, at C7 (Op-ed).

stimulated judicial and administrative challenges by non-minority applicants to whom law schools have denied admission.<sup>14</sup>

As long as schools place primary importance on objective criteria standards for admission, they will be unable to diversify their entering classes. Furthermore, diversity admission policies potentially violate Equal Protection. The challenge for law schools is to construct a policy that meets the goals of diversity without violating the rights of others. Legislators' recent efforts to abolish affirmative action policies threaten law schools' ability to satisfactorily diversify the classroom.<sup>15</sup>

## II. JUDICIAL REVIEW

### A. The Supreme Court's Review of a Diversity Admission Policy: *Regents of the University of California v. Bakke*<sup>16</sup>

Law school diversity admission policies are challenged under the Equal Protection Clause on the grounds that the policies grant prefer-

14. See *Hopwood v. Texas*, 861 F. Supp. 557 (W.D. Tex. 1994). See also *infra* text accompanying notes 132-41; Office of Civil Rights Letters of Findings, Case No. 01-93-2005 (1993)(non-minority applicant unsuccessfully challenged University of Connecticut Law School's voluntary diversity admission policy); Office of Civil Rights Letters of Findings, Case No. 01-92-2083 (1992)(Asian students unsuccessfully challenged Massachusetts Institute of Technology admission policy as discriminatory for setting minority goals that excluded Asian students where Asian students were most populous group of admitted students).

15. See Jeff Leads, *Jackson Urges Students To Back Affirmative Action*, L.A. TIMES, June 10, 1995, at B1; Abigail Thernstrom, *A Class Backwards Idea: Why Affirmative Action For the Needy Won't Work*, THE WASH. POST, June 11, 1995, at C01. One state has taken non-legislative action towards abolishing affirmative action. On July 20, 1995, the University of California Board of Regents adopted two resolutions that have the potential to change the future of the University of California school system. In response to California Governor Pete Wilson's call to eliminate affirmative action in education, the Board of Regents voted on resolutions entitled "Policies Ensuring Equal Treatment" in relation to admissions to University of California schools and the University's employment and contracting practices. Cal. Bd. of Regents Res. SP-1 & SP-2 (July 20, 1995).

Resolution SP-1 prohibits the University of California from "using race, sex, color, ethnicity or national origin as criteria for admission to the University or to any program of study" after January 1, 1997. Cal. Bd. of Regents Res. SP-1, § 2 (July 20, 1995). Furthermore, not more than 75% or less than 50% of any entering class shall be admitted based solely on grades. *Id.* § 5. The Board of Regents may consider economic disadvantage or other anti-social influences against an individual. *Id.* § 4. The resolution passed by a vote of 14 in favor, 10 against and 1 abstention.

Resolution SP-2 mandates that as of January 1, 1996, race, color, sex, ethnicity, and national origin can no longer be used as criteria in employment and contracting practices. *Policy Ensuring Equal Treatment—Employment and Contracting*, Cal. Bd. of Regents Res. SP-2 (July 20, 1995). The resolution passed 15 in favor, 10 against. *Id.*

The University of California School system is the first in the nation to take such steps towards revamping affirmative action programs. See Amy Wallace & Dave Leshner, *UC Regents, in Historic Vote, Wipe Out Affirmative Action Diversity*, L.A. TIMES, July 21, 1995, at A1. Commentors speculate that enforcement of the resolutions will drastically decrease the number of Black and Latino students at the Universities. *Id.* Conversely, the Asian student population will rise. *Id.*

16. 438 U.S. 265, 98 S. Ct. 2733 (1978).

ential treatment to some applicants. The Court has formulated equal protection tests that vary depending on the particular class of persons to which the challenged program allegedly grants preferential treatment.<sup>17</sup> Where a policy grants benefits to a particular group based on race, it is inherently suspect and is therefore subject to strict scrutiny.<sup>18</sup> Such was the case in *Regents of the University of California v. Bakke* where a plurality of Justices found the need to consider the Davis medical school admission policy under the "strictest scrutiny" since it provided a quota for minority applicants.

Allen Bakke, a white male, unsuccessfully applied for admission to University of California at Davis (Davis) Medical School in 1973 and in 1974.<sup>19</sup> He challenged the school's 1973 admission policy, adopted

17. The Court has adopted three levels for reviewing equal protection challenges: a rational basis or rational relationship standard, an intermediate standard, and a strict scrutiny standard. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* (4th ed. 1991).

Under the rational basis standard, the Court must determine that government action has a rational relationship to a legitimate interest of government. The Court uses this standard to review a government classification under the equal protection guarantee when that classification is related to welfare benefits, property use, or business or personal activity that does not involve a fundamental constitutional right, suspect classification, or the characteristics of alienage, sex, or legitimacy. See *Cleland v. National College of Business*, 435 U.S. 213, 98 S. Ct. 1024 (1978) (considering restrictions on educational benefits of veterans); *Lyng v. Castillo*, 477 U.S. 635, 106 S. Ct. 2727 (1986) (considering eligibility restrictions of Food Stamp Benefits); *Hodel v. Indiana*, 452 U.S. 314, 101 S. Ct. 2376 (1981) (considering the restriction of private property use under the Federal Surface Mining and Reclamation Act); *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S. Ct. 2207 (1978) (considering state control of retail gasoline price).

A reviewing court will uphold a challenge under the intermediate standard of review if it finds that the classification bears a substantial relationship to an important interest of government. The court will use the intermediate standard when reviewing gender and illegitimacy cases. See *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971) (considering gender preference in Idaho probate statute); *Clark v. Jeter*, 486 U.S. 456, 108 S. Ct. 1910, 1914 (1988) (considering paternity action on behalf of an illegitimate child). Prior to *Adarand v. Peña*, 115 S. Ct. 2097 (1995), courts used this standard in reviewing federal racial affirmative action cases. See *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S. Ct. 2997 (1990) (considering a minority preference policy in awarding new licenses).

The Court now uses the strict scrutiny standard to review government classifications based on race or national origin. See *Adarand*, 115 S. Ct. 2097 (considering a federal minority business preference program); *City of Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 706 (1989) (considering local government ordinance granting preference for city contract awards based on race).

18. See *Adarand*, 115 S. Ct. 2097; *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978). See also *infra* text accompanying notes 52-82.

19. *Bakke*, 438 U.S. at 276, 98 S. Ct. at 2741. In 1973, Mr. Bakke received a benchmark score of 468/500, but his application was late, and after his application was completed, no applicants in the general admission pool were admitted with a score below 470/500. At that time four seats in the special admission program were open, although Mr. Bakke was not considered for these seats. *Id.* at 276, 98 S. Ct. at 2741. Mr. Bakke wrote to the Associate Dean and Chairman of the Admissions Committee, Dr. George H. Lowrey, to

in an effort to diversify its entering class, on the grounds that it operated to exclude him from the school on the basis of his race. Bakke challenged the policy as violative of the Equal Protection Clause,<sup>20</sup> the California Constitution,<sup>21</sup> and Title VI of the Civil Rights Act of 1964 (Title VI).<sup>22</sup> Davis' admission policy divided applicants into two groups. One group was comprised of non-minority applicants who had achieved a minimum 2.5 UGPA, while the other group contained all minority applicants.<sup>23</sup> The school set aside a certain number of seats for applicants in each of the groups.<sup>24</sup> Individuals from the general applicant

---

protest the admissions quotas. In 1974, Mr. Bakke applied early and received high marks from a student interviewer, but received low marks from the faculty interviewer who, coincidentally, was Dr. Lowrey. Dr. Lowery gave him his lowest score of 86, making his total score 549/600. (There was one additional interviewer in 1974, so the total score was 600, as opposed to 500 in 1973.). Under the special admission program, applicants were admitted with significantly lower credentials than Mr. Bakke. *Id.* at 277, 98 S. Ct. at 2741.

20. U.S. CONST. amend. XIV, § 1, reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

21. CAL. CONST. art. I, § 7, reads:

No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.

22. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1989), reads:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

23. *Bakke*, 438 U.S. at 274-75, 98 S. Ct. at 2739-40. Each applicant in the non-minority group was evaluated on the basis of his or her UGPA, MCAT score and observations made during a personal interview conducted by a member of the Admissions Committee. The Committee automatically rejected non-minority applicants whose UGPA fell below 2.5. In contrast, the committee referred minority student applications to a Special Admissions Committee comprised mainly of members of minority groups. This Committee rated minority applicants in a manner similar to the applicants in the general applicant pool, except that a 2.5 UGPA did not serve as a ground for summary rejection. Thus, all minority applicants were considered for admission by the Special Admissions Committee, regardless of their UGPA. *Id.*

With the exception of the minimum UGPA for non-minorities, students were evaluated for admissions based on the same general criteria. However, each of the two Admissions Committees operated in a vacuum and did not compare its applicants to the other applicant group. The Special Admissions Committee did not rate or compare minority applicants to the non-minority applicants but could accept or reject applicants based on failure to meet course requirements or other specific deficiencies. The Special Admissions Committee continued to recommend applicants until the number set by faculty vote were admitted. *Id.* at 273-75, 98 S. Ct. at 2739-40.

24. *Id.* at 275, 98 S. Ct. at 2740. In 1968, when the overall class size was 50, the faculty set aside eight seats for minorities. In 1971, the overall class size was expanded to 100, and in 1973, the number of seats set aside for minorities was expanded to sixteen. *Id.*



pool could not fill seats from the minority applicant pool, even if seats were available.<sup>25</sup>

When Davis rejected Bakke in 1973, four seats reserved for applicants from the minority pool were unfilled while the seats for the general admission pool were filled.<sup>26</sup> Davis rejected Bakke again in 1974 although the school accepted minority applicants with lower test scores.<sup>27</sup> Following the second rejection, Allen Bakke sued Davis and the Regents of the University of California in state court.<sup>28</sup>

The trial court found that Davis' admission policy was a racial quota and held that it violated the California and United States Constitutions, as well as Title VI.<sup>29</sup> The California Supreme Court affirmed. Applying strict scrutiny, it concluded that the program violated the Equal Protection Clause because it was not the least intrusive means of achieving the school's compelling goals. The court further found that the program did not pass state constitutional scrutiny or the Title VI challenge.<sup>30</sup> A majority of the court concluded that an entity is prohibited from considering race in programs that use government funds.<sup>31</sup> Thus, the court ordered Davis to admit Bakke into its medical school. Upon the state's appeal, the Supreme Court granted certiorari.<sup>32</sup>

The Supreme Court, considering both the Equal Protection Clause and Title VI, affirmed the California Supreme Court's decision.<sup>33</sup> However, the Court was sharply divided. Justices Brennan, White, Marshall and Blackmun concluded that Title VI permits federally funded entities to enact programs or policies that assist minority groups to gain equal access to programs more easily available to Caucasians.<sup>34</sup> However, Title

25. *Id.* at 272-76, 98 S. Ct. at 2738-40.

26. *Id.*

27. *Id.* at 277, 98 S. Ct. at 2741.

28. Bakke sued for mandatory injunctive and declaratory relief. *Id.* at 277, 98 S. Ct. at 2741-42.

29. *Id.* In reaching its conclusion, the trial court emphasized that minority applicants in the program were rated only against one another and that 16 places out of the class of 100 were reserved exclusively for minorities. *Id.* at 278-79, 98 S. Ct. at 2742.

30. *Bakke v. Regents of the Univ. of Cal.*, 553 P.2d 1152 (1976). The California Supreme Court ordered UC-Davis to admit Mr. Bakke to the Medical School, since the school was unable to demonstrate that the plaintiff would not have been admitted in the absence of the challenged program. *Id.* at 1172.

31. *Bakke*, 438 U.S. at 299, 98 S. Ct. at 2753.

32. *Id.* at 281, 98 S. Ct. at 2743.

33. *Bakke* at 271, 98 S. Ct. at 2738. A majority of the Supreme Court agreed that Davis must admit Bakke. At the Supreme Court level, UC Davis maintained that there was no private right of action under Title VI. *Id.* at 282, 98 S. Ct. at 2744. However, although the Court reached its decision based on the Equal Protection argument, it still recognized that a private right of action might exist under Title VI. Because the issue was not argued or decided below, the Court chose not to address "this difficult issue." *Id.* at 283, 98 S. Ct. at 2745. The Court also did not address the issue of whether private plaintiffs under Title VI must exhaust administrative remedies prior to bringing legal action. *Id.* at 283-84, 98 S. Ct. at 2745.

34. *Id.* at 325, 98 S. Ct. at 2766.

VI and the Civil Rights Act do not take precedence over the Constitutional protection of the Equal Rights Clause and thus such programs or policies are valid only to the extent that they are coterminous with the Fourteenth Amendment.<sup>35</sup>

Justice Powell, writing for the majority, acknowledged the need to ensure that Title VI programs do not violate the rights of Caucasians, but found that the Davis program violated the Equal Protection Clause.<sup>36</sup> Chief Justice Burger, and Justices Stevens, Stewart and Rehnquist joined in his conclusion that the program was invalid. Chief Justice Burger, and Justices Stevens, Stewart and Rehnquist, however, did not consider the constitutional issue since they concluded that the program violated Title VI.<sup>37</sup> Thus Justice Powell cast the "swing" vote and wrote the plurality opinion.

The proper standard of review for the Davis program was of significant concern to the five Justices who considered the program on constitutional grounds. Those Justices concluded that the Davis policy included "a classification based on race and ethnic background" because the policy permitted the Davis admission committee to treat applicants differently based on race.<sup>38</sup> Justice Powell's opinion pointed out that programs or policies with "benign"<sup>39</sup> racial classifications are only permissible if they withstand the Court's exacting scrutiny.<sup>40</sup> Thus, he would have permitted the Davis admission policy if it were "precisely tailored to serve a compelling governmental interest."<sup>41</sup>

---

35. *Id.* The Justices would have found that the Davis program did not violate the Equal Protection Clause. *Id.*

36. *Id.* at 320, 98 S. Ct. at 2763.

37. See generally *id.* at 408-22, 98 S. Ct. at 2808-14.

38. *Id.* at 289, 98 S. Ct. at 2747.

39. The Court has written that "benign carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens based on race is reasonable" to correct for general discrimination. *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 564-65, 610, 110 S. Ct. 2997, 3008-09, 3033 (1990). For an in-depth discussion of benign racial classifications, see Roy L. Brooks, *The Affirmative Action Issue: Law, Policy, Morality*, 22 U. CONN. L. REV. 323 (1990).

40. *Bakke*, 438 U.S. at 290, 98 S. Ct. at 2748. The Petitioners argued that the affirmative action admissions policy should not be subject to strict scrutiny since it was challenged by a white male and not by a member of a historically discriminated class of people. Justice Powell disagreed with this theory, recognizing that although the laws of discrimination are founded on a "two-class" theory of Black and White Americans, the Equal Protection Clause assures all persons the protection of equal laws regardless of the status of their particular racial or ethnic group. *Id.* at 294-95, 98 S. Ct. at 2750-57. See *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070-71 (1886). In their concurrence, Justices Brennan, White, Marshall and Blackmun agreed with Justice Powell, adding that the affirmative action admission policy did not mandate strict scrutiny but that such a program is permissible if the court finds "(1) that there has been some form of discrimination against the preferred minority groups by society at large and (2) that there is no reason to believe that the disparate impact sought to be rectified by the program is the product of such discrimination." *Bakke*, 438 U.S. at 365-69, 98 S. Ct. at 2786-88.

41. *Bakke*, 438 U.S. at 299, 98 S. Ct. at 2753. Justice Powell also wrote that "in

Justice Powell found a compelling governmental interest existed in attaining a diverse student body.<sup>42</sup> A diverse student body contributing to a robust exchange of ideas is a constitutionally permissible goal on which a race-conscious university admissions program may be predicated.<sup>43</sup> However, although the Constitution does not bar admission policies from introducing race as a factor in the selection process, Powell wrote that preferring members of any one group for no reason other than race or ethnic origin is discrimination on its own.<sup>44</sup> The Davis admission policy, which set aside a specific number of seats for students in identified minority groups, unfairly benefited the interest of a victimized group at the expense of other innocent individuals, and therefore, violated the Equal Protection Clause.<sup>45</sup> Additionally, its practice of having separate admissions sub-committees review minority and non-minority candidates inappropriately insulated applicants from com-

---

order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.* at 305, 98 S. Ct. at 2756 (quoting *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2854-55 (1973)). See also *Loving v. Virginia*, 388 U.S. 1, 11, 87 S. Ct. 1817, 1823 (1967); *McGlaughlin v. Florida*, 379 U.S. 196, 85 S. Ct. 283, 290-91 (1964).

42. Attainment of a diverse student body is related to academic freedom. *Bakke*, 438 U.S. at 311-12, 98 S. Ct. at 2759-60.

43. *Id.* at 311-12, 98 S. Ct. at 2759-60. Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Id.* at 313, 98 S. Ct. at 2762.

44. *Id.* at 307, 98 S. Ct. at 2757 ("We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations.").

Title VI clearly establishes that where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by federally funded institutions, race conscious action is required to accomplish the remedial objectives of Title VI. *Id.* at 307-09, 98 S. Ct. at 2757-58. Justices Brennan, White, Marshall, and Blackmun agreed with this, stating that "[Title VI] does not bar the preferential treatment of racial minorities as a means of remedying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment." *Id.* at 328, 98 S. Ct. at 2767.

45. *Id.* at 307, 98 S. Ct. at 2757. Justice Powell upheld the California Supreme Court's decision that the special admissions program was unlawful, and that Mr. Bakke was to be admitted to Medical School, but reversed the decision enjoining the Medical School from considering race in admissions. *Id.* at 325, 98 S. Ct. at 2766. Chief Justice Burger, and Justices Stewart, Rehnquist, and Stevens, in a concurring opinion, agreed that the policy was unlawful because it unfairly favored one group over another. *Id.* Justices Brennan, White, Marshall, and Blackmun concurred in the holding and dissented in part, as they did not believe that Allen Bakke should be admitted to the Medical School or that quotas should be maintained. *Id.* at 379, 98 S. Ct. at 2793. They joined in Parts I and V-C, and White joined in part III-A. *Id.* at 328, 98 S. Ct. at 2767. Along with Justice Powell, Justices Brennan, White, Marshall, and Blackmun upheld the use of race in the admissions process, while Justices Burger, Stevens, Rehnquist, and Stewart considered the issue irrelevant to this case. See RON SIMMONS, *AFFIRMATIVE ACTION: CONFLICT AND CHANGE IN HIGHER EDUCATION AFTER Bakke* 1-2 (1982).

parison against the entire admissions pool.<sup>46</sup> For these reasons, Justice Powell concluded that the Davis admissions policy violated the Equal Protection Clause and therefore was constitutionally impermissible.

Justice Powell's opinion did not preclude schools from considering race as a factor in instances where a program is free from clear racial preference or goals. Race or ethnic background may be considered a "plus" in the admissions process.<sup>47</sup> Thus, although Powell invalidated the program, his opinion makes clear that he would not necessarily invalidate all affirmative action admission programs.<sup>48</sup>

Although the Court invalidated the Davis admission policy, a majority of the Court agreed that there are certain instances where race-based preference policies or affirmative action policies are permissible. Justices Brennan, White, Blackmun and Marshall agreed with Justice Powell that there is a compelling interest in ameliorating or eliminating, where feasible, the disabling effects of identifiable discrimination.<sup>49</sup> Encouraging diversity in the student population is a compelling interest that is sometimes permissible even if such action results in unequal treatment.<sup>50</sup> The Court reasoned that the non-minority student would greatly benefit, and his or her educational training would be enhanced, by having the opportunity to learn, study and discuss academic informa-

---

46. *Bakke*, 438 U.S. at 315, 98 S. Ct. at 2761.

47. *Id.* at 317, 98 S. Ct. at 2762. For example, assume two applicants, one minority and one non-minority, have the same UGPA and MCAT scores. Under Justice Powell's opinion, an admissions committee can offer admission to the minority applicant before it offers admission to the non-minority applicant since a diversity viewpoint "plus" UGPA and MCAT score is of more value to the school than a non-diversity viewpoint and the same "objective" test scores.

48. Justices Brennan, White, Marshall and Blackmun agreed with Justice Powell that the State has a legitimate interest in an admission program that includes the competitive consideration of race and ethnic origin. The Justices disagreed with Justice Powell's conclusion and held that the Davis policy survived strict scrutiny. Thus, according to the dissenters, there are certain instances where federally funded entities can enact race-based programs. Davis' purpose of "remedying the effects of societal discrimination . . . where there is a sound basis for concluding that minority under-representation [in the medical profession] is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School" is a sufficient compelling governmental interest. *Id.* at 362, 98 S. Ct. at 2784. Justice Brennan wrote that "no decision of this court has ever adopted the proposition that the Constitution must be colorblind." *Id.* at 336, 98 S. Ct. at 2771. In his opinion, Congress would not have adopted the Civil Rights Act, which encourages the elimination of discrimination, while at the same time "forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations." *Id.* The Court has held that under certain circumstances the remedial use of racial criteria is not only permissible but is required to eradicate constitutional violations. See *Board of Educ. v. Swann*, 402 U.S. 43, 91 S. Ct. 1284 (1971)(invalidating a statute forbidding the assignment of students to school on the basis of race because it would hinder the implementation of remedies necessary to accomplish desegregation in the school).

49. *Bakke*, 438 U.S. at 325, 98 S. Ct. at 2766.

50. *Id.* at 307, 98 S. Ct. at 2757.

tion with students from diverse backgrounds.<sup>51</sup> However, while race-based programs are sometimes permissible, a majority of the Court held that specific goals or quotas are always impermissible to achieve diversity or to dismantle past discrimination.<sup>52</sup>

*Bakke* gave some guidance to educational institutions aiming to dismantle the effects of discrimination.<sup>53</sup> A majority of the Court recognized the University's right to select students who would best contribute to the "robust exchange of ideas."<sup>54</sup> In this light, the Court viewed the Davis admission policy as seeking to achieve a goal that is of paramount importance to the fulfillment of its mission and, in fact, as serving an important governmental interest.<sup>55</sup> However, ethnic diversity is only one element in a range of factors a university may properly consider in attaining the goal of a heterogeneous student body.<sup>56</sup>

### B. The Supreme Court's Current Strict Scrutiny Test

Since *Bakke*, the Court has not reconsidered the constitutional validity or the appropriate level of review for race-based admission policies.<sup>57</sup>

51. *Id.* Students with pro-civil rights voices are silenced by professors who speak to the contrary and do not call on them. Students need to hear in the classroom about "law in everyday terms and fit to human needs" and not about "law insulated from cultural and intellectual diversity, and law focused on cumbersome sieges to the Constitution rather than on personal accountability and responsible, legal administration." Dennis Graham Combs, *Preachers of the Bar*, N.Y. TIMES, June 13, 1993, at E19.

52. *Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978).

53. *Id.* at 316-17, 98 S. Ct. at 2761-62. "[T]he attainment of a diverse student body . . . is a constitutionally permissible attainable goal for an institution of higher education." *Id.* at 311-12, 98 S. Ct. at 2759.

54. *Id.* at 313, 98 S. Ct. at 2760.

55. *Id.*

56. *Id.* at 314, 98 S. Ct. at 2760. The Court acknowledged that the importance of diversity may be greater at the undergraduate level than at the medical school level, where the focus is on "professional competency," but concluded that the "contribution of diversity is substantial" even at this level, because doctors provide services to a "heterogeneous population." *Bakke*, 438 U.S. at 313-14, 98 S. Ct. at 2760. The Court also noted that while law schools focus on gaining legal skills and knowledge, this focus "cannot be effective in isolation from the individuals and institutions with which the law interacts . . ." *Id.* at 314 (quoting *Sweatt v. Painter*, 339 U.S. 629, 634, 70 S. Ct. 848, 850 (1950)).

57. Since *Bakke*, courts rarely have heard challenges against schools claiming that an affirmative action admission policy violated Title VI and the Equal Protection Clause. A plaintiff did not have standing unless he or she could prove actual harm. The Court recently relaxed the standing requirement. In *Northeastern Florida Chapter of the Associated Gen. Contractors of America v. City of Jacksonville*, 113 S. Ct. 2297 (1993), the Court determined whether a Jacksonville program requiring that ten percent of all construction contracts go to Minority Business Enterprises was constitutional. The challenge was brought by the Northeastern Florida Chapter of the Associated General Contractors of America (Northeastern). The City of Jacksonville argued that Northeastern did not have standing, as it could not show actual harm. The Court held that in cases where members of one group were made to have a more difficult time obtaining benefits, the members of that group did not have to show an injury in fact. Instead, in order to prove

However, through a series of cases considering the validity of race-based preference programs in the employment context, the Court has articulated a clear definition of strict scrutiny. The current test has evolved from *Bakke*, which held that a race-preference program survives strict scrutiny if it is "precisely tailored to serve a compelling interest,"<sup>58</sup> to the present day test of evaluating whether the program is narrowly tailored to achieve a compelling governmental interest.<sup>59</sup>

In 1987, the Court more clearly articulated the strict scrutiny test for race-based programs in the workplace in *United States v. Paradise*.<sup>60</sup> *Paradise* considered the constitutionality of a one-black-to-one-white promotion plan that the Alabama Department of Public Safety adopted pursuant to a district court consent decree. The consent decree required the Department of Public Safety to institute this plan as an interim measure to ensure the promotion of black state troopers.<sup>61</sup> The plan followed years of court battles and ineffective consent decrees in response to the Department's "systematic and perpetual" discrimination against black state troopers.<sup>62</sup> Appellants challenged the consent decree, claiming the plan granted preferential treatment to Black state troopers, thereby violating the Equal Protection Clause.<sup>63</sup>

Since its mandate to promote some state troopers based on race was a race-preference policy, the Court applied a strict scrutiny standard.<sup>64</sup> The Court would uphold the decree only if it was "narrowly tailored to achieve a compelling governmental interest."<sup>65</sup>

---

standing, the group only had to demonstrate that it had difficulty in obtaining the benefit. Such a showing was enough to demonstrate a prima facie case of denial of equal treatment. *Id.* at 2302.

58. *Bakke*, 438 U.S. at 299, 98 S. Ct. at 2753. See also *supra* note 41.

59. See *City of Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 706 (1989); *Adarand v. Peña*, 115 S. Ct. 2097 (1995); and text accompanying notes 72-75.

60. 480 U.S. 149, 107 S. Ct. 1053 (1987).

61. *Id.*, 107 S. Ct. at 1055.

62. *Id.* at 153, 107 S. Ct. at 1057. In 1972, the district court issued an order imposing a hiring freeze and ordering the Department to refrain from engaging in discriminatory employment practices, including promotions. Seven years after the initial decree, the court found that the Department had still not implemented a plan to increase minority candidate promotions. Thus, the court approved a second consent decree in which the parties agreed that the Department would administer a promotions exam to all applicants. Promotions would be granted based on performance on the exam. However, African American candidates performed disproportionately more poorly on the exam, and when the Department announced a need to promote fifteen new candidates, none of the African American candidates had performed well enough to be eligible for promotion. *Id.* at 163, 107 S. Ct. at 1062. The United States objected to using the test for promotions and in 1983, the district court ruled that the test had an adverse impact on African Americans. The district court subsequently ordered that, for a period of time, at least 50% of those promoted must be African American. The United States appealed the court's order on the ground that it violated the Equal Protection Clause. The court of appeals affirmed the order and the United States appealed to the Supreme Court. *Id.* at 149, 107 S. Ct. at 1053.

63. *Id.* at 150, 107 S. Ct. at 1055.

64. *Id.* at 167, 107 S. Ct. at 1064.

65. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S. Ct. 1842 (1976). In

*Paradise* clearly articulated the narrowly tailored element of the strict scrutiny test. The Justices unanimously concluded that the appropriate considerations for finding whether a race-based program was narrowly tailored included: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship between the numerical goals and the relevant labor market; and (4) the impact of the relief on the rights of third parties.<sup>66</sup>

The Justices agreed that the circumstances preceding the need for the consent decree, and the lower court's decision to issue the decree, sufficiently demonstrated a compelling governmental interest in remedying past and present discrimination by a state actor.<sup>67</sup> Justice Brennan, with whom Justices Marshall, Blackmun and Powell joined, concluded that even under a strict scrutiny analysis, the one-black-to-one-white promotion requirement was permissible under the Equal Protection Clause.<sup>68</sup> Justice Powell, joined by Justice Stevens, concurred. These five Justices found that the one-black-to-one-white hiring program was narrowly tailored to achieve the goal of remedying proven discrimination.<sup>69</sup>

*Paradise* gave courts clear guidelines for evaluating race-based programs. However, the Court's conclusion that since the program survived strict scrutiny, there was no need to consider the appropriate level of Equal Protection review,<sup>70</sup> left open the question of whether strict scrutiny is always appropriate for race-based preference programs. When read together with *Bakke*, it seemed that the strict scrutiny test was

---

Wygant, Justice Powell, in an opinion joined by Chief Justice Burger and Justices Rehnquist and O'Connor, referred to his language in *Bakke* to enunciate the present strict scrutiny test. The Court considered a collective bargaining agreement between the Board of Education and a teachers' union that provided for layoffs by seniority where the percentage of minorities laid off would exceed the percentage of minorities employed at the time. The Board of Education justified this race-based policy on the need for diverse role models for its students. Justice Powell wrote that where race-based programs are concerned, the racial classification must be justified by "a compelling state purpose and the means chosen by the state to effectuate that purpose must be narrowly tailored." *Id.* at 285, 106 S. Ct. at 1852.

66. *Paradise*, 480 U.S. at 171, 107 S. Ct. at 1066.

67. The Court upheld the district court's order by a 5-4 margin and there was no majority opinion. Justice Brennan was joined by Justices Marshall, Blackmun and Powell in a plurality opinion. Powell concurred in the judgment, but concluded that the Court should not institute judicial remedies for proven *de jure* discrimination. However, he found that the Supreme Court's school desegregation cases established the principle that lower courts have a reasonable degree of flexibility in fashioning remedies for proven government discrimination. The Justices also agreed that the program could be upheld if it was narrowly tailored to meet that interest. *Id.* at 185, 107 S. Ct. at 1073.

68. *Id.* at 186, 107 S. Ct. at 1074. Stevens agreed with the result. The Court found that the race-conscious relief ordered by the district court was justified by a compelling governmental interest in eradicating the Department's pervasive, systematic and obstinate discriminatory exclusion of Blacks. *Id.* at 166-70, 107 S. Ct. at 1063-66.

69. *Id.* at 186, 106 S. Ct. at 1074.

70. *Id.* at 166-67, 106 S. Ct. at 1063-64.

appropriate when reviewing benign discrimination race-preference programs of state and local government. The Court clarified this uncertainty in 1989 in *City of Richmond v. J.A. Croson Company*,<sup>71</sup> which mandated the use of the strict scrutiny test for state and local government race-based affirmative action policies.<sup>72</sup>

In *Croson*, the Court reviewed a plan that required a primary city contractor to award 30% of the amount of its contract to minority business enterprises (MBEs), defined as subcontractor businesses owned by members of certain minority groups.<sup>73</sup> *Croson*, a non-minority contractor, challenged the program as violative of Equal Protection.<sup>74</sup> Justice O'Connor wrote that a state or local affirmative action admission policy is subject to strict scrutiny.<sup>75</sup> Justices Rehnquist, White, Kennedy and Scalia agreed with that portion of the opinion.<sup>76</sup> *Croson* makes clear that the Court will uphold race-based preference policies under the Fourteenth Amendment only where there is a compelling governmental interest and where the program is narrowly tailored to meet the policy's necessary objectives.<sup>77</sup>

In June, 1995, the Supreme Court extended the rigorous strict scrutiny standard of review to federal race-based preference programs in *Adarand Constructors, Inc. v. Peña*.<sup>78</sup> *Adarand* considered the constitutionality of a federal statute that granted financial incentives to prime contractors who awarded subcontracts to companies controlled by socially and economically disadvantaged individuals.<sup>79</sup> *Adarand*, a non-

---

71. 488 U.S. 469, 109 S. Ct. 706 (1989).

72. *Id.* at 494-96, 109 S. Ct. at 722-23.

73. The statute identified "Black, Spanish-speaking, Oriental, Eskimos, or Aleuts" as minorities. *Id.* at 478, 109 S. Ct. at 713 (citing RICHMOND, VA., CITY CODE § 12-156(a)(1985)).

74. *Id.* at 483, 109 S. Ct. at 716.

75. Justice O'Connor wrote the opinion. Chief Justice Rehnquist and Justice White joined Justice O'Connor. Justices Kennedy and Scalia each concurred in separate opinions. Justice Stevens concurred in the decision but found it unnecessary to consider the appropriate standard of review. Justice Marshall wrote the dissent, which was joined by Justices Brennan and Blackmun. See *id.* at 537-38, 109 S. Ct. at 744-45.

76. *Id.* at 475, 109 S. Ct. at 712.

77. *Id.* at 517, 109 S. Ct. at 734.

78. 115 S. Ct. 209 (1995). A 1993 decision foreshadowed the Court's move toward applying the rigorous standard in a sweeping way. In *Shaw v. Reno*, 113 S. Ct. 2816 (1993), the Court considered whether a state-created voting district, clearly drawn to ensure a Black majority, violated the Equal Protection Clause. Shaw considered the appropriate standard under which to review state legislation that created voting districts based on race. The Attorney General maintained that the Court should review the legislation under intermediate scrutiny, which the Court applied to all other "vote-dilution" cases. The majority disagreed and held that since the legislation clearly distinguished among citizens based on race, it potentially burdened one group in the interest of benefiting another, thereby threatening the "special harms" of race-based preference policies. Thus, the legislation must be subject to strict scrutiny. *Id.*

79. *Adarand*, 115 S. Ct. at 2102. The Court considered policies promulgated under the authority of Section 8 of The Small Business Act, 15 U.S.C. §§ 631-656 (1994) (Act).



minority owned contracting company, challenged the federal program as violative of the Fifth Amendment, which provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law."<sup>80</sup>

Writing for the majority, Justice O'Connor first considered the appropriate level of review for assessing whether the federal program was permissible.<sup>81</sup> Prior to *Adarand*, *Metro Broadcasting v. F.C.C.*<sup>82</sup> was the precedent. *Metro Broadcasting* held that "benign" federal racial classifications need only satisfy intermediate scrutiny.<sup>83</sup> Justice O'Connor suggested that the need for intermediate scrutiny may have evolved from the principle that the Fifth Amendment does not protect individual rights to the same extent as the Fourteenth Amendment.<sup>84</sup> This was in sharp contrast to the Court's requirement that the Equal Protection Clause demands strict scrutiny of "benign" state or local race-based preference policies.<sup>85</sup> A majority of the *Adarand* Court overruled *Metro Broadcasting*<sup>86</sup> and held that the more stringent standard should apply

The Act provides in part that it is the policy of the United States to provide "maximum practicable opportunity" to small business concerns owned and controlled by socially and economically disadvantaged individuals engaged in contracting with federal agencies. *Id.* § 637(d)(1).

80. U.S. CONST. amend V. *Adarand Constructors, Inc.* is a Colorado-based highway construction Company. In 1989, the Central Federal Lands Highway Division of the United States Department of Transportation solicited bids for a Colorado highway construction project. Mountain Gravel Construction Co. (Mountain Gravel), a general contractor, solicited subcontract bids and then submitted to the government a bid for the entire job. *Adarand Constructors* submitted to Mountain Gravel the lowest bid to perform the guard rail construction work for the highway construction project. However, Mountain Gravel awarded the guard rail job to *Gonzales Construction Co.*, a certified small business controlled by "socially or economically disadvantaged individuals." Because Mountain Gravel awarded the bid to *Gonzalez*, it received payment by the federal government and was therefore able to submit a lower overall bid for the construction project than it could have had it accepted *Adarand's* bid. The Government awarded Mountain Gravel the construction project. *Adarand*, 115 S. Ct. at 2102.

81. Justice O'Connor delivered the majority opinion and was joined in part by Chief Justice Rehnquist, and Justices Kennedy, Thomas and Scalia. Justices Scalia and Thomas filed opinions concurring in part and concurring in the judgment. Justice Stevens filed a dissenting opinion in which Justice Ginsburg joined. Justice Souter filed a dissenting opinion in which Justices Ginsburg and Breyer joined. Justice Ginsburg filed a dissenting opinion in which Justice Breyer joined. *Adarand*, 115 S. Ct. at 2101.

82. 497 U.S. 547, 110 S. Ct. 2997 (1990).

83. *Id.* at 564-65, 110 S. Ct. at 3008-09 (concluding that "benign" federal racial classifications are permissible if "they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives"). See also *Fullilove v. Klutznick*, 448 U.S. 448, 491, 100 S. Ct. 2758, 2781 (1980) (finding a reviewing court must uphold federal race-based legislation if the objectives of the legislation are within the power of Congress and the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible means for achieving the constitutional objective).

84. *Adarand*, 115 S. Ct. at 2106.

85. *Id.* at 2110.

86. See also *Fullilove*, 448 U.S. 448, 100 S. Ct. 2758 (1980).

to all race-based preference policies, regardless of who implements the policy.<sup>87</sup> The strict scrutiny test "ensure[s] that the personal right to equal protection of the laws has not been infringed."<sup>88</sup>

*Adarand* cited the strict scrutiny test language as controlling. A reviewing court must consider whether a "benign" racial classification serves a compelling governmental interest and is narrowly tailored to meet that interest.<sup>89</sup> The Court did not pass on the legislation but instead remanded the case to be considered under the stricter standard.<sup>90</sup> Thus, *Adarand* does not define "compelling interest" or "narrowly tailored," nor does it provide further insight into when the Court would find that legislation survives strict scrutiny.

Although *Adarand* imposed a stricter standard for all race-preference policies, several Justices noted that there may be instances where a policy will survive this rigorous test.<sup>91</sup> The majority held that the government is not disqualified from acting in response to the unhappy persistence of both the practice and lingering effects of racial discrimination.<sup>92</sup> The majority further tried to dispel the notion that "strict scrutiny is 'strict in theory but fatal in fact.'"<sup>93</sup> Thus, despite recent claims that *Adarand* killed affirmative action,<sup>94</sup> the reality may be quite the contrary.<sup>95</sup>

The *Adarand* decision is jurisprudentially sound. It extends the same standard of review to federal race-based policies that the Court previously applied to state and local policies. Federal, state, and local

---

87. *Adarand*, 115 S. Ct. at 2113.

88. *Id.* Justice Stevens, in his concurrence, wrote that "nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account." *Id.* at 2122 (Stevens, J., concurring). Justice O'Connor stated that what Justice Stevens failed to recognize was that the specificity of the strict scrutiny test allows for various considerations, including which governmental entity is implementing the race-based preference policy. *Id.* at 2113. "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decision making. . . . [T]he point of strict scrutiny is to differentiate between permissible and impermissible governmental uses of race." *Id.* The court remanded the challenge for further consideration under this new test, and thus although *Adarand* reaffirms the test, it does not give guidance into specific elements that will meet the test. *Id.* at 2118.

89. *Id.* at 2113.

90. *Id.* at 2118.

91. *Id.* at 2117.

92. *Id.*

93. *Id.* at 2117 (citing *Fullilove*, 448 U.S. at 519, 100 S. Ct. at 2795 (Marshall, J., concurring)).

94. See Linda Greenhouse, *The Supreme Court: Affirmative Action; Justices, 5 to 4, Cast Doubts on U.S. Programs that Give Preference Based on Race*, N.Y. TIMES, June 13, 1995, at A1; Charles Krauthammer, *Never Mind the Court Decision: Affirmative Action Will Die in Legislatures*, PITTSBURGH POST-GAZETTE, June 19, 1995, at A8; *Another Blow to Affirmative Action*, ST. LOUIS POST-DISPATCH, June 14, 1995, at 6B.

95. See Penda Hair, *Adarand Case Doesn't Kill Affirmative Action*, THE DENVER POST, June 19, 1995 at B7.

entities<sup>96</sup> enact race-preference policies in response to the same problem: discrimination in America. Additionally, these policies all have the same goal to diversify where diversity has not occurred absent some sort of regulation. Given the parallel in the ends and the means of these policies, it is justifiable that courts review these policies under the same rigorous guidelines.

Furthermore, while the language of the Fifth and the Fourteenth Amendments is different, the guarantees are essentially the same. Federal, state, and local governments, and any entities thereof, cannot impinge on individual liberties for the sake of some notion of past discrimination. Based on these guarantees, courts now require entities to demonstrate: (1) that there is a compelling need for a particular policy and (2) that the program is narrowly tailored to achieve its end action to rectify current disparity. Proponents of a particular "benign" race-based policy will do well to have their policy reviewed under strict scrutiny. If a policy survives such exacting review, it is clearly necessary and effective. The stringent review might, therefore, console even the most ardent affirmative action opponent.

Unfortunately, while the Court has confirmed the proper standard of review for "benign" race-based preference policies, it has given little guidance in dealing with a particular program which meets the strict scrutiny standard. The Court has evaluated race-preference policies under the strict scrutiny test, thereby shedding some insight into when it deems a policy permissible. However, the Court has not suggested appropriate viable alternatives to impermissible race-based preference policies. In fact, it seems to have taken the approach that Justice Stewart took toward pornography in *Jacobellis v. Ohio*,<sup>97</sup> it will know a permissible race-preference policy when it sees one; for the most part, however, the challenged race-preference policies "are not that."<sup>98</sup> This attitude has left law school admission committees and other institutions interested in enacting race-based preference policies in a quandry.

---

96. An entity is any body receiving funding from a governmental unit. Thus, private law schools are governmental entities if such schools' operational budgets are derived, in part, from government funds. See *Bob Jones Univ. v. Johnson*, 396 F. Supp. 597 (1974). In *Bob Jones*, the district court in South Carolina considered whether veterans benefits could be terminated with regard to students receiving the federal assistance to attend Bob Jones University. At issue was whether the federal funding could be terminated since the tuition dollars were spent at an institution that did not comply with Title VI. Bob Jones claimed that the federal government could not force compliance with Title VI since it did not directly receive federal funding. The court ruled that the university, which included 221 students who during the year received benefits of approximately \$397,800 under federal assistance programs for veterans, was a recipient of federal assistance within the meaning of the Civil Rights Act of 1964 and thus was governed by the law. *Id.* at 601.

97. 378 U.S. 184, 84 S. Ct. 1676 (1964).

98. With regard to whether a motion picture was pornographic, Justice Stewart wrote, "I know it when I see it and the motion picture involved in this case is not that." *Id.* at 197, 84 S. Ct. at 1683.

Nevertheless, recent Court decisions lend guidance to determine when a reviewing court might find a compelling governmental interest and when a policy is narrowly tailored to that interest.

### 1. Compelling Governmental Interest

As a general rule, the Court has been unwilling to uphold race-based remedial programs unless the governmental entity can demonstrate present effects of past discrimination.<sup>99</sup> The Court has carved out an exception where education is concerned. In *Bakke*, Justice Powell wrote that the educational interest in diversity is substantial and may support a state's compelling governmental interest in enacting a race-based policy.<sup>100</sup> The Court has not required evidence of discrimination in upholding educational race-based policies since educational diversity equally benefits all students, regardless of membership in a particular group.<sup>101</sup>

Justice Powell wrote that the benefits of diversity in education flow two ways: minority students are brought into the classroom and non-minority students benefit from hearing the voices of others.<sup>102</sup> He wrote that diversity is an essential element of education in undergraduate school and in graduate school.<sup>103</sup> Quoting *Sweatt v. Painter*,<sup>104</sup> Justice Powell concluded that legal learning is ineffective "in isolation from the individuals and institutions with which the law interacts."<sup>105</sup>

---

99. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, 160 S. Ct. 1842, 1850 (1986); *City of Richmond v. Croson*, 488 U.S. 469, 489, 109 S. Ct. 706, 719 (1989).

100. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320, 98 S. Ct. 2733, 2763 (1978).

101. *United States v. Fordice*, 112 S. Ct. 2727 (1992); *Bakke*, 438 U.S. 265, 98 S. Ct. 2733 (1978); *Hopwood v. Texas*, 861 F. Supp. 551, 570 (W.D. Tex. 1994). Under current law, the goal of diversity is sufficient by itself to satisfy a compelling governmental interest. See also *Shurberg Broadcasting, Inc. v. F.C.C.*, 876 F.2d 902 (D.C. Cir. 1989), *rev'd*, 497 U.S. 547, 110 S. Ct. 2997 (1990).

102. See *Bakke*, 438 U.S. at 313, 98 S. Ct. at 2760. Justice Powell wrote that "[a]n otherwise qualified medical student with a particular background . . . may bring to a professional school . . . outlooks[ ] and ideas that enrich the training of its student body . . . and better equip[s] . . . graduates to render with understanding their vital service to humanity." *Id.* at 314, 98 S. Ct. at 2760. An environment fostering robust exchange of ideas makes the goal of diversity of "paramount importance to the fulfillment of [a university's] mission." *Id.* at 313, 98 S. Ct. at 2760.

103. *Id.* at 313, 98 S. Ct. at 2760.

104. 339 U.S. 629, 70 S. Ct. 848 (1950).

105. *Bakke*, 438 U.S. at 314, 98 S. Ct. at 2760 (quoting *Sweatt*, 339 U.S. at 634, 70 S. Ct. at 850)). Since *Bakke*, various Justices have echoed Justice Powell's opinion. In *Metro Broadcasting*, the Court considered the validity of F.C.C. policies granting preferential treatment based on race. Justice Brennan, writing for the majority, wrote that "a 'diverse student body' contributing to a 'robust exchange of ideas' is a 'constitutionally permissible goal.'" *Id.* at 567, 110 S. Ct. at 3010. In *Wygant*, where the Court reversed a decision upholding a bargaining agreement that limited the number of minority teachers the Board of Education would layoff in order to preserve the ratio of minority to non-minority faculty, four Justices recognized the compelling governmental interest in diver-

When considering whether there is a compelling governmental interest in enacting a race-based preference policy, the Court evaluates the intrusion of a particular policy on innocent individuals. When "eradicating racial discrimination," the Court may uphold policies whereby "innocent persons may be called upon to bear some of the burden."<sup>106</sup> However, any imposition must be strongly limited.<sup>107</sup> Thus in *Wygant*, a majority of the Court held that a preferential lay-off policy imposed too great a burden on others since it translated into the loss of existing jobs for some "innocent third parties."<sup>108</sup> Four Justices suggested that race-based hiring goals might be more acceptable than a lay-off program since such a policy only resulted in denial of a future employment opportunity and therefore was not as intrusive as the loss of an existing job.<sup>109</sup>

In contrast, where education is concerned, the Court has written of the value that non-minorities receive from diversity. Diversity enriches the training of a student body and better equips graduates to "render with understanding their vital service to humanity."<sup>110</sup> Unlike in the employment sector, where an "innocent third party" may lose a job or livelihood as a consequence of a race-based preference policy, the training through diverse voices stands to benefit the "innocent third parties" in the classroom. Thus, the Court's finding of a compelling governmental interest in diversifying education, as opposed to requiring proof of past discrimination for race-based preference policies in the employment sector, is logical given the distinction between education and employment.

## 2. "Narrowly Tailored to Meet the Policy's Objectives"

The Court's application of the *Paradise* "narrowly tailored" test illustrates its general reluctance to validate race-based remedial policies absent strong proof that such policies are necessary and are the only means available to achieve a federally-funded entity's compelling interest. The four-part test requires proof that there is a need for relief, that the policy is temporary, that there is a rational relationship between the goals of the policy and the population the policy seeks to assist, and that the policy does not unfairly favor one particular group.<sup>111</sup>

---

sifying education. Justice O'Connor in her concurrence wrote that the "state interest in the promotion of racial diversity [in education] has been found sufficiently compelling." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286, 106 S. Ct. 1842, 1853 (1989). Justices Marshall, Brennan, and Blackmun in their dissent agreed with Justice O'Connor that the state has a compelling governmental interest in diversifying education. *Id.*

106. See *Wygant*, 476 U.S. at 281, 106 S. Ct. at 1850.

107. *Id.*

108. *Id.* at 281, 284, 106 S. Ct. at 1850, 1852. Chief Justice Burger, and Justices Powell, Rehnquist, O'Connor and White reversed the decision of the Sixth Circuit.

109. *Id.* at 281, 106 S. Ct. at 1850-57.

110. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 314, 98 S. Ct. 2733, 2760 (1978).

111. See generally *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053 (1987).

Recent decisions illustrate the Court's boundaries for the four elements.

*a. The Necessity of the Relief and the Efficacy of Alternative Remedies*

The Court will not uphold a benign race-based remedial policy unless the governmental entity enacting the policy demonstrates that the policy is necessary to achieve a compelling interest. Furthermore, the policy must be the least intrusive and most effective means to achieve the goals of the federally-funded entity's program.<sup>112</sup> In determining whether a program satisfies this element, the Court will consider the purpose the program is designed to serve, the policy reasons for the program and the availability of alternative relief.<sup>113</sup>

The Court has held that relief is necessary where a federally funded entity predicates professional advancement on tests that yield a variable achievement rate for different races or ethnicities.<sup>114</sup> For example, *Guardians Association v. Civil Service Commission of New York*<sup>115</sup> considered the necessity for an alternative to an examination-based police hiring program. Petitioners, Black and Hispanic police officers, were appointed to the New York City Police Department (NYPD) upon passing the examinations administered for entry level appointments. As a group, the test scores of Black and Hispanic police officers were well below the test scores of non-minority candidates. Since appointments were made based on test scores, the examinations caused Blacks and Hispanics to be hired later than most non-minority candidates.<sup>116</sup> NYPD also fired police officers on a last-hired first-fired basis. Thus, more often than not, Blacks and Hispanics were fired first.<sup>117</sup> The Court concluded that the performance on the examination yielded a disproportionate representation of Blacks and Hispanics on the police force. Consequently, there was a need for relief from the discriminatory effect of the standardized examination.<sup>118</sup>

---

112. See *supra* text accompanying note 89.

113. See *Paradise*, 480 U.S. at 170-74, 107 S. Ct. at 1066-68.

114. See *Guardians Ass'n v. Civil Service Comm. of N.Y.*, 463 U.S. 582, 103 S. Ct. 3221 (1983).

115. *Id.*

116. *Id.* at 582, 103 S. Ct. at 3222. The disparity in exam scores also lessened petitioners' seniority and other benefits, which were similarly based on exam performance.

117. *Id.* at 565-86, 103 S. Ct. at 3223-24. The district court found that the challenged examination had a discriminatory impact on the scores and pass rates of Blacks and Hispanics and were not job-related. These findings were upheld by the court of appeals and the Supreme Court seemed to agree. *Id.* at 585, 103 S. Ct. at 3223.

118. The Court, however, was divided as to whether the remedial measure of hiring one black for one white was appropriate under the law. *Id.* *Bakke* did not consider the Davis program in such specific terms. However, both Justice Powell and Justice Brennan recognized that the purpose behind the Davis program was to ensure the State's legitimate interest in promoting diversity in education. Justice Powell found the Congressional testimony in support of the Civil Rights Act supported race-based preference programs or policies. Absent some policies, he concluded, certain groups might not receive such equality. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 340, 98 S. Ct. 2733, 2773 (1987).

In addition to finding the need for relief where objective tests yield a disparate result, the Court has held that there is a need to eliminate racial segregation in education generally.<sup>119</sup> Thus, where a reviewing court finds that test scores, or policies on which test scores are based, have a discriminatory effect, it will likely find a need for relief. Such relief, however, must be the least intrusive and most efficient alternative to achieve elimination of the discriminatory impact.

To date, the Court has not offered litigants more efficient alternatives to challenged policies. The Court has suggested that less intrusive "stop gap" measures are not more efficient since such measures will not yield an ultimate resolution to a problem.<sup>120</sup> In general, the Court has upheld policies as efficient where the entity offering the policy will achieve its goals.<sup>121</sup>

b. *"Flexible, Waivable and Temporary in Nature"*

The Court has made clear that an affirmative action policy will not withstand the second element of the narrowly tailored test unless it is easily adaptable to changing governmental needs (flexible); easily terminated when not needed (waivable); and limited in duration (temporary).<sup>122</sup> In *Croson*, the Court struck down the Minority Business Enterprise legislation since it did not have either a specific termination date or, at a minimum, a provision for reviewing the legislation.<sup>123</sup> The *Paradise* Court found the one-black-to-one-white hiring plan met the second element of the narrowly tailored test since the district court mandated the hiring program only for as long as the department continued to prohibit minorities from being promoted.<sup>124</sup> Additionally, under the consent decree, the court could easily eliminate the program once Alabama's Department of Public Safety promoted a reasonable number of Black and Hispanic troopers by no longer mandating the state's method of promotion.<sup>125</sup> Thus, a program or policy will pass the second element of the narrowly tailored test if the reviewing court can identify a termination provision with a quick method of eliminating the policy once the federally funded entity meets the goals of the policy or program.

The Court will conclude that a need for relief exists when an "objective" test yields a discriminatory result.<sup>126</sup> The Court has also found

---

119. See *United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992).

120. See *United States v. Paradise*, 480 U.S. 149, 171-74, 107 S. Ct. 1053, 1066-68 (1987).

121. See *Guardian Ass'n v. Civil Service Comm. of N.Y.*, 463 U.S. 582, 103 S. Ct. 3221 (1983).

122. See *Paradise*, 480 U.S. at 178, 107 S. Ct. at 1070.

123. *City of Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 706 (1989).

124. *Paradise*, 480 U.S. at 178, 107 S. Ct. at 1070.

125. *Paradise*, 480 U.S. at 163-64, 107 S. Ct. at 1062-63. The Court found that the one-black-to-one-white hiring program was not necessary after one year since the Department achieved a comfortable level of diversity. *Id.* at 165-66, 107 S. Ct. at 1063.

126. *Paradise*, 480 U.S. at 171, 107 S. Ct. at 1066.

a need for relief from educational policies that result in discrimination or separation by race.<sup>127</sup> Thus, it is likely that where the Court finds that "objective" tests infringe on the rights of individuals to advance based on race, the Court will find that relief is necessary and must be achieved in the least intrusive manner.

c. "Relationship of Numerical Goals to Relevant Population"

In analyzing the third element of the narrowly tailored test, the reviewing court must consider the numerical relationship between an entity's goals for its race-based program and the desired end of the program. Statistical proof as evidence of its remedial purpose supplies the court with a means for determining that the entity offering the remedial policy had a "firm basis for concluding that remedial action was appropriate."<sup>128</sup> The Croson Court found that Richmond's statistical analysis was not narrowly tailored to its goal of increasing minority participation in contracting.<sup>129</sup> The legislation required primary contractors awarded city construction contracts to subcontract at least thirty percent of the dollar amount of each contract to Minority Business Enterprises.<sup>130</sup> The Richmond legislature chose the numerical goal of 30% based on the percentage of minorities in the general population.<sup>131</sup> The Court found that since the City's goal of 30% minority subcontractors reflected the general population and not the relevant population of minority contractors in the area, it did not meet the third element of the narrowly tailored test.<sup>132</sup> The Court made clear that setting a goal based on the general population is impermissible, since it "rests upon the completely unrealistic assumption that minorities will choose a particular trade in lock step proportion to their representation in the local population."<sup>133</sup>

The Court will hold that the program's numerical goals bear a reasonable relationship to the relevant population when the policy's goals are measured against a population more closely tied to the particular group of individuals the policy seeks to benefit.<sup>134</sup> *Paradise*

---

127. *United States v. Fordice*, 112 S. Ct. 2727, 2743 (1992).

128. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 292, 106 S. Ct. 1842, 1856 (1985).

129. *City of Richmond v. Croson*, 488 U.S. 469, 507, 107 S. Ct. 706, 729 (1989).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Croson*, 488 U.S. at 507, 109 S. Ct. at 729. See also *Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 106 S. Ct. 3019 (1986). In *Sheet Metal Workers*, the district court set a union goal of non-whites in the applicable pool against the number of minorities in the New York City population. The court held that the plan was not narrowly tailored and that the statistics bore no rational bearing to the goal of increasing the percentage of minorities in the union. *Id.* at 444, 106 S. Ct. at 3033. Justice O'Connor, affirming in part and dissenting in part wrote, "[I]t is completely unrealistic to assume that individuals of each race will gravitate with mathematical exactitude to each employer or union absent unlawful discrimination." *Id.* at 494, 106 S. Ct. at 3059.

134. *Croson*, 488 U.S. at 469, 109 S. Ct. at 706.



held that the one-black to one-white hiring scheme was valid because the goal of the program was measured against the non-white population in the relevant work force.<sup>135</sup> Similarly, in *Sheet Metal Workers v. E.E.O.C.*, the Court rejected an argument that a Union's non-white membership goal should reflect something other than the percentage of non-whites in New York City.<sup>136</sup> The Court held that the appropriate statistical relationship could reflect the percentage of non-whites in the New York City Union because the program was aimed at ameliorating discriminatory effects within a Union whose membership was employed in New York City.<sup>137</sup>

The "statistical relationship" analysis is contradictory to past decisions. In *Bakke*, a majority held that goals and quotas are never permissible in enacting race-based preference programs or policies.<sup>138</sup> Despite this, *Paradise* held that a reviewing court should consider the numerical goals of a particular race-based preference program.<sup>139</sup> Recent decisions acknowledge that a reviewing court cannot identify the appropriate time to end a program absent some numerical measure.<sup>140</sup> The Court has recognized that the best way to assess the "speed of progress" toward fair diversity is through statistical evidence.<sup>141</sup> Yet, the *Bakke* prohibition against "goals" or "quotas" remains intact. The Court's acknowledgment, through the third element of the narrowly tailored test, that there must be some recognizable numerical goal of achievement after which a program or policy is no longer necessary, seems a tacit way of overruling the *Bakke* principle.

#### d. "The Policy May Not Favor One Group Over Another"

The fourth element of the narrowly tailored test most closely embodies the principles of the Equal Protection Clause. Congress adopted the Equal Protection Clause to ensure that minorities, particularly African Americans, were not denied equal treatment under the law.<sup>142</sup> However, as programs and policies aimed at benefiting African Americans and other

135. *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1053 (1987).

136. *Sheet Metal Workers*, 478 U.S. at 440-42, 106 S. Ct. at 3031-32.

137. *Id.* at 482, 106 S. Ct. at 3053.

138. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 285, 98 S. Ct. 2733, 2747 (1978).

139. *Paradise*, 480 U.S. at 171, 107 S. Ct. at 1066.

140. See *Paradise*, 480 U.S. at 179-181, 107 S. Ct. at 1070-73. See generally *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S. Ct. 2997 (1990); *City of Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 706 (1989); *Sheet Metal Workers v. E.E.O.C.*, 978 U.S. 421, 106 S. Ct. 3019 (1986). See also *Adarand v. Peña*, 115 S. Ct. 2097 (1995) (affirming the *Paradise* narrowly-tailored test).

141. See *Paradise*, 480 U.S. at 179-81, 107 S. Ct. at 1070-73; *Sheet Metal Workers*, 478 U.S. at 477-78, 106 S. Ct. at 3057.

142. See *Bakke*, 438 U.S. at 286, 98 S. Ct. at 2746. The Equal Protection Clause became a vehicle to ensure that African Americans received "the same rights and opportunities that white people take for granted." *Id.* at 287, 98 S. Ct. at 2746.

minorities became more popular, particularly following Congressional enactment of the Civil Rights Act, the Court began to use the Equal Protection Clause to safeguard the treatment white males previously took for granted. *Bakke* struck down the Davis admission policy because it impermissibly granted admission to minority applicants who would not otherwise have the opportunity to enter medical school over white males with higher test scores.<sup>143</sup> Davis' separate admissions committees, which were created to increase the number of minority physicians in the country, led to the medical school's unequal treatment of applicants.<sup>144</sup> In contrast, *Paradise* held that the one-black-to-one-white hiring requirement did not pose an unacceptable burden on white males because the program did not absolutely bar any non-minority individual's advancement; it merely postponed the white males' advancement.<sup>145</sup> The Court noted that, under the program, fifty percent of those promoted were non-minority, there were no layoffs,<sup>146</sup> and the basic requirement that black troopers must be qualified still remained.<sup>147</sup> The Court concluded that these provisions safeguarded the program against providing unequal treatment for individuals.<sup>148</sup>

### C. The Federal Courts' Application of the Strict Scrutiny Test

Although *Adarand* specifically tried to dispel the notion that "strict in theory does not mean fatal in fact,"<sup>149</sup> the national trend against race-based preference policies may result in the Equal Protection Clause becoming a barrier to diversification. Recently, two federal courts struck down state racially-based post-secondary education policies tied to the admissions process. Each holding echoes the conservative trend toward which many judicial institutions are beginning to lean.

In *Podberesky v. Kirwan*<sup>150</sup> and *Hopwood v. Texas*,<sup>151</sup> federal courts considered whether race-based preference programs that are part of education admission policies violated the Equal Protection Clause. In each instance, the court subjected the challenged policy to strict scrutiny. Each court would uphold the challenged program if it served a compelling governmental interest and was narrowly tailored to meet the school's goals.

---

143. *Id.* at 320, 98 S. Ct. at 2763.

144. See generally *id.* at 265, 98 S. Ct. at 2733.

145. *Paradise*, 480 U.S. at 182-83, 107 S. Ct. at 1072.

146. *Id.* at 182, 107 S. Ct. at 1072.

147. *Id.* at 183, 107 S. Ct. at 1073. The Court also noted that the policy merely postponed promotion and that denial of future employment opportunity is not as intrusive as the loss of an existing job. *Id.*, 107 S. Ct. at 1072.

148. *Id.* at 185, 107 S. Ct. at 1073.

149. *Adarand v. Peña*, 115 S. Ct. 2047, 2101 (1995). See also *Fullilove v. Klutznick*, 448 U.S. 448, 519, 100 S. Ct. 2758, 2795 (1980) (Marshall, J., concurring).

150. 38 F.3d 147 (4th Cir. 1994).

151. 861 F. Supp. 551 (W.D. Tex. 1994).

In *Podberesky v. Kirwan*,<sup>152</sup> the United States Court of Appeals for the Fourth Circuit considered whether a race-based scholarship program, which was connected to the University of Maryland College Park (UMCP) admissions program, violated the Equal Protection Clause. Daniel Podberesky, an Hispanic male, applied to the University of Maryland in the Fall of 1989. Along with his application, he requested that the school consider him for the Banneker Scholarship, which was limited to students of African American heritage.<sup>153</sup> UMCP adopted the Banneker Scholarship in response to an Office for Civil Rights (OCR) finding that segregation between black and white students remained in the Maryland college and university school system.<sup>154</sup> Podberesky's scholastic achievement far exceeded the minimum requirements for the scholarship.<sup>155</sup>

Podberesky challenged the constitutional validity of the Banneker program under the Equal Protection Clause.<sup>156</sup> The trial court found that the race-based preference program triggered strict scrutiny review.<sup>157</sup> It would permit the program to remain in effect if it was narrowly tailored to achieve a compelling interest. The court defined the compelling governmental interest in accordance with *Wygant* and *Croson*, decisions concerning employment race-preference policies. Accordingly, UMCP would have to prove present effects of past discrimination in order to justify the selectivity of the Banneker Scholarship.<sup>158</sup> Upon review, the district court granted summary judgment in favor of UMCP.<sup>159</sup> Podberesky appealed.

The Fourth Circuit held that the trial court had correctly found that the Banneker program should be examined in light of the Equal Protection Clause.<sup>160</sup> Under the strict scrutiny test as applied by the district court, the *Podberesky I* court held that the lower court should not have granted summary judgment, since that remedy did not permit the court to find that there were still present effects of past discrimination.<sup>161</sup> Moreover,

---

152. 956 F.2d 52 (4th Cir. 1992).

153. The Banneker Scholarship was part of UMCP's "Black Undergraduate Recruitment Program" it submitted to OCR in 1985. In 1987, UMCP submitted to OCR a revised "Black Undergraduate Recruitment Plan" which listed the Banneker Scholarship as an example of the expanded merit-based financial aid available to minority students. *Id.* at 54-55.

154. *Id.* at 54.

155. Appellant, Daniel Podberesky, had an academic record that far exceeded the minimum requirements for the scholarship; 1340 out of 1600 on the Scholastic Aptitude Test (SAT) and a 4.0 high school grade point average (GPA). At the time appellant applied for this scholarship, the minimum requirement for further consideration was a 900 on the SAT and a 3.0 high school GPA. *Id.* at 53-54.

156. *Id.* at 53.

157. *Id.* at 55.

158. *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847 (1986); *City of Richmond v. Croson*, 488 U.S. 469, 493-94, 109 S. Ct. 706, 720-21 (1989)).

159. *Podbersky I*, 956 F.2d at 53.

160. *Id.* at 55.

161. *Id.* at 57.

OCR's finding of past discrimination was an insufficient governmental interest to justify a race-based scholarship program.<sup>162</sup> The court reversed and remanded for new proceedings.<sup>163</sup>

On remand, the district court found that UMCP had sufficient evidence of present effects of past discrimination to justify the program and that the program was narrowly tailored to serve its stated objectives.<sup>164</sup> Podberesky again appealed to the Fourth Circuit.<sup>165</sup> The Fourth Circuit again subjected the Banneker Program to strict scrutiny.<sup>166</sup>

The court found there was no compelling governmental interest to justify the program since there were no present effects of past discrimination.<sup>167</sup> It rejected UMCP's argument that a poor reputation in the African American community and a climate on campus that was perceived to be racially hostile were sufficient to justify the race-based scholarship. The court held that "mere knowledge of historical acts is not the kind of present effect that can justify a race-exclusive remedy. If it were otherwise, as long as people have access to history books, there will be programs such as this one."<sup>168</sup> Although the court recognized that racial tensions still exist in American society, it deemed these tensions and attitudes insufficient grounds for employing a race-conscious remedy.<sup>169</sup> Moreover, the OCR findings were simply evidence of past discrimination and did not establish any present effects of such discrimination.<sup>170</sup> Ultimately, the court concluded that there was evidence that the Banneker Scholarship program violated the Equal Protection Clause.<sup>171</sup> Thus, the court found that the district court erred in granting UMCP's motion for summary judgment.<sup>172</sup>

The *Podberesky* decisions are flawed. The district court defined a compelling governmental interest based on employment challenges to the Equal Protection Clause.<sup>173</sup> Upon review, the Fourth Circuit failed to recognize the clear exception the Supreme Court has carved out when defining a compelling interest in diversifying education.<sup>174</sup> The Court

---

162. *Id.*

163. *Id.*

164. *Podberesky II*, 38 F.3d 147, 151 (1994).

165. *Id.* at 152.

166. *Id.* at 153.

167. *Id.* at 154-55.

168. *Id.* at 154.

169. *Id.* at 155.

170. *Podberesky I*, 966 F.2d at 55-57.

171. *Podberesky II*, 38 F.3d at 161.

172. *Id.*

173. The court held UMCP to the "strong basis in evidence" standard that satisfied the *Croson* case. *Podberesky I*, 956 F.2d at 55.

174. The Court has never overruled its distinction between a compelling governmental interest in the employment sector and a compelling governmental interest in education. Although *Adarand* most recently affirmed the language of the strict scrutiny test, it did not define a "compelling governmental interest," thereby leaving in place Justice Powell's distinction in *Bakke* for a compelling governmental interest in education. See *supra* text accompanying notes 46-82 & 91-101.

has recognized that there is a value to all in the classroom, regardless of race or ethnic heritage, to hear the opinions of those from different cultures.<sup>175</sup> Had any *Podberesky* court properly found a compelling governmental interest in educational diversity, it might have upheld the Banneker Scholarship as a valid means for increasing the number of African Americans on campus.

In August, 1994, a United States district court, in *Hopwood v. Texas*,<sup>176</sup> considered whether the University of Texas School of Law's (UT) 1992 diversity admission policy violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. In 1992, UT used a dual admission policy. The chair of the admission's committee assigned one sub-committee to consider non-minority applicants and another sub-committee to consider minority applicants.<sup>177</sup> Consequently, when reviewing a particular file, a member of the minority sub-committee could not consider a particular application against a diverse reference group since he or she did not consider non-minority applications.<sup>178</sup>

Among those denied admission in 1992 were one white female and three white males.<sup>179</sup> These four applicants challenged UT's decision,

175. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-12, 98 S. Ct. 2733, 2759-60 (1978); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 306, 106 S. Ct. 1842, 1864 (1986); see also *supra* notes 42-43.

176. 861 F. Supp. 557 (W.D. Tex. 1994).

177. UT had two separate reviewing sub-committees. The Chair of the Admissions Committee set a different presumptive admit or denial TI number for minorities, who were reviewed by one sub-committee and for non-minorities, who were reviewed by a separate sub-committee. The Admissions Committee based acceptance to UT Law School for all applicants on an index number that is a function of each applicant's combined UGPA and LSAT. The Chair of the Admissions Committee initially reviewed all applications regardless of the applicant's residency, race or ethnic heritage and then set a number below which students were presumptively denied admission and another number above which students were automatically admitted to the school. The sub-committees reviewed applicants with numbers between the automatic admission and the automatic rejection numbers.

The reviewing process also differed for minority and for non-minority applicants in other ways. The admissions office divided non-minority files into groups of thirty. Three members of the non-minority sub-committee reviewed each non-minority applicant. In contrast, the entire minority sub-committee reviewed each minority applicant. One member of the minority subcommittee did not review non-minority applications. *Id.* at 562.

178. *Id.*

179. The denied applicants were all white, Texas residents. Cheryl J. Hopwood, a white female, had a TI of 199, Kenneth Elliot's TI was 197, Douglas Carvell's TI was 197 and David Rogers' TI was 197. *Id.* at 564-67.

UT argued that the plaintiffs lacked standing because they could have been put on the waiting list. Moreover, UT maintained that these applicants could not demonstrate that they would have been granted admission absent the challenged admissions policy. *Id.* at 567. The Court stated that it would not grant standing unless the plaintiffs could show an injury in fact. The injury in fact for an equal protection case involving a barrier that makes it more difficult for members of one group to obtain benefits than it is for members of another group, is the denial of the equal treatment. A denial of the benefit is not

relying on Title VI and the Fourteenth Amendment.<sup>180</sup> The district court agreed with the plaintiffs that the admission policy unconstitutionally granted preferential treatment based on race.<sup>181</sup>

Applying strict scrutiny analysis, the court, quoting Justice Powell in *Bakke*, found that a compelling governmental interest existed since the school's efforts were limited to "seeking the educational benefits that flow from having a diverse student body and to addressing the present effects of past discriminatory practices."<sup>182</sup> The court concluded that without the diversity admission policy, UT would not have achieved a diverse student body.<sup>183</sup> The recent OCR findings coupled with the State's "long history of discriminating against [B]lacks and Mexicans," and UT's history of racial discrimination provided sufficient evidence to establish that the remedial purpose of UT's diversity admission policy constituted a compelling governmental interest.<sup>184</sup>

Although the court concluded that UT had a compelling interest in using a diversity admission policy, the policy failed to pass constitutional muster because it was not narrowly tailored to meet the goals of diversity and reversing discrimination. Applying the *Paradise* test when considering whether the program was narrowly tailored, the court found that

---

necessary for standing. Thus, because the plaintiffs were not considered for admission in a manner similar to minority students, the court ruled the applicants had standing to bring their claim. *Id.* at 568. See also *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 113 S. Ct. 2297, 2301-02 (1993).

180. *Hopwood*, 861 F. Supp. at 569.

181. The court noted that the diversity admission policy was not entirely voluntary because UT adopted the policy in response to the OCR Texas plan. Nonetheless, the court concluded that under an equal protection analysis, the same level of scrutiny applied to race conscious affirmative action plans adopted pursuant to a consent agreement whether or not such plans were voluntarily adopted. Thus, the court would uphold the policy if it met the Supreme Court's requirements that (1) there was a compelling governmental interest, and (2) the policy was narrowly tailored to achieve the goals of that interest. *Id.* at 569 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274, 106 S. Ct. 1842, 1847 (1986)). See also *City of Richmond v. Croson*, 488 U.S. 469, 109 S. Ct. 706 (1989); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S. Ct. 2733, 2748 (1978). The purpose of ascertaining whether a compelling governmental interest exists is to smoke out the illegitimate uses of race by ensuring that the goal is in fact important. *Hopwood*, 861 F. Supp. at 569 (quoting *Croson*, 488 U.S. at 493, 109 S. Ct. at 721)). The narrowly tailored analysis ensures that the means chosen fit the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice.

182. *Hopwood*, 861 F. Supp. at 570 (quoting *Bakke*, 438 U.S. at 313, 98 S. Ct. at 2760) (environment fostering robust exchange of ideas makes goal of diversity of paramount importance in the fulfillment of a university's mission); *Podbersky I*, 956 F.2d. 52, 57 (1992) (race-related remedy may be used in an attempt to remedy effect of past discrimination)).

183. *Hopwood*, 861 F. Supp. at 573. If the UT Law School had considered minorities under the general admissions policy, without regard to race or ethnicity, the admissions committee would have offered seats to 936 students, nine of whom were identified as African American and eighteen of whom were identified as Mexican American. *Id.* at 571.

184. *Id.* at 571.

the diversity admission policy met the first three factors. First, UT sufficiently demonstrated that it was impossible to achieve diversity without an affirmative action admission policy.<sup>185</sup> Second, the objective of UT Law School was to narrow the gap progressively so that at some point in time UT would no longer need a diversity admission policy.<sup>186</sup> Third, UT Law School's goals for minority enrollment as a percent of total enrollment bore a reasonable relationship to the percent of minority college graduates in Texas. These goals were also consistent with the OCR plan.<sup>187</sup>

Ultimately, the court held that the diversity admission policy violated the Fourteenth Amendment because it failed to afford each individual applicant a comparison with the entire pool of applicants.<sup>188</sup> The court recognized the laudable and imperative goal of diversity in the education system. Moreover, it agreed with Justice Powell that race or ethnicity could be considered a plus factor in a school's consideration of a particular applicant.<sup>189</sup> The court noted that when weighing non-traditional factors in the admissions decision, it is permissible for an admissions committee to choose an applicant with a lower LSAT and/or UGPA. Such an applicant may be preferable based on qualifications that include non-objective factors.<sup>190</sup>

UT's dual admission policy "insulated applicants" from review against each other, a process which the *Bakke* Court also found impermissible.<sup>191</sup> However, while *Hopwood* rules out a dual admission policy, it recognizes the value the Supreme Court placed on diversity. Under *Hopwood*, admission committee members may consider race as a factor that is weighed against the unique characteristics that non-minority applicants possess. A school that does not permit a comparison between minority and non-minority applicants, however, unfairly favors one group over another.<sup>192</sup>

185. *Id.* at 573. The court also noted that the ultimate effect of abandoning the diversity admission policy would be to redirect minority students to the historically separate state law school at Texas Southern University, thereby segregating the law school again. *Id.*

186. *Id.* at 575. The court noted that the admissions committee regularly meets to review and to readjust the diversity admission policy to meet the current needs of the school of law with regard to diversity. *Id.*

187. *Id.* The relevant population referred to in factor three is not considered to be the general population of the United States.

188. *Id.* at 579.

189. *Id.* at 578 (quoting *Bakke*, 438 U.S. at 317-18, 98 S. Ct. at 2762)). The court also recognized other schools with seemingly similar affirmative action admission policies.

190. *Id.* at 577. "It is permissible and sometimes necessary to permit an applicant to lose out on the last available seat to another applicant receiving a 'plus' on the basis of ethnic background. Under such a policy, that applicant is not foreclosed from all consideration".

191. See *Bakke*, 438 U.S. at 317, 98 S. Ct. at 2762.

192. *Hopwood*, 861 F. Supp. at 578. Weeks before the trial began, the University of Texas School of Law modified its admission plan. As of September 1, 1994, the admissions committee consisted of one full time faculty member, the assistant dean for admissions.

With the exception of separately reviewing minority candidates, the admissions committees treated applicants similarly. In fact, the court suggested that it would have upheld the admissions policy absent the separate reviewing committees.<sup>193</sup> Thus what *Hopwood* really stands for is the pronouncement the Court made over 40 years ago in *Brown v. Board of Education*:<sup>194</sup> "separate but equal is inherently unequal."<sup>195</sup>

As plaintiffs continue to challenge diversity admission programs, reviewing courts will most likely apply the strict scrutiny test conservatively. It is unclear whether the Court will redefine a compelling governmental interest in education to require present effects of past discrimination. Such a standard is much more difficult to meet than merely proving the need for diversity. However, the value of diversity in the classroom benefits all groups equally and thus a strong basis exists for letting Justice Powell's findings in *Bakke* stand. Under the current law, it is still possible to construct a diversity admission policy that will withstand strict scrutiny.

### III. A MODEL DIVERSITY ADMISSION POLICY

The diversity admission policy (model policy) empowers an admissions committee with full responsibility for selecting students for admission to the law school.<sup>196</sup> Applicants to the law school should include in their application the raw LSAT and UGPA; an application form; a numerical index calculated from the student's UGPA and LSAT; and a candidate profile, which includes an opportunity for applicants to identify their race or ethnicity and any other information an applicant deems pertinent, including references, a personal statement or a resume. The numerical index is the basis upon which further review takes place.<sup>197</sup> During its

---

Race and ethnicity will continue to be factors, but the Law School has removed its presumptively deny and discretionary categories, and will review all candidates that are not automatically admitted based on their TI number. See Janet Elliot, *UT Responds to Suit with Policy Changes*, TEXAS LAW, May 23, 1994, at 10.

193. *Hopwood*, 861 F. Supp. at 578-79.

194. 347 U.S. 483, 74 S. Ct. 686 (1954).

195. *Id.* at 495, 74 S. Ct. at 692.

196. Courts that have considered diversity admissions programs have not identified the appropriate number of members of an admission committee or the appropriate members of the committee vis-a-vis employment status. Thus, the number of members should probably be a function of the amount of work the application process generates. Moreover, committee members could be faculty, students, administrators or any combination thereof.

The Pace University School of Law Admissions Committee is comprised of seven faculty members, including the Dean of Students and five students. Two faculty members and one student read each application. In 1994, the School received 2,752 applications, the majority of which were in the discretionary category.

197. The LSAC calculates the index based upon information a school gives to them in a "correlation report." The correlation report is based upon the incoming class's UGPA and LSAT averages. The LSAC then looks at the school's correlation reports for the past three years and, given what it sees regarding how much weight has been given



initial meeting each year, the admissions committee should decide what index to use for purposes of automatic admission and automatic rejection. In addition, the committee may set a minimum LSAT score.<sup>198</sup>

Applicants with indices above the automatic acceptance line receive letters of acceptance without committee review and applicants below the automatic rejection line are rejected. Applicants whose indices place them below the automatic admission line and above the automatic rejection line are in the discretionary group. All Committee members review each applicant in the discretionary group. Committee members review applications in groups of about thirty applications, which provides a broad basis against which applicants can be compared. Minority applicants are interspersed among each group but do not comprise any one group of applications.

In assessing a particular candidate's qualifications, each committee member should be sensitive to the value diversity has in the classroom and should consider, among other things, the undergraduate institution from which the applicant came, any graduate degrees, work experience, ability to speak a foreign language, personal statement, letters of recommendation, race, ethnic heritage, national origin, age, past experience and the essay portion of the LSAT. A committee member may assign a particular value to each attribute, including race and ethnicity, as he or she deems appropriate.

For any academic year, the admissions committee should strive to achieve an entering class whose ethnic and racial diversity is proportional to the number of minority students graduating from college that year.<sup>199</sup> The admissions committee should periodically assess the minority applicant acceptance rate throughout the yearly admission period. Committee members should place greater value on race or ethnicity if the committee finds it is not admitting a fair number of minority candidates. Similarly, the committee may limit the value of diversity when it deems appropriate.

#### IV. SUBJECTING THE MODEL POLICY TO STRICT SCRUTINY

##### A. *Law Schools Have a Compelling Interest in Employing a Diversity Admissions Policy*

The Court has recognized that the goal of a diverse student body will support a finding of a compelling governmental interest, at least in

---

to the LSAT versus the GPA, provides a suggested index. For example, Pace University School of Law currently weighs the UGPA 60% and the LSAT 40%. See *supra* notes 47-48 and accompanying text.

198. At Pace University School of Law, any applicant for the Fall 1994 entering class who scored 142 or below was rejected regardless of other factors such as high UGPA, even if their index would otherwise have placed them in the discretionary group described below.

199. For 1995, this would be approximately 20-25%. See *supra* note 9 and accompanying text.

higher education.<sup>200</sup> Law schools that desire a truly diverse class will not achieve their goal if their admissions committee solely or primarily considers objective data (i.e. LSAT, UGPA) in its admission decisions.<sup>201</sup> The model policy yields a very diverse class, however, and courts would find that law schools have a compelling interest in its adoption.

Suppose 1000 students apply for admission to a law school that is seeking an entering class of 150 students. Their LSAT scores range from 140 to 180, and their UGPA's range from 2.0 to 4.0. Based on LSAT and UGPA scores, the law school sets an automatic acceptance rate for any individual with an LSAT of 160 or above and a UGPA of 3.0 or above. This is, for the most part, the only ground upon which the school can accept an applicant.<sup>202</sup> Based on Law School Admission Council's admission statistics for the 1993-94 year, 309 students are eligible for admission into the law school. Eighty-six percent of these students will be Caucasian, twelve percent will be members of a minority group (only eight percent are members of Black or Hispanic groups) and two percent will not have identified themselves by race or ethnicity.<sup>203</sup> Clearly an admission policy that only considers an applicant's objective criteria will yield a minimally diverse class.<sup>204</sup> Under the model policy, a school could set an automatic admission range at a 165 LSAT and a 3.5 UGPA.<sup>205</sup> It might then set a discretionary pool from a 145 to 164 LSAT and a 2.5 to 3.5 UGPA. This will yield a total of 610 students. Sixty-five percent will be non-minority students, thirty-two percent will be minority students and three percent will not have identified themselves as members of a particular group.<sup>206</sup>

Thus, where an admissions committee increases its discretionary category, it will have a larger pool from which to choose applicants best suited for its school. Indeed, up to forty-two percent of the members of this pool may have identified themselves as members of some minority group. The committee, however, may not agree to admit a percent of applicants that directly reflects the percent of minority applicants who apply to the school. Such would be a quota.<sup>207</sup>

---

200. See *supra* text accompanying notes 41-42 & 91-101.

201. See *supra* notes 12-20 and accompanying text.

202. It is generally recognized that in limited instances, the Dean or other administrative officer can admit students based on special circumstances.

203. NATIONAL DECISIONS PROFILE, LAW SCHOOL ADMISSIONS SERVICE (1995) (charts a-5, d-3, e-3, f-3, g-3, h-3).

204. See *supra* notes 183-84 and accompanying text.

205. This will yield approximately 10 students. See NATIONAL DECISIONS PROFILE, LAW SCHOOL ADMISSIONS SERVICE (1995).

206. *Id.* Minority groups include: American Indian, African American, Asian, Chicano/Mexican American, Hispanic, Pacific Islander and Puerto Rican.

207. In *Bakke*, the Court defined a quota as a fixed number of seats set aside for a particular group. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288-89, 98 S. Ct. 2733, 2747 (1978). See *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 599, 110 S. Ct. 2997, 3027 (1990)(defining a quota as a fixed quantity set aside).

However, the committee may consider race and ethnicity as factors in the application process and, therefore, the committee may find that some minority candidates, like their non-minority peers, are not "qualified" for admission into its school. Alternatively, the committee members may find that a large portion of the minority applicants have several attributes that make them, as individual candidates, the best candidates for admission into the law school. Thus, the discretionary category may yield an entering class that is more diverse than forty-two percent.

Increasing the admission committee's discretionary category permits committee members to review a greater range of diverse candidates. A law school may not choose diversity candidates in proportion to the percent of diversity applicants in the discretionary pool. The model policy sets no such quota. Instead, it merely increases the number of minority applicants an admission committee may consider. The larger the minority pool, the more students from which the school can choose and the more diverse the classroom.<sup>208</sup>

**B. The Model Policy Is Narrowly Tailored to Meet the Objective of Accepting a Diverse Entering Class**

The model policy must be narrowly tailored to meet the goals of the remedial program. A reviewing court should analyze policies pursuant to the narrowly-tailored test enunciated in *Paradise*. The model policy meets each prong of this test.

**1. There is a Necessity for Relief and the Model Policy is the Most Efficient Alternative**

As demonstrated above, the model policy is necessary to ensure the compelling governmental interest of diversity in the classroom. It also is the least intrusive and most effective means to achieve this goal. Traditionally, law schools admit students based on their objective test scores. The Court has held that there is a need for relief from a policy whereby advancement predicated on objective examinations "produce[s] an inherent slant toward the majority."<sup>209</sup> Thus if a school is interested in admitting a diverse class, traditional admission policies are inadequate.

---

208. Diversity has been defined as the "quality of being different." See Sheila Foster, *Difference and Equality: A Critical Assessment of The Concept of "Diversity"*, 1993 WIS. L. REV. 105, 126 (1993). General diversity includes characteristics such as age, gender, and cultural background. See Lisa P. Baar, *The Higher Education Amendments of 1992: Resolving the Conflict Over Diversity Standards and Institutional Eligibility for Title IV Aid*, 30 HARV. J. ON LEGIS. 253, 276 n.104 (1993). See also Sharon Elizabeth Rush, *Understanding Diversity*, 42 FLA. L. REV. 1 (1990).

209. See James C. Hathaway, *The Myth and Meritocracy of Law School Admissions*, 34 J. LEGAL EDUC. 86 (1994). In both *Paradise* and *Guardians Association*, the Court found that standardized tests yield a population pool that is skewed in favor of non-minorities. See text accompanying notes 111-118.

Although relief is necessary, the Court will not permit a diversity admission policy to stand unless it is the least stringent alternative and the most effective means available to accomplish the goal of diversity in the classroom. Law schools have few alternatives to ensure a diverse student body given the LSAT's discriminatory impact<sup>210</sup> and the disparity in the American education system.<sup>211</sup> Moreover, these limited alternatives would not quickly remedy the disparate "objective" scores among racial groups.

Many critics charge that the reason particular racial and ethnic groups perform poorly on the LSAT is because the test is racially biased.<sup>212</sup> It seems unlikely that the Law School Admission Council will offer a race-neutral exam sooner than law schools can adopt the model policy.<sup>213</sup> The model policy easily and immediately accounts for this discriminatory effect since it permits admission committee members to correct for the LSAT score by assigning some weight to race and ethnicity. Law schools can quickly adopt this policy and thereby make the model policy more efficient than waiting for a fair and impartial LSAT.

Another alternative is to correct the historical discrimination in education. Arguably, applicants' UGPAs are of unequal value since the educational system is so varied. One remedy for relief from this purported inequality would be to ensure equality in the American primary and secondary educational system. The Court in *Brown* and then Congress, enacting the Civil Rights Act, have imposed an affirmative duty on educators to remove vestiges of discrimination in education. Despite the fact that over 40 years have passed since early attempts at judicial or congressional solutions, there is still a great need for reform.<sup>214</sup> As

---

210. See White, *supra* note 4. See also Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993); Danny Holley & Thomas Kleven, *Minorities and The Legal Profession: Current Platitudes, Current Barriers*, 12 T. MARSHALL L. REV. 299 (1987); Charles R. Lawrence III, "Justice" or "Just Us": Racism and The Role of Ideology, 35 STAN. L. REV. 831 (1983); Russell L. Jones, *The Legal Profession: Can Minorities Succeed?*, 12 T. MARSHALL L. REV. 347 (1987).

211. See *Bakke*, 438 U.S. at 326-27, 98 S. Ct. at 2766-67 (Brennan, J., concurring in part and dissenting in part). See also Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 B.C. L. REV. 633 (1994); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994); David M. White, *Pride, Prejudice and Prediction: From Brown to Bakke and Beyond*, 22 HOWARD L. J. 375 (1979).

212. See *supra* note 209.

213. The Law School Admission Council has taken steps to eliminate racial bias from the LSAT. It engages in ongoing research to prevent race and gender sensitive questions from appearing on the test, prescreens passages for racial and gender sensitivity, and removes questions that, while appearing neutral on their face, have a discriminatory impact on minority and female test takers. These changes have resulted in a narrowing of the gap between minority and non-minority test takers in recent years. Electronic Interview with Kent Lollis, Associate Director, Law School Admissions Council (July 18, 1995).

214. In *Hopwood*, the court concluded that "the defendants have shown it is not

recently as 1991, the Supreme Court, in *United States v. Fordice*, held that at least one state had still not dismantled its racially segregated education system.<sup>215</sup>

The model policy, which encourages admissions committees to consider race or ethnic heritage as a "plus," seems a much more realistic and immediate manner in which a school can achieve diversity. Law schools can implement the model policy at any time with little effort because it merely requires committee members to evaluate applicants as they would be required to do anyway, although in a different way. The committee can easily expand its discretionary applicant category and advise committee members to assign weight to race and ethnicity in the decision process. The model policy is likely to yield a diverse applicant pool and therefore will achieve the goal of diversity in the classroom in the most efficient manner.

## 2. The Model Policy is Flexible, Waivable and Temporary in Application

The model policy must be "flexible, waivable and temporary in application."<sup>216</sup> While the Court in *Croson* invalidated the city's race-based preference program because the city enacted the program with no certain date for it to end,<sup>217</sup> the Court has not enunciated a specific length of time that would satisfy this prong.<sup>218</sup> However, it has sanctioned programs that are constructed so they can easily be terminated once the program's goal is met. *Hopwood* held that the admissions committee's policy of annually reviewing the appropriate profile for candidates in the discretionary pool was flexible and that the committee's policy of annually redefining the appropriate criteria for admission, rejection or discretionary review was short enough to satisfy the second prong of the "narrowly tailored" test.<sup>219</sup>

The model policy is very flexible. It provides that an admissions committee periodically review the particular qualities of its entering

---

possible to achieve a diverse student body without an affirmative action program that seeks to admit and enroll minority candidates." *Hopwood v. State of Texas*, 861 F. Supp. 551 (W.D. Tex. 1994).

215. 505 U.S. 717, 112 S. Ct. 2727 (1992). See also *Missouri v. Jenkins*, 63 U.S.L.W. 4486 (U.S. June 12, 1995)(No. 93-1023); *Freeman v. Pitts*, 503 U.S. 467, 112 S. Ct. 1430 (1992); *Brown v. Board of Educ.*, 892 F.2d 851 (1989); *United States v. City of Yonkers*, 880 F. Supp. 212 (1995); *People Who Care v. Rockford Bd. of Educ.*, 851 F. Supp. 905 (1994).

216. *United States v. Paradise*, 480 U.S. 149, 178, 107 S. Ct. 1053, 1070 (1987). See *supra* text accompanying notes 122-23.

217. *City of Richmond v. Croson*, 488 U.S. 469, 470, 109 S. Ct. 706, 709 (1989). The Court found that "the plan allowed race-based decision making essentially limitless in scope and duration." *Id.*

218. The *Paradise* court held that the one-black-to-one-white hiring plan was permissible so long as the department continued conduct that effectively prohibited minorities from being promoted. *Paradise*, 480 U.S. at 178, 107 S. Ct. at 1070.

219. *Hopwood*, 861 F. Supp. at 553.

class.<sup>220</sup> Should an admissions committee find that it is not accepting a broad spectrum of diverse candidates, it can re-evaluate and perhaps broaden the LSAT or UGPA or index cut-off score for its discretionary category.

The model policy is also waivable. A law school can eliminate the policy at its discretion at any point during the reviewing process. The school need only return to a policy of admission based on the LSAT and UGPA—one based on “objective criteria.”

Finally, the model policy is temporary in application since the admission committee must adopt it annually. *Hopwood* found that the Texas admission policy was temporary since its clearly stated objective was “to narrow the gap to the point where affirmative action will not be required.”<sup>221</sup> In contrast, the remedial legislation *Croson* considered was limitless since, absent repeal, it was to remain in effect.<sup>222</sup> The model policy mandates that law schools regularly reevaluate their admissions needs and criteria and consider the most appropriate standards for review for their schools.<sup>223</sup> The policy’s annual review provides built-in limits on the duration of the program, an element absent from the affirmative action program *Croson* struck down.

### 3. The Model Policy’s Numerical Goal Bears a Reasonable Relationship Towards the Number of Students Who Might “Gravitate” Toward Law School

The model policy will satisfy the third prong of the “narrowly tailored” test if the relief ordered bears a proper relationship to the appropriate class of eligible applicants. *Croson* rejected a program that measured its goals against the general minority population.<sup>224</sup> *Sheet Metal Workers* rejected the argument of non-minority union members that a hiring and promotion program for a New York City union should be measured against the general New York City population, including surrounding counties, since union members lived throughout the area.<sup>225</sup> Justice O’Connor wrote that it is unreasonable to assume that all minorities would “gravitate with mathematic exactitude” to work in New York City.<sup>226</sup> The Court found that the appropriate measure would be limited to New York City where union members worked.<sup>227</sup>

The Court has upheld programs or policies more narrowly drawn, such as in *Paradise*, where the Court upheld a consent decree, the goal

---

220. See *supra* text accompanying notes 199-200.

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

222. *City of Richmond v. Croson*, 488 U.S. 469, 470, 109 S. Ct. 706, 709 (1989).

223. See *supra* text accompanying notes 199-200.

224. *Croson*, 488 U.S. at 470-71, 109 S. Ct. at 709.

225. *Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 440, 106 S. Ct. 3019, 3031 (1986).

226. *Id.* at 494, 106 S. Ct. at 3059 (O’Connor, J., concurring in part and dissenting in part).

227. *Id.*

of which was to insure that the number of black sergeants was proportional to the number of blacks on the police force.<sup>228</sup> The number against which an admission committee can measure its goals for diversity must bear a reasonable relationship to an identifiable and appropriate population.

Under the Court's standards, the model policy passes constitutional muster because it defines a relevant and reasonable population against which to measure the diversity "goal" for law schools as the number of minority candidates who sit for the LSAT.<sup>229</sup> An individual would probably not take the LSAT without intending to apply to law school. Drawing its relevant population from this narrow group increases the "mathematic exactitude" with which one can assume individuals will "gravitate" toward law school. Under the Court's analysis, this goal is reasonable and possible to achieve.

In *Paradise*, the Court found permissible a goal that measured promotion against the small population that was eligible for such promotion.<sup>230</sup> Here, law school diversity is limited to the small population that is eligible for admission consideration. Limiting the number by which schools should measure diversity against the proportion of individuals who evince an intention to go to law school through taking the LSAT is appropriate. In 1992-93, twenty three percent of those taking the LSAT were minorities.<sup>231</sup> The relationship of the goals of the model policy are clearly measured against the relevant population. The model policy strives to ensure that an admission committee admit a percentage of minority candidates that reasonably reflects the number of minority candidates interested in attending law school. The Model Policy suggests that law schools strive for an entering class comprised of approximately twenty two to twenty five percent minority candidates.<sup>232</sup> This number bears a reasonable relationship to the number of

---

228. See *United States v. Paradise*, 480 U.S. 149, 107 S. Ct. 1070 (1987).

229. The Court would most likely find that a pool consisting of minority graduates from four year colleges, or applicants otherwise eligible to enter law school, would be a narrowly drawn pool. However, Justice O'Connor's argument in *Sheet Metal Workers* could apply here since it is equally unreasonable to assume that all college graduates would "gravitate with mathematic exactitude" to law school. *Sheet Metal Workers*, 478 U.S. at 494, 106 S. Ct. at 3059. The ABA will not permit an applicant to enter law school prior to graduation from an accredited college or university. ABA Standard 210. Note the foreign law students' requirement and that foreign law students would not be considered part of a historically underrepresented group. The American Bar Association and the American Association of Law Schools' rules provide that an individual cannot apply or be accepted into law school unless such individual has completed the LSAT. Thus, every individual who has completed the LSAT is eligible for law school.

230. *Paradise*, 480 U.S. at 179-80, 107 S. Ct. at 1070-71.

231. NATIONAL DECISIONS PROFILE, LAW SCHOOL ADMISSIONS SERVICE (1994) (percent in 1987-88 was 15.3% and percent in 1991-92 was 21.2%). In 1992-93, only 19.2% of those minorities taking the LSAT were admitted into a law school. *Id.*

232. While the 19% admission rate is laudable, one must recognize that this number is achieved, in part, because most schools have affirmative action admission policies in

individuals applying to law school. It is therefore likely to withstand strict scrutiny since it reasonably reflects the relevant statistical pool and would therefore satisfy the test's third prong.

#### 4. The Policy Does Not Favor One Group Over Another

The Court recognizes that educational diversity benefits all individuals, regardless of membership in a particular racial or ethnic group. Given this, the model policy benefits all admitted students since it yields a diverse educational forum. Its goal is to promote a classroom experience that will avail all future lawyers of experiences and perspectives that they may not have previously considered. This echoes the benefits of educational diversity that Justice Powell cited in *Bakke*.<sup>233</sup>

The policy is also void of clear benefits to a particular class of applicants since it does not impose any specific goals or quotas and does not grant preferential treatment to any particular group. The target range for diversity, approximately 25% of the class, is not a mandate. Schools may choose the best candidates. They may be those who will provide a different perspective from the traditional, majority experience. However, there is no requirement that members from a particular class must fill 25% of the available seats. Thus, unlike the Davis policy, the model policy does not favor minority applicants over white males. Moreover, the model policy is a single review process and not a dual admission system like the Texas policy. Minority and non-minority files are commingled so that admission committee members read them together. Finally, the model policy does not impose an absolute bar to non-minority advancement and is therefore similar to the one-black-to-one-white hiring plan the *Paradise* Court upheld. The model policy does not suggest per se that one applicant should be admitted at another applicant's expense. Instead, admission committee members consider a range of factors including age, socioeconomic situation and race or ethnicity and evaluate which students are likely to become good lawyers based on these subjective criteria. Justice Sparks noted in the *Hopwood* decision that where a school's goal is diversity, an applicant whose LSAT score is lower may sometimes be more valuable to the school and its learning environment than an applicant with a higher LSAT score.<sup>234</sup> The model policy embraces this constitutionally permissible concept. Therefore, the model policy would withstand the fourth prong of the "narrowly tailored" test.

---

place. The recent court decisions including *Hopwood* and *Podberesky* threaten to invalidate these policies. The Model Policy discussed in this article does not presume that schools should adopt programs. Rather, it offers law schools a policy that will withstand a court challenge.

233. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320, 98 S. Ct. 2733, 2763-64 (1978). See also *supra* note 56.

234. *Hopwood v. State of Tex.*, 861 F. Supp. 551 (W.D. Tex. 1994).



## CONCLUSION

Law schools have a compelling institutional interest in achieving diversity in the classroom and thus may enact admission policies that further support this interest. Law schools will not achieve diversity in the classroom, however, absent adoption of diversity admission policies. Such policies are presumptively race-based and will therefore be subject to strict scrutiny review. A diversity admission policy that considers race as a factor by extending the applicant pool for minority students, requires admissions committee members to simultaneously review minority and non-minority applicants and does not create goals, quotas or separate waiting list categories, is likely to withstand the Court's scrutiny. The Model Policy, which incorporates these criteria, satisfies constitutional standards and is a good model for law schools to adopt.

## ADDENDUM

On March 18, 1996, as this article proceeded to publication, the United States Court of Appeals for the Fifth Circuit decided *Hopwood v. Texas*.<sup>235</sup> A majority of the three-judge panel held that the University of Texas School of Law may not use race as a factor in admissions to combat the perceived effects of a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school. The majority contended that Supreme Court jurisprudence indicated that there is only one compelling state interest to justify racial classifications; remedying past wrongs committed within the particular system at issue.

The majority rejected Justice Powell's contention in *Regents of the University of California v. Bakke*,<sup>236</sup> that there is a compelling governmental interest under the Fourteenth Amendment in considering race or ethnicity for the purpose of achieving a diverse student body. Judge Weiner, in a separate opinion, stated that if *Bakke* is to be declared dead, the Supreme Court, and not a three-judge panel of a circuit court, should make that decision. Therefore, Judge Weiner, assumed, without deciding, that diversity is a compelling interest and concurred in the opinion by finding that the admissions policy at the University of Texas School of Law was not narrowly tailored to achieve the goal of diversity.

---

235. Nos. 94-50569 & 94-50664, 1996 WL 120235 (5th Cir. Mar. 18, 1996).

236. 438 U.S. 265, 311, 98 S. Ct. 2733, 2759 (1978).